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Fundamental Rights in European Contract Law

Fundamental Rights in European Contract Law

A comparison of the impact of fundamental rights on contractual relationships in
Germany, the Netherlands, Italy and England

Grondrechten in het Europees contractenrecht

Een vergelijking van de werking van grondrechten in contractuele relaties in
Duitsland, Nederland, Italië en Engeland

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aan de Universiteit van Amsterdam
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prof. dr. J.W. Zwemmer
ten overstaan van een door het college voor promoties
ingestelde commissie,
in het openbaar te verdedigen in de Aula
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Amsterdam, 29 June 2007

Introduction

A. *Fundamental rights and European contract law*¹

The effects of fundamental rights in general private law and, subsequently, also in contract law have been the subject of academic debate since the coming into force of the modern European Constitutions and international human rights treaties after the end of the Second World War. The reconstruction of destroyed cities, economies and social structures during this time coincided with political and legal initiatives to better secure the rights of citizens, which had suffered serious infringements during wartime. In a relatively short period of time, several important international fundamental rights documents were introduced, such as the Universal Declaration of Human Rights (1948), the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, 1950), the European Social Charter (ESC, 1961), the International Covenant on Civil and Political Rights (ICCPR, 1966) and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966). In post-war Europe, moreover, a number of fundamental rights were strongly entrenched by the documents constituting the Federal Republic of Germany (the *Grundgesetz* of 1949), the Republic of Italy (the *Costituzione* of 1948) and the Fifth French Republic (the *Constitution* of 1958,² referring to the Preamble to the ‘social’ *Constitution* of the Fourth French Republic founded in 1946)³.

It did not take long for the question to arise whether these international and constitutional rights, written for the protection of the citizen against the State, could also affect relations between citizens, in which equally serious infringements were considered to take place. A first phase in the evolution of the interaction between fundamental rights and private law, in particular contract law, can be traced back to the pioneer judgments of the German Federal Courts. The *Bundesarbeitsgericht*, dealing with labour law cases, recognised an immediate effect of several basic constitutional rights on employment contracts as early as the 1950s,⁴ while the *Bundesverfassungsgericht*, the Constitutional Court, not long afterwards committed itself to the theory of the indirect influence of fundamental rights through the general clauses of private law.⁵ Meanwhile, in Italy the first effects of fundamental rights on employment contracts appeared in the case law of the *Corte di Cassazione*, the Supreme Court.⁶ In particular for Germany, later also for

¹ This brief bird’s-eye view of the historical development of the debate owes much to the research conducted within the EC-funded Research Training Network ‘Fundamental Rights and Private Law in the European Union’, contract n. HPNR-CT-2002-00228, co-ordinated by Gert Brüggemeier, Aurelia Colombi Ciacchi and Giovanni Comandé. See further section D of this Introduction; the websites of the project: www.liderlab.org/rtn and www.fundamentalrights.uni-bremen.de; and the forthcoming publications of the RTN: Brüggemeier, Colombi Ciacchi & Comandé 2008a and 2008b.

² Only with the Constitution of the Fifth French Republic was constitutional standing given to the *Déclaration des droits de l’homme et du citoyen* of 1789.

³ In France, even though the early effects of fundamental rights go back to the late 1940s, the reference to constitutional rights in contract cases has remained scarce. The rights protected by the ECHR, on the other hand, have had a broader impact. See, for example, Raynaud 2003; Debet 2002.

⁴ See section 2.1.1.

⁵ The famous *Liith* judgment, *BVerfG* 15 January 1958, *BVerfGE* 7, 198, which will be discussed in section 2.2.1.

⁶ *Cass. civ.* 10 August 1953, *Giust. civ.* 1953, 2687.

Italy, these developments marked the beginning of an ongoing debate among legal authors as to the desirability of such effects and the manner in which they should be given shape.⁷

In European countries that experienced less dramatic post-war constitutional changes, the discourse gathered momentum in a second phase, often inspired by the German case law and the rapidly expanding amount of literature on the topic. In the Netherlands, for instance, the effects in contract law – and patrimonial law in general – of constitutional rights became more frequent from the 1970s onwards, and the academic debate developed alongside.⁸

This second phase blended almost seamlessly into a third phase, in which the role of fundamental rights in Europe was elaborated in more detail, without fundamentally challenging the theoretical framework that by then had been established. In Germany, the theory of indirect effect declared by the *Bundesverfassungsgericht* was almost generally accepted and applied.⁹ In the Netherlands, the role of fundamental rights in private law gained renewed attention in the light of the revision of the Dutch Constitution (*Grondwet*) in 1983,¹⁰ while at the same time references to the Constitution and to the ECHR became more frequent in Dutch case law.¹¹ The Italian *Corte costituzionale*, the Constitutional Court, finally, used a fundamental rights argumentation to recognise a right to housing¹² and a right to privacy¹³ in relations between private parties.

A fourth phase of the debate on fundamental rights and private law, with an emphasis on contract law, may roughly be established as commencing in the early 1990s and comprising several parallel movements in various European countries as well as on the level of the European Union. In Germany, three groundbreaking decisions of the *Bundesverfassungsgericht*¹⁴ rekindled the debate on the intensity of the influence which fundamental rights might have on contractual relationships,¹⁵ given that the effect granted to these rights by the Constitutional Court seemed to imply a farewell to the principle of party autonomy on which contract law was based. In England,¹⁶ in the meantime, a vivid discussion was started on the possible effects of fundamental rights on inter-private relations, following the coming into force of the Human Rights Act 1998

⁷ For Germany, see Nipperdey 1950 and 1961; Dürig 1956; Leisner 1960. Note that Italian legal authors have been influenced by the German developments, as shows, for instance, from the use of terminology (*Drittwirkung*); for instance, Morelli 1996, p. 539; Morelli 1999, p. 3-4.

⁸ Early cases of lower Dutch civil courts date back to the 1940s, e.g. *Ktr. Arnhem* 25 October 1948, *NJ* 1949, 331. From the late 1960s and early 1970s onwards, the Dutch Supreme Court has, however, also addressed the issue, e.g. *HR* 31 October 1969, *NJ* 1970, 57 (*Mensendieck I*) and *HR* 18 June 1971, 407 (*Mensendieck II*); see below, section 2.2.2. For the academic debate during that period, see Maris 1969; Drion 1969.

⁹ Canaris 1984.

¹⁰ De Graaf & De Haas 1984; Koekkoek 1985.

¹¹ *HR* 9 January 1987, *NJ* 1987, 928 (*Edamse bijstandsvrouw*); *HR* 5 June 1987, *NJ* 1988, 702 (*Goeree I*); *HR* 2 February 1990, *NJ* 1991, 289 (*Goeree II*). I would also place the recognition of a general personality right in this third phase. Though the relevant judgments are slightly outside of the indicated timeframe, they have clearly been inspired by the German *allgemeine Persönlichkeitsrecht* and, thus, fit within the theory of ‘horizontal effect’ as defined in the second and third phase indicated here. See *HR* 15 April 1994, *NJ* 1994, 608 (*Valkenborst*) and *HR* 6 January 1995, *NJ* 1995, 422 (*Parool*). These cases will not be discussed in more detail in this book, since they fall outside the scope of contract law. For a more detailed analysis of the general personality right in Dutch and German law, see Nehmelman 2002.

¹² *Corte cost.* 25 February 1988, n. 217, *Giur. cost.* 1988, 833 and 7 April 1988, n. 404, *Foro it.* 1988, I, 2515.

¹³ *Corte cost.* 12 April 1973, n. 38, *Giur. cost.* 1973, 354.

¹⁴ *BVerfG* 7 January 1990, *BVerfGE* 81, 242 (*Handelsvertreter*); *BVerfG* 19 May 1992, *BVerfGE* 86, 122 (*Betriebsschlösser*); *BVerfG* 19 October 1993, *BVerfGE* 89, 214 (*Bürgerschaft*). See also *BVerfG* 26 July 2005, *NJW* 2005, 2363 and 2376, in which the Court has reaffirmed the reasoning developed in these judgments.

¹⁵ Canaris 1999. For further references, see section 2.2.2.

¹⁶ All subsequent references to ‘England’ will naturally mean the law in force in England and Wales.

(HRA 1998) as of 2 October 2000.¹⁷ Dutch legal authors also took up the theme again, partly with an eye on the developments in Germany and England, partly because of the progressing influence of fundamental rights on case law.¹⁸ In Italy, moreover, fundamental rights caused landslides in the case law regarding non-pecuniary damages,¹⁹ judicial review of the content of contracts,²⁰ and the *ex officio* powers of the courts in respect to the reduction of manifestly excessive contractual penalties²¹.

These new developments in national contract laws concurred with two interrelated projects on the European level. In the first place, comparative research on contract law was boosted in the wake of the completion of the common market within the European Union in 1993. For the purpose of answering questions regarding the possible harmonisation of contract law in Europe, which could allegedly improve the functioning of the internal market, legal academics started to investigate the differences and similarities between the contract laws of the EU Member States. Furthermore, a number of research projects were developed,²² which drafted common rules or model rules of contract law in anticipation of a European Civil Code or other form of harmonisation of contract law in Europe. In the second place, besides the academic initiatives, after the turn of the millennium the European Commission became active in this new field,²³ issuing a series of Communications regarding the development of a more coherent European contract law.²⁴ Both legal-comparative literature²⁵ and comments on the Commission's work²⁶ have addressed the role of fundamental rights in the constitution and development of national contract laws and a possible harmonised contract law in Europe. The discussion, moreover, has received an additional impulse from the debate leading up to the recent agreement on a Reform

¹⁷ The HRA 1998 has 'brought home' the rights protected by the ECHR to British citizens; see the Government White Paper 'Rights Brought Home: The Human Rights Bill', October 1997, *Cm* 3782, included in Wadham, Mountfield & Edmundson 2003, p. 283-298. See further sections 2.1 and 2.5.1.

¹⁸ See, for instance, Smits 2003. A fairly recent judgment by the Dutch Supreme Court, the *Hoge Raad*, has addressed the question to what extent contractual good faith, or reasonableness and fairness (*redelijkheid en billijkheid*), may limit fundamental rights; *HR* 12 December 2003, *NJ* 2004, 117 (*biv-test II* or *dentist case*), building on *HR* 18 June 1993, *NJ* 1994, 347 (*Aids-test* or *biv-test*).

¹⁹ *Cass. civ.* 31 May 2003, n. 8827 and 8828, *Foro it.* 2003, I, 2273.

²⁰ *Cass. civ.* 20 April 1994, n. 3775, *Giust. civ.* 1994, p. 2159-2173.

²¹ *Cass. civ.* 24 September 1999, n. 10511, *Foro it.* 2000, I, 1929; *Cass. civ.*, joint divisions, 13 September 2005, n. 18128, *Foro it.* 2005, I, 2985.

²² For instance, the Gandolfi Group, working on a European Contract Code; the Study Group on a European Civil Code (Von Bar project), see www.sgecc.net; and the Joint Network on European Private Law, an EC-funded Network of Excellence working on 'Common Principles of European Contract Law' (CoPECL). Furthermore, the Trento Common Core Project started working on comparative studies aimed at finding a common core in European private law, see www.jus.unitn.it/dsg/common-core/home.html. Moreover, the Commission on European Contract Law (Lando Commission), which had been established in the 1970s, published its *Principles of European Contract Law (PECL)*, see Lando & Beale 1995, 2000 and 2003.

²³ Following the European Parliament's Resolutions on the possible harmonisation of substantive private law, OJ C 158, 26 June 1989, p. 400 (Resolution A2-157/89); OJ C 205, 25 July 1994, p. 518 (Resolution A3-0329/94). Note, furthermore, that many of the research projects mentioned in the previous footnote have also received funding from the European Community.

²⁴ See the 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.

²⁵ Barak 2001; Markesinis 2001b; Hesselink 2002a; Taylor 2002; Mak 2003a; Smits 2003; Cherednychenko 2004a; Gerstenberg 2004; Colombi Ciacchi 2005 and 2006.

²⁶ Hesselink 2002b and 2004b; Social Justice Group 2004, p. 667-668; Grundmann 2005, p. 207-208; Rodotà 2005.

Treaty regarding the institutional settlement of the Union, which will give a legally binding status to the Nice Charter of Fundamental Rights.²⁷

From this brief history of fundamental rights and contract law, it appears that the subject is as important for Europe today as it was in the early post-war years. While developments in various countries indicate changes in the views taken on fundamental rights protection in contractual relationships, the progressing ‘Europeanisation’ of national contract laws and legal academic debate emphasises the need to regard the Constitution of Contract Law also from a comparative perspective. I would like to submit that, consequently, some old questions require reconsideration, whereas several new questions have arisen regarding the role of fundamental rights in contract law.

B. *Questions*

Since the first German legal literature on the subject appeared, the debate on the effects of fundamental rights in contract law has mainly evolved around the question of whether or not these rights were directly binding not only on public authorities but also on private parties.²⁸ In fact, the distinction between direct and indirect effects of fundamental rights still seems the most commonly used model of analysis.²⁹ It encompasses questions regarding the roles of the legislator and the judges, as well as contract parties themselves, in the process of giving effect to fundamental rights in contract law. Are they bound in a direct manner, meaning that they have to comply with fundamental rights as formulated on the constitutional level, or are they only indirectly addressed, meaning that they have to take into account the values protected by fundamental rights when interpreting and applying rules of contract law?

The traditional discourse, accordingly, may be said to focus on the question of *how* fundamental rights should be integrated in contract law, presuming that in any case the compliance of contract law with these rights has to be guaranteed. The justification for this technique of dispute resolution seems to be included in the definitions themselves: if contract parties are directly addressed by fundamental rights, then of course these rights should be considered in adjudication. If a theory of indirect effect is adopted, then an eye should always be kept on the interpretation and application of contract rules in accordance with fundamental rights.

In the light of more recent developments, demarcating the aforementioned fourth phase of the discussion, emphasis now appears to have shifted to the question of *why*, in the first place, fundamental rights should be given effect also in contract law. This change of focus seems to be related to the renewed attention for the values and principles underlying contract law, in particular the tension between party autonomy and the protection of weaker contract parties.³⁰ Increasingly often, it seems that civil courts pursue policies of distributive justice, limiting freedom of contract

²⁷ The Draft Treaty establishing a Constitution for Europe, 18 July 2003, http://europa.eu/constitution/index_en.htm (last consulted on 28 June 2007), included the EU Charter of Fundamental Rights in its Part II. On this topic, see Alpa 2004 and Rodotà 2005. Since the people of France and the Netherlands have rejected the text of the treaty in national referenda, the ratification of the constitutional document became a problem and new negotiations were started. At the European Council in Brussels, on 23 June 2007 the EU leaders agreed on a mandate for an Intergovernmental Conference which will draw up a Reform Treaty by the end of 2007.

²⁸ Nipperdey 1950 and 1961; Dürig 1956; Leisner 1960.

²⁹ Compare Canaris 1999; Smits 2003.

³⁰ Compare Hesselink 2002a; Grundmann 2005; Lurger 2005; Colombi Ciacchi 2006, p. 177-180.

for the purpose of protecting contract parties holding a weaker bargaining position.³¹ Fundamental rights have been said to provide the judiciary with ‘a powerful tool to adapt traditional contract law instruments to contemporary democratic and social values’³² and, as such, may have an important impact on these types of cases.³³

The analysis of the effects of fundamental rights in contractual relationships, therefore, should include an investigation of the underlying reasons for applying this technique for resolving cases. Indeed, the formal mode of giving effect to fundamental rights seems to strongly depend on the justification that is given for either using or rejecting the application of these rights in contract cases. The emphasis put on either a principle of autonomy or a principle of solidarity, furthermore, might affect the extent to which certain fundamental rights are integrated into contract law reasoning.

Notwithstanding the differences in approach, the traditional view on the topic and the new perspective may be said to address several common issues. These may be summarised as follows:

- a) To what extent do fundamental rights affect contract law?
- b) In which types of cases can fundamental rights be applied?
- c) What does the explicit consideration of fundamental rights add to contract law adjudication?

The first question encompasses both the requirement of formal legitimacy for the application of fundamental rights in contract law (can constitutional law be considered as superior to private law, and who are addressed by fundamental rights?) and the need for a substantive justification (to what extent may fundamental rights be applied to modify existing rules of contract law, and may they be used to pursue certain policies?). The second question is more straightforward, in the sense that it regards the definition of criteria for giving effect to fundamental rights in contract cases: which rights may be applied in which kind of contract disputes? The third question, finally, asks whether civil courts should in so many words consider the role of fundamental rights in cases engaging the values protected by these rights, even if contract parties have not made reference to these rights. Moreover, it addresses the problem of to what extent the courts may assume *ex officio* powers on the basis of fundamental rights argumentation.

In this book, an attempt is made to find answers to these questions on the basis of a comparison of German, Dutch, Italian and English case law, legislation and legal literature on the topic. Approaching the subject from different angles, it will be attempted to gain insights into the interaction between fundamental rights and contractual norms, for the purpose of defining criteria for the application of fundamental rights in contract cases.

C. *Approach and terminology*

Given the relevance of fundamental rights for the further development of European contract law,³⁴ the general approach adopted for the analysis of the theme is a comparative one. Differences and similarities will be looked for in the examples of fundamental rights affecting the

³¹ See, for instance, the ‘fourth-phase’ German and Italian cases referred to in the previous section.

³² Colombi Ciacchi 2006, p. 180.

³³ Compare the Manifesto of the Social Justice Group 2004, p. 667.

contract laws of the selected countries and explanations will be sought for these, on the basis of which an attempt will be made to answer the questions listed above.

The research will focus on developments in case law for two reasons. In the first place, the impact of fundamental rights in contract law has been felt on the level of dispute resolution rather than on the level of legislation. Legislation in the field of contract law should in principle already express the values protected by these rights and, usually, it is the task of the judges to make sure that the rules of contract law are interpreted and applied in line with these values. In the second place, an attempt to find common threads in the interaction between fundamental rights and contract law, in my opinion, should consider legal problems in their most specific forms: the resolution of specific contractual disputes by the courts might give a better idea of the relevant criteria for fundamental rights application than could an abstract analysis of legal provisions implementing certain fundamental rights.

With an eye on the substantive protection of fundamental rights in contract law, moreover, a ‘bottom-up’ approach will be adopted for the case law analysis.³⁵ Instead of selecting certain fundamental rights and looking how they have been given effect in the contract laws of the selected countries, the analysis will take the contractual relationship itself as a starting point. Assuming that judicial intervention in a contractual relation on the basis of fundamental rights argumentation to a certain extent limits the parties’ freedom of contract, it will be investigated how and where the courts have struck a balance between the protection of fundamental rights and respect for party autonomy. In this way, it may be seen what substantive impact fundamental rights have had on contract law. Furthermore, a comparison of the case law of the various selected countries might provide an impression of the way in which similar cases have been dealt with, thus giving an indication of the possibilities of harmonising certain parts of contract law in Europe.

The theoretical framework within which the case law will be analysed is, in the first place, the aforementioned distinction between direct and indirect effects of fundamental rights in contract law. Given the predominant role of these concepts in the analysis of national developments on the topic, they will be applied in a first attempt to answer today’s questions in European contract law. As will be argued later on,³⁶ however, they cannot fully explain the growing emphasis on fundamental values in contract cases and, moreover, they cannot give detailed indications as to the intensity of effects of fundamental rights in such cases. In the second place, therefore, a comparative legal-political analysis of the theme will be made, exploring the various policies which civil courts might pursue in contract cases. The main concepts in this analysis will be autonomy and solidarity, which may be considered two paradigms of current European contract law.³⁷

At this point, several terminological choices require attention. In principle, when speaking about ‘fundamental rights’, I refer to all rights that form part of national Constitutions and international

³⁴ See section A above.

³⁵ This approach concurs with the method of research chosen within the RTN project ‘Fundamental Rights and Private Law in Europe’; see section D below.

³⁶ Chapter 3.

³⁷ Compare Hondius 1999; Hesselink 2002b. See further Chapter 3.

human rights treaties³⁸, as well as rights that have derived therefrom.³⁹ Occasionally, the terms ‘constitutional rights’ or ‘basic rights’, and ‘human rights’ will be used when indicating, respectively, the rights laid down in national Constitutions and rights codified in international treaties. Such variations in terminology are mostly inspired by stylistic and esthetical reasons, in the sense that ‘fundamental rights’ will without doubt be among the terms most used in this book and, where possible, some alternatives will be sought.

More substantive arguments lie at the heart of the choice to avoid the terms ‘horizontal effect’ and ‘*Drittwirkung*’.⁴⁰ The concept of ‘horizontal effect’ is often used to define the effects of fundamental rights in relations between private parties, as opposed to the ‘vertical effect’ of fundamental rights in the relation between citizens and the State. A problematic aspect of this terminology, however, is that it does not indicate whether it includes the acts of public authorities acting in a private capacity: some authors use ‘horizontal effect’ to refer to all private-law relations, including those in which the State appears as a private party, while others use it in a more restricted sense, implying only relations between non-State actors. Another confusing aspect is that the adjective ‘horizontal’ suggests an equality of contract parties that might distort the view taken on the effects of fundamental rights in contract law: while formal equality between contract parties may be guaranteed (freedom of contract), it seems that fundamental rights can be of special importance in cases in which this formal idea does not correspond with substantive reality (disturbance of the contractual equilibrium) and the actual relation between parties shows a certain ‘verticality’.

The German concept of ‘*Drittwirkung*’ has similar disadvantages attached to it. The term *Drittwirkung*, literally meaning ‘third party effect’, derives from the idea that fundamental rights in principle govern the State-citizen relationship and that, consequently, any effect outside of this relationship should be considered as engaging third parties.⁴¹ This terminology might lead to misunderstandings if it is not clear who the parties involved actually are. Moreover, the term *Drittwirkung* might be confused with the terminology often used in general private law to refer to the extent to which a third party, who is not a party to a certain contract, is nonetheless affected by this contract or can invoke the provisions of the agreement against the contracting parties. Finally, the term *Drittwirkung* is suggestive, in the sense that it might give the idea that an effect of fundamental rights is only felt by one of the parties to a dispute, as is often the case in the citizen-State relationship, in which the State has to respect citizens’ rights. This would be a misrepresentation of the role of fundamental rights in contractual relationships, in which both parties usually can invoke such rights and the effects are therefore felt on both sides. For these

³⁸ References will mostly be made to rights protected by the ECHR, since this treaty seems to have had the most profound impact on the private laws of the States that are party to the various human rights treaties. Reference to other treaties will be made where relevant.

³⁹ See further section 1.1.1.

⁴⁰ On the difficulties attached to the distinction ‘horizontal effect’ v. ‘vertical effect’, as well as ‘private law effect’ v. ‘public law effect’, see already Drion 1969, p. 587-588.

⁴¹ Compare Canaris 1999, p. 35, who stresses the terminological distinction between the direct effect of fundamental rights (*unmittelbare Drittwirkung*, referring to private parties being addressed by fundamental rights) and their direct applicability (*unmittelbare Geltung*, referring to the applicability of fundamental rights on private legal relationships). See also Lurger 2002, p. 234-238. On the implications of this terminological distinction, see further section B of the Epilogue to Part I.

reasons, I prefer not to speak about *Drittwirkung*, nor of horizontal effect, but to plainly refer to ‘effects of fundamental rights in contractual relationships’.

A marginal note should, nevertheless, be made when defining these effects as being either ‘direct’ or ‘indirect’. In international human rights law, the terms direct and indirect effect are frequently used to describe certain ways of assuring respect for these rights in the States that are party to the relevant treaties. A direct effect, in this context, is constituted by the liability of a State for having violated a certain human right. An indirect effect, on the other hand, occurs when a positive obligation is imposed on a State to make its law comply with treaty rights. It should be pointed out that the terminology used for the analysis of the effects of fundamental rights in contractual relationships, though identical in wording, has a different meaning: ‘direct effect’ indicates the application of fundamental rights in contract law in the way in which they have been formulated on the constitutional level, whereas ‘indirect effect’ refers to the protection of these rights through the interpretation of provisions of private law or contract law, such as the general clauses of ‘good morals’ or ‘good faith’. Even when raising the discussion to the European level, speaking about the effects of international and supranational fundamental rights documents or of the development of a harmonised contract law, I will use the terms ‘direct’ and ‘indirect effect’ in this latter sense.

Last but not least, something should be said on the notion of ‘European contract law’ which figures in this book. It is a term that is next of kin to ‘European private law’, which has been justly characterised as ‘a very popular expression, despite or perhaps even thanks to its vagueness’.⁴² In this book, European contract law should be understood as, first of all, referring to the comparative analysis of the contract laws of the selected European countries. On the basis of this comparison, in the second place, an attempt will be made to contribute to the more general debate about what a harmonised contract law in Europe could look like. Usually, it should follow from the context which meaning of European contract law is intended, but where necessary, of course, clarifications will be added.

D. Countries and language

Although the title of the book promises an analysis of European contract law, it should be admitted that the research will focus on only a few countries, while from the comparison of these a more general discourse will be developed. A number of practical reasons may be given for the limited selection of legal systems, among which are the vastness of the theme of the research – covering almost all areas of contract law and, depending on national demarcations, parts of tort law as well –, an assessment of the work which one person can do in a certain amount of time, the available materials, and limited knowledge of the languages of the EU Member States. Of course, however, the final selection has been based on more substantive grounds as well, such as the importance of the legal system for European contract law, its influence on the law of other countries, and recent developments regarding fundamental rights and contract law. A choice has been made for four European legal systems, which each highlight different aspects of the theme.

The analysis made in the first Part of the book will focus on German and Dutch law. Germany, being the legal system in which the application of fundamental rights in private law has

⁴² Colombi Ciacchi 2005, p. 290.

its origins, offers a wealth of materials on the subject, going back to the early 1950s. Of particular interest are the developments in the case law of the *Bundesverfassungsgericht* in the 1990s, which have sparked a debate on the current meaning of private autonomy and the position of the Constitutional Court in this field. The Netherlands, though not a major European legal system, is of interest for the analysis because of the growing attention for fundamental rights in Dutch case law and legal literature,⁴³ the likely influence of German law, the relatively young recodification of contract law in the *Burgerlijk Wetboek* (1992), and the active participation of Dutch legal academics in the debate on European contract law. Moreover, as a Dutch citizen I have had easy access to the legal culture of the Netherlands and its case law.

The results of the analysis of German and Dutch case law will be compared with the English and Italian law on the subject, which offer two different perspectives. Comparative notes on developments in Italy concern the role of the Constitutional Court, the interpretation of general clauses of contract law in the *Codice Civile*, and the application of the principle of solidarity (codified in Article 2 of the *Costituzione* of 1948) in contract law. English common law, on the other hand, offers a counterbalance to the continental code-based systems of contract law, whereas the discussion surrounding the enactment of the Human Rights Act 1998 has addressed topics related to earlier developments in other systems, regularly casting a comparative glance at German law.

In the second Part of the book, the four legal systems will be more evenly balanced, taking examples from each in order to test the hypothesis that will be developed on the role of fundamental rights in contract law adjudication.⁴⁴ This change of approach may be justified on the basis of two interrelated arguments. First of all, the analysis made in the first Part aspires to extract answers to the questions presented in this Introduction from the general development of fundamental rights application in the contract laws of the various countries. The analysis thus focuses on the cases in which this type of argumentation has been used, a considerable number of which will be indicated in German and Dutch law. Developments in Italian and English law will be used to illustrate the factors that may be of influence on particular aspects of the application of fundamental rights to contractual relationships. The second Part of the book, on the other hand, starts from a more general theoretical view on the interaction between fundamental rights and rules of contract law, which will be tested against examples from the various legal systems. In this analysis, all four countries will play more or less equal roles, since case solutions based on fundamental rights will be compared with outcomes based on other types of argumentation, thus providing an overview of the way in which specific problems have been resolved in the selected systems. Placing these case solutions in a theoretical framework, an attempt will be made to again answer the questions formulated in this Introduction.

A second reason for the different emphasis on some of the selected legal systems is that the research for Part I has originated from the manner in which the topic has been dealt with in Dutch and German law. The results from the analysis of these two systems will serve as touchstones for the comparison with other countries, such as Italy and England. Part II will build on the results of this comparison, but a more general perspective will be taken. Cases in which fundamental rights have been applied will be compared with similar cases that have been solved

⁴³ See section A of this Introduction and section 2.3 below.

⁴⁴ Section 5.3.2.

on the basis of ‘pure’ private law reasoning. In that context, specific examples will be analysed, for which the solutions in the various countries will be placed alongside each other.

While leaving it up to the reader to judge whether the comparative analysis of the selected countries fully supports the statements that will be made on general European contract law, I would like to add that the research has greatly benefited from my participation in the Research Training Network ‘Fundamental Rights and Private Law in the European Union’.⁴⁵ The comprehensive comparative study conducted by this Network involved not only Germany, the Netherlands, Italy and England, but also France, Poland, Portugal, Spain and Sweden. Even if this book will not contain references to all of these legal systems, the comparative, European spirit of the project will hopefully be reflected in the more general parts of the analysis presented here.

Lastly, the choice to write in English, which is not my mother tongue, may be justified by the fact that this language by now seems to have become the *lingua franca* of the academic debate on European contract law. Presenting the analysis in English provides the possibility to make available to a wider audience materials that have been written in less diffused languages, such as Dutch and Italian.⁴⁶ Thus, the aspiration is to make a contribution to the European academic debate on the effects of fundamental rights in contract law.

E. Parts and chapters

Finally, some guidelines may be given as to the structure of the book, in order to better find a way through the argument. Basically, the analysis will be presented in two parts, the first one providing a comparative overview of the developments in case law, and the second one analysing the underlying changes in the contract laws of the selected countries and the undercurrents of the European Commission’s initiatives in the field of European contract law. As said earlier, the first part of the analysis will be conducted from a comparative perspective, against the background of the theoretical distinction between direct and indirect effects of fundamental rights in contract law. The second part will approach the theme from a comparative legal-political perspective.

Part I comprises three chapters. First of all, the basic concepts regarding fundamental rights application will be set out, concentrating on the tension between the principle of freedom of contract and the possible limitations to this principle on the basis of general clauses of private law interpreted in the light of fundamental rights (Chapter 1). Subsequently, the most important cases in German and Dutch law on the subject will be presented and several comparative notes will be made on developments in Italian and English law (Chapter 2). This overview of case law will then be analysed in terms of direct and indirect effects and an attempt will be made to answer the questions formulated in section B of this Introduction (Chapter 3).

In fact, the third Chapter forms a keystone of the argument, since it explains the change of perspectives that at the same time distinguishes and binds the two Parts of the analysis. It will be argued that the concepts of direct and indirect effect do not sufficiently clarify the relationship between constitutional law, fundamental rights and contract law. An alternative perspective could be chosen and it will be defended that a comparative legal-political analysis might prove an option

⁴⁵ See also the RTN’s forthcoming publications: Brüggemeier, Colombi Ciacchi & Comandé 2008a and 2008b.

⁴⁶ In the text of the book, citations will be given in English where possible. Original texts in German, Dutch and Italian will be included in footnotes.

which is worth pursuing for explaining the developments regarding fundamental rights and European contract law.

Part II will elaborate this line of thought in four chapters. To begin with, a conceptual framework for the analysis will be sketched, combining European and North-American legal theories regarding the tension between autonomy and solidarity in contract law (Chapter 4). The relation between political stakes in contract law adjudication and the application of fundamental rights to contract cases will then be further explored. It will be argued that fundamental rights intermediate between politics and law, and as such may specify the policy issues addressed by certain contract cases (Chapter 5). This hypothesis will be tested against several case examples (Chapter 6), after which a renewed attempt will be made to define the criteria for the application of fundamental rights in contract law (Chapter 7).

Making a rough division, a reader interested in the practical side of the argument might be best served by Chapters 1, 2 and 6, whereas a reader attracted by the theoretical aspects of the discourse might find something of interest in Chapters 3, 4, 5 and 7. Bibliographical references in the footnotes, finally, will be made in an abbreviated form, while a complete list of the mentioned legal literature and a list of cases can be found at the end of the book.

Part I

Fundamental rights in European contract law.

Developments in case law

Introduction to Part I

The effects of fundamental rights on contractual relationships can in principle be established both through legislation and through case law. While the legislator should take fundamental rights into account when drafting rules in the area of contract law, judges in civil cases might be presented with cases addressing the interpretation of these rules and cases introducing new problems related to the fundamental rights of contract parties. In fact, questions regarding the role of fundamental rights argumentation in specific cases may not be easy to answer on the abstract level of legislation and will require a judicial solution: can a surety, for instance, be held to be bound to the agreement with the bank, even if this meant that she would have to live below the minimum subsistence level for the rest of her life? Is a non-competition clause valid if it effectively prohibits a commercial agent from working in his country for a period of several years? Can a celebrity couple obtain an injunction prohibiting the publication of unauthorised photographs of their wedding, while they had previously waived elements of their privacy by selling exclusive rights to official wedding pictures to another magazine? And is it possible to enforce a contractual clause that consists of a waiver of the freedom to teach a certain method of exercises for improving one's posture if the student, who is a party to the contract, fails her examination?

Although concerning cases of many different types and of varying social importance, these examples have in common that they require an assessment of the contractual interests involved as well as the consideration of certain interests that on the constitutional level, in the relation between State and citizen, have been recognised as being in need of protection by means of fundamental rights. Although the legislator might have given a framework within which the cases should be resolved, the specific circumstances of the disputes require the courts to consider the actual consequences of the contractual arrangements on the parties' interests protected by fundamental rights. It is this judicial development of the application of fundamental rights in contract cases in Europe that will be explored in this Part.

The central question posed by 'fundamental rights and contract law' cases is how to resolve the tension between the parties' autonomy and freedom of contract, on the one hand, and the protection of values recognised as 'fundamental' in society, on the other. In the examples given, private individuals in principle had freely agreed to certain limitations of their fundamental rights in respect of other private parties. A non-competition clause by definition implies a restriction of one's choice of profession and a person who has reached the age of majority and is of sound mind may in principle be assumed to have assessed the risks related to a surety when entering into a suretyship agreement with a bank. But can these contractual clauses be upheld in case the non-competition clause factually reduces freedom of profession to an extent that it endangers the means of existence of the person bound by it, and in case the performance of the suretyship arrangement makes it impossible for the surety to maintain herself and her child?

In this Part, I will examine the way in which the courts in the various countries selected for the research have dealt with these types of questions. As explained in the Introduction to the book, the emphasis of the analysis will lie on German and Dutch law, whereas comparative notes will be made on Italian and English law. The first Chapter will sketch the legal framework within which the case law has to be considered, starting from the principle of freedom of contract and

the general clauses of private law and briefly exploring the status of fundamental rights in the various legal systems. Chapter 2 will then give an overview of the developments in case law regarding fundamental rights and contractual relationships, placing them within the ambit of the distinction between direct and indirect effect of these rights in contract law. Subsequently, in Chapter 3 an attempt will be made to understand these developments and derive guidelines from them for the future application of fundamental rights in contract cases. It will be submitted that the analysis of case law in terms of direct and indirect effects does not provide a completely satisfactory answer to the question of why fundamental rights should appear in judicial reasoning in contract law and that other lines of argument deserve further exploration. An alternative point of view for the analysis will then be proposed, namely a comparative legal-political perspective. In an Epilogue to Part I, finally, a brief summary will be given of the results of the analysis conducted and some loose ends will be tied up before moving on to Part II, in which the legal-political approach will be further elaborated.

1 Freedom of contract and fundamental rights

In Germany and the Netherlands as well as in England and Italy freedom of contract has for a long time been recognised as a central principle of contract law.¹ It safeguards the autonomy of parties in the field of contract law, giving them the possibility to arrange their interrelations in the way that suits them best. Nevertheless, the concept is necessarily limited: one party's freedom only goes as far as it does not harm others.² Therefore, contract law provides for limits relating to the conclusion of an agreement as well as to the content of the contractual provisions. In particular the general clauses of private law, such as good morals and good faith (Germany, the Netherlands, Italy) or more specific rules that solve situations similar to those governed by such general clauses (England) seem to open the door for fundamental rights to fill in these limitations. Thus, the question arises to what extent fundamental rights can and should set limits on a party's freedom of contract.

This chapter will sketch the background against which the effects of fundamental rights in contract law have taken place and continue to take shape in Germany, the Netherlands, England and Italy. First, the fundamental rights documents that are of importance will be enumerated (section 1.1). Subsequently, a brief general description of the principle of freedom of contract and of the various relevant general clauses and concepts of private law in Germany and the Netherlands, Italy and England will be given (1.2). Lastly, the questions that will have to be dealt with in the following chapters will be further specified (1.3).

1.1 Fundamental rights

For the legal systems included in the research, in this chapter a brief overview will be given of the history and status of the documents in which fundamental rights have been laid down. For each country, particular attention will be paid to the place of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)³ in domestic law. First, however, the problems concerning the definition of a 'fundamental right' will be briefly discussed.

1.1.1 *Defining fundamental rights*

Legal doctrine is divided as to the question of what a fundamental right encapsulates. When can a right be deemed to be 'fundamental'? And what are the criteria for its contents? Does it have to be laid down in a constitutional provision to be considered fundamental? Are there also unwritten

¹ Palandt/Heinrichs 2007, Einf v § 145, no. 7; Asser/Hartkamp 2005 (4-II), no. 34; Nieuwenhuis 1979, p. 6-7 and p. 43-51; McKendrick 2000, p. 3-6 and 2003, p. 6-7; Treitel 2003, p. 2-3; Alpa 2001, p. 348; Navarretta 2003, p. 193. In Italy, the principle has even been codified, in Article 1322 *c.c.*: '[Autonomia contrattuale]. Le parti possono liberamente determinare il contenuto del contratto nei limiti imposti dalla legge (...).' For a comparative analysis of the principle of freedom of contract as a fundament of private law in the 19th Century, see Jansen 2003, who puts the idea of unlimited freedom of contract into perspective.

² Compare Mill 1859, p. 75-76. See also Article 4 of the *Déclaration des droits de l'homme et du citoyen* of 1789: 'La liberté consiste à pouvoir faire tout ce qui ne nuit pas à autrui: ainsi, l'exercice des droits naturels de chaque homme n'a de bornes que celles qui assurent aux autres membres de la société la jouissance de ces mêmes droits. Ces bornes ne peuvent être déterminées que par la loi.'

³ European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome 4 November 1950, www.echr.coe.int

fundamental rights? May the courts recognise ‘new’ rights on the basis of the ones that have already been recognised?

Many authors distinguish a ‘formal’ and a ‘substantive’ definition of a fundamental right. The formal criterion (recognition in written form) is easier to apply than the vaguer substantive criterion (e.g. ‘norms that aim at guaranteeing human dignity’ or ‘rights that are fundamental for the protection of personal autonomy’).⁴

The formal criterion usually applied for defining fundamental rights is that of codification in a constitutional catalogue of fundamental rights. In Dutch and German law this criterion is often applied, if only for the practical ‘workability’ of the concept. It is then assumed that the fundamental rights that are part of positive law are those legal principles that have been laid down in a rule – often one that has been broadly formulated – forming part of a national Constitution or an international human rights treaty.⁵ In Germany and the Netherlands, these would be the rights included in the catalogue of fundamental rights encompassed by respectively the *Grundgesetz* and the *Grondwet*, as well as the rights included in the ECHR and ICCPR. The constitutional legislator has formally recognised these rights as ‘fundamental’ and, moreover, these rights have been ‘entrenched’, in the sense that they cannot be modified or can only be modified through a special legislative route.⁶

The Italian *Costituzione* also contains a list of entrenched fundamental principles, as well as rights and duties of the citizens. The terminology ‘fundamental right’, however, scarcely appears in the text of the *Costituzione*: only Article 32 *Cost.* determines that health is safeguarded as a ‘*fondamentale diritto*’ of the individual and a collective interest.⁷ Article 2 *Cost.*, in a more general context, refers to the ‘inviolable rights of man’ that are recognised and guaranteed by the State.⁸ In legal literature it has been ascertained that the differentiation in terminology in the Constitution does not imply a substantive deviation from the concept of ‘fundamental rights’ as it is known in occidental legal culture.⁹ ‘Inviolable rights’ in the sense of Article 2 *Cost.* are thus understood as ‘fundamental’, even though not all rights guaranteed by the Italian Constitution are also considered ‘*diritti inviolabili*’.¹⁰

In some jurisdictions, on the other hand, a right does not necessarily have to be written down or be derived from a written right in order to be recognised as ‘fundamental’. English common law already encompassed a number of fundamental rights before the ECHR rights were given further effect by means of the Human Rights Act 1998. Before the HRA incorporated the Convention rights into British law, fundamental values were expressed in liberties and in a number of unwritten fundamental rights. Liberties could be defined as ‘residual freedoms’, in the sense that individuals were allowed to do whatever they pleased provided they did not transgress the

⁴ See for instance Verhey 1992, p. 13-14; Alexy 1985, p. 39.

⁵ Verhey 1992, p. 13. See Feldman 2002, p. 28 on the relationship between natural and positive rights.

⁶ In the Dutch *Grondwet*, the procedure for constitutional revision can be found in Chapter 8. The German *Grundgesetz* specifies the revision procedure in Article 79.

⁷ Article 32 *Cost.*: ‘La Repubblica tutela la salute come fondamentale diritto dell’individuo e interesse della collettività, e garantisce cure gratuite agli indigenti. (...)’

⁸ 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.’

⁹ Corte Costituzionale 1990, p. 234; Onida 2004, p. 56.

¹⁰ Navarretta 2004, p. 18. See further section 1.2.4.

substantive law or infringe the legal rights of others.¹¹ Besides these liberties, English common law recognised several fundamental rights, such as the rights to personal security and personal liberty as well as the rights to private property, to freedom of discussion and to assembly.¹² It should however be observed that in this constellation no rights were ‘strictly fundamental, in the sense of entrenched (basic, inalienable)’, since Parliament still had the supremacy to legislate these rights out of existence and there was no written Constitution with entrenched provisions.¹³ Although the HRA transformed former liberties into rights, it did not alter this ranking of rights: an entrenchment of legislation on human rights could, according to the government, not be reconciled with English constitutional traditions.¹⁴ The HRA still takes parliamentary sovereignty as a starting point and can accordingly be amended or repealed by a subsequent Act of Parliament.

The ‘fundamentality’ of fundamental rights thus appears to differ from one country to another.¹⁵ Definitions show varying combinations of practical and substantive criteria for the indication of fundamental rights and, moreover, the degree of entrenchment of these rights varies from one legal system to another. However, it seems that for the selected countries at least the following features of a fundamental right may be distinguished: a) an expression of a legal principle concerning human dignity and personal freedom; b) in a rule that has been quite broadly formulated; c) which has been recognised as ‘constitutional’ by the legislator and/or the courts. An additional feature of ‘classical’ fundamental rights, moreover, is the negative obligation they usually impose on the State, meaning that they provide citizens with a defence against intervention by the State in the exercise of these rights. Think, for example, of the freedom of expression, which the State may not limit except on the grounds mentioned in a limitation clause, such as for instance in Article 7 *Gm*, Article 5 *GG* and Article 10 ECHR. Classical rights have also occasionally been interpreted as requiring the State to act, instead of merely omitting to interfere (‘socialisation’ of classical fundamental rights).¹⁶ ‘Social rights’ by definition contain a positive obligation for the State, in the sense that they require State authorities to take positive action for the realisation of these rights. The right to education, for instance, obliges the State to organise and maintain a system of schools and the right to a healthy and clean environment requires the State to take measures in order to secure environmental protection. These rights, however, are open to various interpretations and their enforcement can usually not be claimed in court.¹⁷ Classical fundamental rights thus seem to offer stronger protection for citizens’ freedom from the State.

¹¹ Wadham, Mountfield & Edmundson 2003, p. 3.

¹² Wadham, Mountfield & Edmundson 2003, p. 3. See also Hood Phillips & Jackson/Leopold 2001, no. 22-002.

¹³ Hood Phillips & Jackson/Leopold 2001, no. 22-002; Feldman 2002, p. 70.

¹⁴ Rights Brought Home: The Human Rights Bill, Government White Paper, October 1997, *Cm* 3782, no. 2.16; Oliver 2003, p. 113.

¹⁵ Alexy 1985, p. 473-475.

¹⁶ Kortmann 2005, p. 66-68; Burkens and others 2006, p. 137-139; Verhey 1992, p. 14-20.

¹⁷ Kortmann, 2005, p. 67; Burkens and others 2006, p. 138.

1.1.2 Germany

Das Grundgesetz (Basic Law)

Germany's catalogue of fundamental rights has been laid down in the *Grundgesetz* that came into force on 23 May 1949.¹⁸ The *Grundgesetz* (hereafter also: Basic Law or GG) was originally drafted for the Federal Republic of Germany that was established at the time of the division of Germany after the Second World War. The *Grundgesetz* was, accordingly, meant to serve only for a limited period of time. It was assumed that when the nation would eventually be reunified, a new Constitution for all German people would be drafted. For this reason, the transitional document was not baptised a 'Constitution', but merely a 'Basic Law'.¹⁹ When the time came for the reunion of the two Germanies, on 3 October 1990, this Basic Law had however established its position as a fundamental and influential institution, in particular through the case law of the Federal Constitutional Court. Hence, it came to pass that the once thought 'temporal' *Grundgesetz* was adopted as a Constitution for all Germany upon its reunification.²⁰

Apart from regulating the constitutional structure of the state,²¹ the *Grundgesetz* expresses the fundamental rights acknowledged by the German people. Their codification may be seen as a direct reaction to the atrocities that had taken place under the Nazi regime. This is also apparent from the central position that has been given to human dignity, laid down in Article 1 GG: '(1) Human dignity is inviolable. To respect and protect it is the duty of all state authority. (2) The German People therefore acknowledge inviolable and inalienable human rights as the basis of every human community, of peace, and of justice in the world. (...)'²² 'Human dignity' indicates the general intrinsic value of man that is based on his personality.²³ On the basis of this principle, the Basic Law recognises and codifies pre-constitutional and enforceable rights.²⁴

This bill of rights, laid down in the first chapter of the *Grundgesetz*, comprises several 'classical' fundamental rights, such as the right to life and to physical integrity (Article 2(2)), the principle of equality (Article 3), the freedom of religion and of conscience (Article 4), the freedom of expression and freedom of the press as well as the freedom of art and science (Article 5), the right to respect for marriage and family life (Article 6), the freedom of assembly (Article 8) and of association (Article 9), the confidentiality of correspondence (Article 10), the freedom of movement (Article 11), the sanctity of the home (Article 13), the right to respect for property

¹⁸ Grundgesetz für die Bundesrepublik Deutschland, 23 May 1949, *BGBI. I*, p. 1. For an overview of German constitutional history before 1949, see Willoweit 1990.

¹⁹ Willoweit 1990, p. 321-322; Kommers 1997, p. 30; and Sachs 2003, *Einführung*, no. 13-15.

²⁰ Compare the preamble to the *Grundgesetz*. On the occasion of the reunification, some changes were made to the document, on which see Kommers 1997, p. 31 ff.

²¹ This aspect will not be further discussed here. For extensive commentaries, see for instance Von Münch/Kunig 2000 and Sachs 2003.

²² Translation by Tschentscher 2003. The German wording of Article 1 GG is thus: '(1) Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt. (2) Das Deutsche Volk bekennt sich darum zu unverletzlichen und unveräußerlichen Menschenrechten als Grundlage jeder menschlichen Gemeinschaft, des Friedens und der Gerechtigkeit in der Welt. (...)'

²³ Jarass/Pieroth 1997, Article 1, no. 4, referring to *BVerfG* 24 February 1971, *BVerfGE* 30, 173 (*Mephisto*), p. 214: 'der allgemeine Eigenwert, der dem Menschen kraft seiner Persönlichkeit zukommt'.

²⁴ This is a fundamental difference with the Weimar Constitution (1918-1933), which recognised fundamental rights only as goals or guiding principles, which were not judicially enforceable. As a consequence, these rights could easily be repressed during the Nazi regime. Willoweit 1990, p. 285; Kommers 1997, p. 33; Foster & Sule 2002, p. 204.

(Article 14) and for citizenship (Article 16), and the right of petition (Article 17). These are usually considered rights that protect the citizens against the State, so-called ‘*Abwehrrechte*’. ‘Social’ rights,²⁵ which give the citizens a certain claim for State action, include education (Article 7), the freedom of profession (Article 12), socialisation (Article 15) and asylum (Article 16a).²⁶

The *Grundgesetz* explicitly distinguishes between general fundamental rights, that apply to all people, and citizens’ rights, that apply to Germans only. The first category includes, for instance, the freedom of expression and of religion, whereas the second category encompasses, for example, the freedoms of assembly, of association and of profession.²⁷ Foreigners may seek protection of the latter rights by the ‘safety net’ provision of Article 2(1) *GG*.²⁸

Article 2(1) *GG* expresses a value that has great importance in public as well as private law relations: ‘Everyone has the right to free development of his personality in so far as he does not violate the rights of others or offend against the constitutional order of morality.’²⁹ The provision is generally considered as protecting private autonomy and freedom of contract.³⁰ The latter principle, as well as other specific freedoms that may be brought under section 2(1), is only protected by this article in so far as it is not safeguarded by other constitutional provisions.³¹ Article 2(1), that thus serves as a safety net, has in conjunction with Article 1, been the starting point for the development of personality rights.

Restrictions on the various fundamental rights have been laid down in the specific articles of the *Grundgesetz*. Intrusions on the rights to life and physical integrity may, for instance, ‘only be made pursuant to a statute’ (Article 2(2)) and the right to assembly may, with regard to open-air assemblies, be ‘restricted by or pursuant to a statute’ (Article 8(2)). In addition, Article 19 *GG* gives some general provisions for the restriction of the basic rights. It requires that statutes that may limit these rights, ‘must apply generally and not solely to an individual case. Furthermore, such statute must name the basic right, indicating the relevant Article’. According to section 19(2), ‘[i]n no case may the essence of a basic right be infringed’. Section (3) provides that ‘basic rights also apply to domestic corporations to the extent that the nature of such rights permits’.³² A

²⁵ On the distinction between classical and social rights, and its relevance, see Maunz/Zippelius 1998, p. 136-138. Classical rights may be defined as those rights that protect a citizen against interventions by the State; social rights, on the other hand, concern positive obligations of the State, for instance to provide a social security system or education.

²⁶ Translations taken from Tschentscher 2003.

²⁷ Robbers 1994, p. 49.

²⁸ The question arises whether this ‘safety net’ function might cause tension in respect to the law of the European Community regarding free movement of persons.

²⁹ Translation by Tschentscher 2003. In German, Article 2(1) *GG* states: ‘Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt.’

³⁰ Nannen 2000, p. 58, with references to the case law of the *Bundesverfassungsgericht*. See also Zöllner 1988, p. 330, footnote 5; Höfling 1991, p. 6; Medicus 2004, p. 39. Only a few German authors do not take the view that freedom of contract is a constitutional right; see Höfling 1991, p. 6, note 32.

³¹ Höfling 1991, p. 9, with references to the case law of the *Bundesverfassungsgericht*. See also Maunz, Dürig & Herzog 1958, Article 2(1), no. 11 and Kommers 1997, p. 313.

³² Translation by Tschentscher 2003. Article 19 *GG*: ‘(1) Soweit nach diesem Grundgesetz ein Grundrecht durch Gesetz oder auf Grund eines Gesetzes eingeschränkt werden kann, muß das Gesetz allgemein und nicht nur für den Einzelfall gelten. Außerdem muß das Gesetz das Grundrecht unter Angabe des Artikels nennen. (2) In keinem Fall darf ein Grundrecht in seinem Wesensgehalt angetastet werden. (3) Die Grundrechte gelten auch für inländische juristische Personen, soweit sie ihrem Wesen nach auf diese anwendbar sind. (...)’

corporation may thus, for instance, invoke its fundamental right to respect for property (Article 14), but it cannot in principle claim freedom of conscience (Article 4).³³

The ECHR in German law

Germany is a party to the European Convention on Human Rights of 1950. Since Germany has a dualistic system of implementing international treaties, the Convention has been transformed into national law by an Act of Parliament (Article 59(2) GG).³⁴ Although its contents are thus directly applicable in German law, the ECHR's ranking is below the *Grundgesetz*.³⁵ However, since the protection offered by the basic rights mostly corresponds to or even extends the scope of the ECHR, the German courts often automatically comply with the latter when taking into account the former.³⁶ The *Bundesverfassungsgericht* (Federal Constitutional Court), moreover, takes into consideration the case law developed by the European Court of Human Rights (ECtHR) when it determines the contents and scope of the basic rights.³⁷

Notwithstanding the important position of the domestic courts in safeguarding Convention rights, the Strasbourg Court has affirmed its leading role in determining the scope of the protection of these rights. In the *Caroline von Hannover* case of 2004, the ECtHR was asked to adjudicate the compliance of the judgments of the German courts with Article 8 ECHR. The case concerned the question whether the German courts had infringed Princess Caroline of Monaco's right to respect for privacy and family life by denying her claims for injunctions against the publication of photographs of her private life in tabloid magazines. According to the ECtHR, the criteria established by the domestic courts were not sufficient to ensure the effective protection of the princess's private life.³⁸ The Court thus drew stricter lines for the protection of privacy than the German courts had done, which allowed a broadly understood freedom of expression of the tabloids to prevail. In doing so, it established its supremacy over the domestic courts regarding the guarantee of the Convention rights in the States that are members of the ECHR.³⁹

In regard to judicial competences, furthermore, a brief reference may be made to the *Solange* judgments of the German Federal Constitutional Court.⁴⁰ In the first decision, in 1974, the *Bundesverfassungsgericht* established its competence to review the constitutionality of European

³³ Robbers 1994, p. 49.

³⁴ Gesetz über die Konvention zum Schutze der Menschenrechte und Grundfreiheiten, 7 August 1952, *BGBI II*, p. 685.

³⁵ Limbach 2001, p. 73 ff., in particular p. 77; Freckmann & Wegerich 1999, p. 34; Foster & Sule 2002, p. 213. See also *Bundesverfassungsgericht* 14 October 2004, 2 BvR 1481/04, www.bundesverfassungsgericht.de (last consulted on 14 December 2006).

³⁶ Foster & Sule 2002, p. 213.

³⁷ Limbach 2001, p. 77.

³⁸ ECtHR 24 June 2004, application no. 59320/00, *ECHR* 2004, 294 (*Von Hannover v. Germany*); see also www.echr.coe.int/echr (last consulted on 12 October 2006).

³⁹ Compare the judgments in the *Görgülü* case: ECtHR 26 February 2004, application no. 74969/01, *ECHR* 2004, 89 and www.echr.coe.int/echr (last consulted on 14 December 2006) and *Bundesverfassungsgericht* 14 October 2004, 2 BvR 1481/04, www.bundesverfassungsgericht.de (consulted on 14 December 2006). The German Federal Constitutional Court in this case established that the domestic courts, when taking into account judgments of the ECtHR in their interpretation of national law, must 'include the effects on the national legal system in their application of the law' (no. 57). This means that '[i]t is the task of the domestic courts to integrate a decision of the ECtHR into the relevant partial legal area of the national legal system, because it cannot be the desired result of the international-law basis nor express the will of the ECtHR for the ECtHR through its decisions itself to undertake directly any necessary adjustments within a domestic partial legal system' (no. 58).

⁴⁰ *BVerfG* 29 May 1974, *BVerfGE* 37, 271 (*Solange I*); and *BVerfG* 22 October 1986, *BVerfGE* 73, 339 (*Solange II*).

Community law, as long as European integration had not proceeded as far as the enactment by the European Parliament of a binding catalogue of fundamental rights.⁴¹ The Court overruled this judgment in 1986, given the level to which the protection of fundamental rights had grown on the EC level: all the main institutions of the Community had legally ascertained that they would act in compliance with the fundamental rights belonging to the common constitutional traditions of the Member States and with the rights protected by the ECHR.⁴² Therefore, the *Bundesverfassungsgericht* determined that it would no longer make use of its competence to test secondary Community law against the *Grundgesetz*, as long as the EC, in particular through the case law of the European Court of Justice, would guarantee the protection of fundamental rights on a level comparable to that offered by the *Grundgesetz*.⁴³ As far as the compliance of EC law with the ECHR and the rights protected by the German Constitution is concerned, the main responsibility thus lies with the European Court of Justice in Luxembourg.

Das Bundesverfassungsgericht (Constitutional Court)

As a last resort, the *Bundesverfassungsgericht* (Federal Constitutional Court) may adjudicate the compliance of judgments with the rights laid down in the *Grundgesetz*.⁴⁴ The *Bundesverfassungsgericht* has two senates, each consisting of eight judges (§ 2 *BVerfGG*). Claims based on the infringement of the basic rights of Articles 1-20 *GG* fall within the competence of the first senate (§ 14(1) *BVerfGG*). The second senate deals with more overtly political actions (§ 14(2) *BVerfGG*) and with the protection of certain basic rights, concerning asylum, foreigners' and citizens' law.⁴⁵ Besides the constitutional review of laws *in abstracto* and in the context of specific judicial proceedings, the Constitutional Court also hears individual complaints.

According to Article 93(1)(4a) *GG* and §§ 13(8a) and 90(1) *Bundesverfassungsgerichtsgesetz* (*BVerfGG*), the court may decide on complaints of unconstitutionality that are filed by any person claiming that one of his basic rights or one of his rights under certain other constitutional provisions has been violated by public authority.⁴⁶ The complainant thus has to be personally, presently and directly affected by the violation of his rights; it does not suffice to claim the *possibility* of an infringement of a basic right.⁴⁷

⁴¹ *BVerfG* 29 May 1974, *BVerfGE* 37, 271 (*Solange I*), 280.

⁴² *BVerfG* 22 October 1986, *BVerfGE* 73, 339 (*Solange II*), 378. See also Article 6 of the EU Treaty and Weatherill 2006, p. 66-77, with references to the case law of the European Court of Justice.

⁴³ *BVerfG* 22 October 1986, *BVerfGE* 73, 339 (*Solange II*), 387: 'Solange die Europäischen Gemeinschaften, insbesondere die Rechtsprechung des Gerichtshofs der Gemeinschaften einen wirksamen Schutz der Grundrechte gegenüber der Hoheitsgewalt der Gemeinschaften generell gewährleisten, der dem vom Grundgesetz als unabdingbar gebotenen Grundrechtsschutz im wesentlichen gleichzuachten ist, zumal den Wesensgehalt der Grundrechte generell verbürgt, wird das Bundesverfassungsgericht seine Gerichtsbarkeit über die Anwendbarkeit von abgeleitetem Gemeinschaftsrecht, das als Rechtsgrundlage für ein Verhalten deutscher Gerichte und Behörden im Hoheitsbereich der Bundesrepublik Deutschland in Anspruch genommen wird, nicht mehr ausüben und dieses Recht mithin nicht mehr am Maßstab der Grundrechte des Grundgesetzes überprüfen; entsprechende Vorlagen nach Art. 100 Abs. 1 *GG* sind somit unzulässig.'

⁴⁴ Limbach 2001.

⁴⁵ Limbach 2001, p. 20; Foster & Sule 2002, p. 77.

⁴⁶ Art. 93 *GG*: '(1) Das Bundesverfassungsgericht entscheidet: (...) 4a. über Verfassungsbeschwerden, die von jedermann mit der Behauptung erhoben werden können, durch die öffentliche Gewalt in einem seiner Grundrechte oder in einem seiner in Artikel 20 Abs. 4, 33, 38, 101, 103 und 104 enthaltenen Rechte verletzt zu sein. (...)'

⁴⁷ Freckmann & Wegerich 1999, p. 102; Foster & Sule 2002, p. 243, referring to *BVerfGE* 1, 97.

There are several other criteria which a claim should meet in order to be admitted.⁴⁸ For instance, all other administrative and judicial remedies must in principle first have been exhausted (§ 90(2) *BVerfGG*). An exception may be made for cases that concern claims of fundamental importance or cases in which the consequences of the delay inherent in following the usual route would be unduly severe. § 93a(2) *BVerfGG* adds that a claim will be admitted to the extent that it is of fundamental constitutional importance or when it is requested to give effect to the rights that are enumerated in § 90(1) *BVerfGG*. Moreover, the complaint can only challenge an act of the public authorities, that is an '*Akt öffentlicher Gewalt*', meaning all acts taken by the executive, the judiciary and the legislature.⁴⁹

1.1.3 The Netherlands

De Grondwet (Constitution)

The current Dutch Constitution, the *Grondwet (Gw)*, dates from 1815.⁵⁰ It was drafted on the occasion of the union of the Netherlands and Belgium in that year, following the French occupation of the Lowlands. From then on, the *Grondwet* saw many changes.⁵¹ A separation from Belgium took place, as a consequence of which the Constitution was adjusted in 1839 and further adjustments were to follow.

The fundamental rights recognised in the *Grondwet* were initially placed with the provisions they covered, setting limits to the various forms of government power.⁵² Since the revision of 1983, the bill of rights has however been laid down in the first chapter of the Constitution. Thus, the importance awarded to fundamental rights has been emphasised, in particular as regards the central place of human dignity in Dutch society.⁵³

Like the German *Grundgesetz*, the *Grondwet* distinguishes 'classical' as well as 'social' rights, although all have been placed in the same chapter.⁵⁴ The classical rights, laid down in Articles 1 to 18 cover equality, citizenship, eligibility, voting, petitions, religion, freedom of expression, freedom of association and of assembly, privacy, personal integrity, sanctity of the home, secrecy of communication, property, personal liberty and certain procedural principles and rights, such as *nulla poena sine lege*, the right to be heard and the right to counsel.⁵⁵ Strikingly, the right to respect for human dignity has not been explicitly formulated, though it can be implicitly recognised in the codified rights. Several social rights have been laid down in Articles 21, 22 and 23 *Gw*. These concern employment, welfare and social security, the environment, health and education.

⁴⁸ Freckmann & Wegerich 1999, p. 101-102; Foster & Sule 2002, p. 242-244.

⁴⁹ Foster & Sule 2002, p. 243.

⁵⁰ *Grondwet voor het Koninkrijk der Nederlanden*, 24 August 1815, current text: *Stb.* 2002, 200. A historical overview of the development of the Dutch constitutional state is given by Van der Pot 2006, p. 117 ff. See also Kortmann 2005, p. 90-101. An introduction to Dutch law in English is provided by Chorus and others 2006.

⁵¹ Van der Pot 2006, p. 141-145 and p. 154-162.

⁵² Kortmann 1987, p. 39 and 2005, p. 22.

⁵³ Kortmann 2005, p. 22. Compare the German *Grundgesetz*.

⁵⁴ Although the distinction is not always clear; Kortmann 1987, p. 40-43. See also Verhulp 1999, p. 8-9 who argues that Article 19(3) *Gw* (freedom of profession), which is originally understood as a social right, may also be seen as a classical right. Social rights in principle are not suitable for 'horizontal' application, whereas classical rights can be. Since the right to freely choose one's profession can be invoked in contract law, this right seems to have a 'classical' component as well.

⁵⁵ For an English translation, see Besselink 2004 or www.oefre.unibe.ch/law/icl/nl00000_.html (consulted on 14 December 2006).

Restrictions on fundamental rights have been included in the specific provisions. Limitations on fundamental rights can, for instance, be prescribed by Act of Parliament (e.g. Articles 4, 6(2), 7(2) and (3), 12, 13 *Gw*). Some rights may be restricted in order to protect good morals (Article 7(3) *Gw*) or in the interest of public order (Article 8 *Gw*). For other rights, limitations are allowed for the protection of health, in the interest of traffic and to combat or prevent certain disorders (Articles 6(2) and 9(2) *Gw*).

The fundamental rights laid down in the *Grondwet* are in principle meant to protect citizens against the State – a comparison may be made with the German concept of *Abwehrrechte*.⁵⁶ On the occasion of the revision of 1983, however, a discussion also took place on the possible effects of fundamental rights between private parties.⁵⁷ The legislator explicitly excluded the effects of fundamental rights in private legal relations between government and citizens from its definition of horizontal effect (*horizontale werking*), since fundamental rights were considered to apply directly in such relationships.⁵⁸ The State was always bound by these rights, even if acting in a private capacity. ‘Horizontal effect’ thus only concerned the effects of fundamental rights between citizens in their interrelations. The notion of a ‘sliding scale of horizontal effect’, borrowed from an article by Boesjes,⁵⁹ was used to depict these effects between citizens: 1) the legislator or the government could be given the instruction to realise fundamental rights also in private law relationships between citizens; 2) a constitutional norm might not only address the legislator, but also the judge, in the sense that he or she had to take it into account when interpreting private law rules or concepts; 3) the fundamental right could itself express a legal interest, which the judge had to take into consideration in the balance of interests; 4) the right might express a legal principle from which the judge could only deviate for important reasons; and 5) the judge might be obliged to apply the fundamental right and only allow deviations that directly followed from a constitutional restriction clause.⁶⁰ The development of the issue was thus for a great part left to the judges.⁶¹

The ECHR in Dutch law

The Dutch ‘moderately monistic’ system of implementing international treaties provides that treaty provisions that are binding on all persons have precedence over statutory regulations (Articles 93 and 94 *Gw*).⁶² Therefore, ECHR provisions that are binding on all persons may be invoked before the Dutch courts. The fundamental rights laid down in the ECHR may in this manner also affect relations between private parties.

No judicial review of constitutionality

In the context of the judicial review of statutes, the direct effect of certain treaty provisions has a remarkable consequence. On the basis of Article 120 *Gw*, Dutch judges are not allowed to test

⁵⁶ See section 1.1.2.

⁵⁷ TK 1975-1976, 13 872, nr. 3; Koekkoek 1985, p. 385 ff.; Kortmann 1987, p. 43-50. On the effects in case law and the various opinions set forth in juridical literature, see section 2.2 below.

⁵⁸ TK 1975-1976, 13 872, nr. 3, p. 15.

⁵⁹ Boesjes 1973, p. 911. See also Koekkoek 1985, p. 386; Kortmann 1987, p. 46.

⁶⁰ TK 1975-1976, nr. 3, p. 15-16. Critical remarks are made by Kortmann 2005, p. 392-394, especially concerning the definition of ‘horizontal effect’.

⁶¹ Kortmann 1987, p. 45-47.

⁶² Van Empel & De Jong 2002, p. 287.

Acts of Parliament against the *Grondwet*.⁶³ Since Article 120 *Gw* does not prevent judges from testing the compliance of statutes with treaty provisions and certain ECHR provisions can directly be invoked before the Dutch courts on the basis of Articles 93 and 94 *Gw*, statutory provisions may, however, be tested via the ECHR against fundamental rights after all. Moreover, the constitutional legislator, during the process of revision in 1983, explicitly considered that the catalogue of fundamental rights in Chapter 1 of the *Grondwet* had a different function than the Convention and should therefore not literally repeat all ECHR rights.⁶⁴ Nevertheless, some rights may be similar to those laid down in the *Grondwet*. A prohibition of discrimination can, for instance, be found in Article 1 *Gw* as well as in Article 14 ECHR. Compared to its place in the German system, the ECHR thus has an important additional function in relation to the Constitution in the Netherlands.⁶⁵

1.1.4 Italy

La Costituzione (Constitution)

The Italian *Costituzione* dates from 1948. It succeeded the first Constitution of the Italian state, the *Statuto albertino* of 1848. This Statute had been proclaimed by King Carlo Alberto for the Kingdom of Piedmont and Sardinia and, subsequently, for the Kingdom of Italy that came into being through the annexation of other parts of the mosaic of small states and territories that covered the boot-shaped peninsula at that time.⁶⁶ It was a compact constitution, which regulated in the first place the constitutional organisation of the State. Several rights of the citizens were enumerated, such as the principle of equality, freedom of domicile and freedom of the press, the inviolability of property and the freedom of reunion, but no specific sanctions for the infringement of these rights were included, nor did the Statute encompass collective or social rights.⁶⁷ Furthermore, it did not provide for a possibility of a constitutional review of laws, nor did it foresee special rules of procedure for the modification of the Constitution.⁶⁸ This explains why, when the fascist party came to power in the 1920s, profound changes in the structure and equilibrium of the Albertine Statute could be realised through formally legal procedures.⁶⁹

At the end of the Second World War, after the fall of the fascist regime, the work began on a new Constitution that would replace the *Statuto albertino*. In a referendum held on 2 June 1946⁷⁰ the Italian people voted in favour of a republican form of state to replace the monarchy and, moreover, a Constituent Assembly was elected to draft the new constitutional provisions.⁷¹ The *Costituzione*, adopted by the Assembly on 22 December 1947, came into force on 1 January 1948.⁷²

⁶³ However, a bill is pending which proposes to introduce a possibility of a judicial review on the basis of a number of the 'classical' fundamental rights. *TK* 2002-2003, 28 331, nos. 1-2. See also Burkens and others 2006, p. 184-188.

⁶⁴ *TK* 1975-1976, 13 872, nr. 3, p. 12-13; see also Heringa 2004, p. 282.

⁶⁵ It may even be said to rank higher than the *Grondwet*; compare Burkens and others 2006, p. 182-183.

⁶⁶ Onida 2004, p. 23; Paladin 1998, p. 20 and p. 75 ff.

⁶⁷ Onida 2004, p. 24-25; Paladin 1998, p. 20-21.

⁶⁸ Paladin 1998, p. 76.

⁶⁹ Onida 2004, p. 26-27; Paladin 1998, p. 86-91.

⁷⁰ The 2nd of June is nowadays celebrated as a national holiday, the *Festa della Repubblica*.

⁷¹ Onida 2004, p. 27; Paladin 1998, p. 99.

⁷² *Costituzione della Repubblica Italiana*, approved by the Constituent Assembly on 22 December 1947, proclaimed by the provisional Head of State on 27 December 1947 and it came into force on 1 January 1948; *GU* 27

The Italian Constitution does not explicitly enumerate ‘fundamental rights’.⁷³ Indeed, only the right to health safeguarded by Article 32 *Cost.* has in so many words been named a ‘*diritto fondamentale*’. This does not imply, however, that there is no constitutional protection of rights of the citizens in their relation to the State. Article 2 *Cost.* establishes that ‘[t]he Republic recognises and guarantees the inviolable rights of man, as an individual, and in the social groups where he expresses his personality, and demands the fulfilment of the unalterable duties of political, economic, and social solidarity.’⁷⁴ In the second chapter of the Constitution (Articles 13-54), furthermore, a large number of rights and duties of the citizens have been laid down, subcategorised under four titles: 1) private relations; 2) social-ethic relations; 3) economic relations; and 4) political relations. Title 1 includes, for instance, personal liberty (Article 13), sanctity of the home (Article 14), the freedom of assembly (Article 17) and of association (Article 18), the freedom of religion (Article 19) and the freedom of expression (Article 21). Title 2 guarantees the rights of the family (Articles 29-31), the right to health (Article 32), the freedom of arts and science (Article 33) and the right to education (Article 34). Title 3 lists several rights of workers, such as the right to a fair salary (Article 36), the equality of male and female employees (Article 37) and the regulation of the right to strike (Article 40). Moreover, it safeguards freedom of enterprise (*libertà di iniziativa economica privata*; Article 41) and private property (Article 42), while allowing expropriation in favour of enterprises of general interest (public services, energy; Article 43) and the regulation of private ownership of land with an eye on the rational use of the land and the equal distribution of welfare (Article 44). Title 4, finally, includes the general right to vote (Article 48), the right of citizens to freely organise themselves in political parties (Article 49) and the equal possibility for men and women to stand as a candidate for public office and eligible positions (Article 51). Furthermore, it codifies several duties with respect to the defence of the country (Article 52), the payment of taxes (Article 53) and loyalty to the Republic and the Constitution (Article 54).

Which rights may be deemed ‘inviolable’ in the sense of Article 2 of the Constitution? It has been the subject of discussion in legal literature whether this provision should be considered a ‘general clause’, which leaves open the possibility for the recognition of new rights, or whether the catalogue of rights mentioned in the *Costituzione* constitutes a ‘closed’ system of constitutionally protected interests.⁷⁵ In the end, the answer seems to lie somewhere in the middle: it has been submitted that the real issue is not the choice between a closed or an open conception of the catalogue of constitutional rights, but rather the difficulty in selecting – from all the rights that could be thought of as ‘fundamental’ – those rights that may be deemed ‘inviolable’ according to the standards of a constitutional system that at the same time requires compliance with the ‘unalterable duties of solidarity’ (Article 2 *Cost.*).⁷⁶ A classification of the interests protected by Article 2 of the Constitution has been made by Navarretta, who distinguishes several categories of

December 1947, n. 298, special edition. The rules of procedure of the Constitutional Court have been laid down in various constitutional laws and a general regulation, which can be found on www.giurcost.org/fonti/index.html (last consulted on 14 December 2006).

⁷³ See section 1.2.1.

⁷⁴ This provision is placed in the first chapter of the *Costituzione* (Articles 1-12), which enumerates fundamental principles of the Italian State.

⁷⁵ Onida 2004, p. 58-59; Paladin 1998, p. 566 ff.; Navarretta 2004, p. 22 ff.; Busnelli 1991a, p. 252-253; Chiarella 2004, p. 51-53. See also section 2.4.1 below.

⁷⁶ Busnelli 1991a, p. 253. Compare Navarretta 2004, p. 22-24; Chiarella 2004, p. 53.

fundamental freedoms, showing a graduation from those related to the public sphere to those mostly engaged in relations between private parties:⁷⁷ 1) a traditional core of fundamental freedoms, starting from personal freedom;⁷⁸ 2) fundamental freedoms of expression and opinion;⁷⁹ 3) rights regarding (moral) personality, in particular the rights to privacy, to honour and to personal identity; 4) the rights to life, to health and to psycho-physical integrity, as well as the rights to a healthy environment and to a home, both of which have a social dimension and an effect in private (liability) relations; 5) general and social rights related to labour;⁸⁰ rights of the family; and 6) human dignity, the free development of one's personality and the principle of equality. Starting from the rights codified in the *Costituzione* it is thus possible, through the judicial interpretation of these rights and within the scope they demarcate, to define specific fundamental rights that are not as such mentioned in the text of the Constitution.⁸¹

The ECHR in Italian law

Italy ratified the European Convention on Human Rights, signed in Rome in 1950, by the law of 4 August 1955, n. 848.⁸² The Convention came into force for the Italian legal system on 26 October of the same year.⁸³ In accordance with the dualistic doctrine of the implementation of international treaties, the ECHR became an integral part of the legal system through this legislative incorporation.⁸⁴ It obtained the status of an ordinary, non-constitutional law (Article 80 *Cost.*).⁸⁵

Given this translation of fundamental human rights into norms of ordinary law, the ranking of the Convention in Italian law has been the subject of discussion in legal literature⁸⁶ and case law.⁸⁷ It has been observed that the fact that the provisions of the ECHR do not have constitutional standing might be used to argue that the courts do not have to deal with the question of giving direct effect to constitutional norms in private law relations.⁸⁸ They can thus avoid the formal side of the discussion of *Drittwirkung* or the 'horizontal effect' of fundamental rights. Moreover, it has been said that judges have considered that the status of the ECHR as an ordinary law would prevent them from reviewing the legitimacy of preceding norms,⁸⁹ which implies ranking the Convention on a level below the Constitution. In accordance with this view, some have argued in favour of a diffuse review of domestic norms against ECHR provisions,

⁷⁷ Navarretta 2004, p. 24-28.

⁷⁸ 'Personal freedom' encompasses freedom from arrest, closely connected to freedom of defence and the right to a fair trial, as well as many subcategories, such as sexual freedom, freedom of movement and of residence, freedom of domicile and of correspondence, and freedom of assembly and association. Navarretta 2004, p. 24.

⁷⁹ From these follow: freedom of information and the freedom of the press, freedom of political opinion, freedom of religion, freedom of arts and sciences and freedom of research and teaching.

⁸⁰ Interests protected by general rights include dignity, equality, health and moral integrity, while social rights range from the right to paid holidays and the right to a fair salary, to the right to strike, and the right to conclude collective contracts. Navarretta 2004, p. 26.

⁸¹ Navarretta 2004, p. 23. Compare Akkermans, Bax & Verhey 1999, p. 2-3.

⁸² Martines 1997, p. 752.

⁸³ Drzemczewski 1983, p. 145. See also the overview of the dates of ratification on the website of the European Court of Human Rights, www.echr.ceo.int, under 'Basic texts' (consulted 14 December 2006).

⁸⁴ Drzemczewski 1983, p. 146.

⁸⁵ Drzemczewski 1983, p. 147; Corte Costituzionale 1990, p. 249.

⁸⁶ Rescigno 2002a; Raimondi 2002, p. 103-105.

⁸⁷ *Corte cost.* 19 January 1993, n. 10, *Riv. dir. int.* 1993, p. 255 and *Cass. pen., sez. I* 12 May 1993, *Cass. pen.* 1994, 439, *Riv. int. dir. uomo* 1993, 580 (*Medrano*).

⁸⁸ Rescigno 2002a, p. 326.

⁸⁹ Rescigno 2002a, p. 326.

rather than institutionalising a check of the compatibility of Italian law with the Convention rights by the Constitutional Court.⁹⁰ In case law, at any rate, a variety of examples can be found of private law issues on which the Convention has already had an impact.⁹¹

A general question which the courts had to deal with concerned the direct applicability of the treaty provisions, that is whether the Convention rights can as such be invoked before the domestic courts, without requiring preceding legislation specifying the norms.⁹² In the *Polo Castro* case of 1989, the *Corte di Cassazione* established that the provisions of the ECHR are directly applicable in Italy insofar as they follow the model of domestic acts, indicating which rights and duties can be derived from them.⁹³ In the subsequent judgment in the *Medrano* case the criminal law section of the *Cassazione* established that the Convention rights also prevail over subsequent domestic norms.⁹⁴ With the civil sections of the Court adhering to this line of argument, the ECHR has thus gained importance in Italian case law.

La Corte costituzionale (Constitutional Court)

The Italian Constitutional Court was established by the Constitution of 1948. It adjudicates, among other questions, the constitutionality of laws and of acts of the State and the Regions having the force of law (Article 135 *Cost.*). Different from Germany, there is no possibility for individual parties to directly bring a claim to the Constitutional Court. When a question concerning the unconstitutionality of a law arises in a dispute between private parties, the judge in this case, at the request of one of the parties, presents the question to the *Corte costituzionale*, if he does not consider it manifestly unsubstantiated (Article 1 of constitutional law n. 1 of 1948,⁹⁵ Article 23 of the Regulations of the Court⁹⁶). When the Court establishes the unconstitutionality of a law or an act having the force of law, the norm remains without further effect from the day after the publication of the decision (Article 136 *Cost.*, Article 30 of the Regulations of the Court).

The *Corte costituzionale* consists of fifteen judges, five of whom have been appointed by the highest ordinary and administrative courts, five appointed by Parliament and five appointed by the President of the Italian Republic (Article 1 of the Regulations of the Court).

⁹⁰ Raimondi 2002, p. 104, with references to case law.

⁹¹ Praduroux 2003 mentions, for instance, the legal status of transsexuals, discrimination of illegitimate children in the law of succession, the right to enjoy one's property, and surrogate motherhood. Bernardini 2004 names the right to a fair trial within a reasonable time (Article 6 ECHR), as well as the effect of the right to enjoy one's property (Article 1 of the First Protocol to the ECHR) in cases concerning constructive expropriation (*occupazione acquisitiva*).

⁹² Conforti 2002. See also, more in general, Alpa 1999, p. 90-94.

⁹³ *Cass. pen.*, joint divisions, 8 May 1989, *Riv. dir. int.* 1990, 1037 (*Polo Castro*).

⁹⁴ *Cass. pen., sez. I* 10 July 1993, *Cass. pen.* 1994, 439, *Riv. int. dir. uomo* 1993, 580 (*Medrano*).

⁹⁵ Constitutional law of 9 February 1948, n. 1, Norme sui giudizi di legittimità costituzionale e sulle garanzie di indipendenza della Corte costituzionale (Norms regarding the judgments of constitutionality and regarding the guarantees for the independence of the Constitutional Court), *GU* 20 February 1948, n. 43.

⁹⁶ Law of 11 March 1953, n. 87, Norme sulla costituzione e sul funzionamento della Corte costituzionale (Norms regarding the composition and the functioning of the Constitutional Court), *GU* 14 March 1953, n. 62.

1.1.5 England⁹⁷

The Constitution

Unlike Germany, the Netherlands and Italy, the United Kingdom (UK) does not have a written Constitution, in the sense of a basic law and a founding document of the State and the system of government.⁹⁸ However, this does not mean that the UK has no Constitution: like Germany, the Netherlands and Italy, the UK is a State and it has a complex and comprehensive system of government.⁹⁹ The most important differences are thus: a) the fact that the UK Constitution is not codified in a single document; and b) that the Constitution, partly as a result of the fact that it has not been written down, does not limit the power of the British Parliament and government like other Constitutions define and limit the powers of their state organs.¹⁰⁰

As regards fundamental rights, the coming into force of the Human Rights Act 1998¹⁰¹ as of 2 October 2000 has been of considerable importance, since it incorporated the rights comprised in the ECHR into English law. Before the HRA came into force, fundamental values in English common law were expressed in liberties as well as in a number of fundamental rights. Liberties could be defined as ‘residual freedoms’, meaning that individuals were allowed to do whatever they pleased provided they did not transgress the substantive law or infringe the legal rights of others.¹⁰² Besides these liberties, English common law included several fundamental rights, such as the rights to personal security and personal liberty as well as the rights to private property, to freedom of discussion and to assembly.¹⁰³ The HRA may be considered to have transformed former liberties into rights.¹⁰⁴

Although the ECHR had no formal force before the HRA came into being, it would be untruthful to state that the Convention had no impact at all on English law before the year 2000. Despite the principle of duality, which requires the incorporation of international treaties into domestic law, the Convention was regularly cited in the domestic courts and judges referred to its provisions when providing grounds for their judgments.¹⁰⁵ However, the Convention did not form a part of the law and neither judges nor the legislature were obliged to take into account the treaty provisions in making their decisions.¹⁰⁶

The ECHR in English law: the Human Rights Act 1998

The coming into force of the HRA as of 2 October 2000 signified an important change in the status of fundamental rights in British law. The Act was drafted on the initiative of the Labour government that was elected in 1997 and it aimed to give further effect to the provisions of the

⁹⁷ This section concerns the law of England and Wales. For convenience I will refer to ‘England’ and ‘English law’, but this should be read as including Wales.

⁹⁸ Hood Phillips & Jackson/Leopold 2001, nos. 1-005 to 1-008; Bradley & Ewing 2003, p. 4-5; Oliver 2003, p. 4-7.

⁹⁹ Bradley & Ewing 2003, p. 4.

¹⁰⁰ Oliver 2003, p. 5; Bradley & Ewing 2003, p. 6-7. See also Koopmans 2003, p. 15 ff.

¹⁰¹ Human Rights Act 1998, www.hmsso.gov.uk/acts/acts1998/19980042.htm (last consulted on 14 December 2006).

¹⁰² Wadham, Mountfield & Edmundson 2003, p. 3; Feldman 2002, p. 70-71.

¹⁰³ Wadham, Mountfield & Edmundson 2003, p. 3. See also Hood Phillips & Jackson/Leopold 2001, no. 22-002.

¹⁰⁴ Oliver 2003, p. 113.

¹⁰⁵ Hood Phillips & Jackson/Leopold 2001, no. 22-007, with further references.

¹⁰⁶ Hood Phillips & Jackson/Leopold 2001, no. 22-008.

ECHR in British law.¹⁰⁷ The dualist system of law required that international treaties ratified by the government, such as the Convention, were implemented into domestic law by an Act of Parliament; otherwise the treaty provisions would not have legal effects in domestic law.¹⁰⁸ Although the ECHR affected English law through the case law of the ECtHR and through the use of arguments based on the Convention in the domestic courts,¹⁰⁹ the HRA has ‘brought home’ fundamental rights to the British citizens, providing them with the possibility to invoke these rights before the domestic courts.

Nevertheless, the rights have not been ‘entrenched’ in English constitutional law. As said earlier, Parliament still has the final say in legislation on fundamental rights, which means that the HRA, like all other statutes, may be changed or set aside by a future Act of Parliament.¹¹⁰

The Act enumerates the Convention rights that it aims to protect, which are the rights laid down in Articles 2 to 12 and 14 ECHR, Articles 1 to 3 of the First Protocol and Articles 1 and 2 of the Sixth Protocol in conjunction with Articles 16 to 18 ECHR (section 1(1) HRA). Article 13 ECHR, which provides a right to an effective remedy for breaches of the Convention rights before a national authority, has not been included. The passage of the Act itself is deemed to give effect to this Article, ‘establishing a scheme under which Convention rights can be raised before [the] domestic courts’.¹¹¹ Neither has Article 1 ECHR been included, which provides that the State parties to the Convention ‘shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1’ of the ECHR.

While the Convention rights have not as such been incorporated into the legal systems within the UK, the Act prescribes how they may be given further effect.¹¹² According to section 3 HRA, legislation ‘must be read and given effect in a way which is compatible with the Convention rights’ so far as this is possible. If one of the higher courts¹¹³ finds that a certain provision of primary or subordinate legislation is incompatible with a ECHR right, it may make a declaration of that incompatibility (section 4 HRA). This also follows from section 6(1) in conjunction with 6(3)(a), which provide that a court, as a public authority, in principle has to act in a way which is compatible with the Convention. Regarding the legislative process, section 19 requires a Minister of the Crown in charge of a Bill in either House of Parliament to make a statement concerning the compatibility of the Bill with the ECHR or, if he feels unable to make such a declaration, to make a statement that the government nevertheless wishes the House to proceed with the Bill.

¹⁰⁷ Rights Brought Home: The Human Rights Bill, Government White Paper, October 1997, *Cm* 3782; included in Wadham, Mountfield & Edmundson 2003, p. 283-298.

¹⁰⁸ Wadham, Mountfield & Edmundson 2003, p. 4; Oliver 2003, p. 111-112.

¹⁰⁹ Laws 1993, p. 65 ff.; Beloff & Mountfield 1996, p. 474-485.

¹¹⁰ Lester 2004, p. 259 remarks that ‘we may be sure that the Government that takes credit for the Act would not have given birth to such a measure today; and there is no certainty that the Act will remain secure from abridgement by this Government or outright repeal by a future Government’. In his opinion, therefore, the best safeguard for the HRA would be the ‘nurturing of a deep-rooted culture of respect for human rights among governors and governed’.

¹¹¹ *Hansard HL*, 18 November 1997, col. 475 as included in Wadham, Mountfield & Edmundson 2003, p. 301.

¹¹² Hood Phillips & Jackson/Leopold 2001, no. 22-015.

¹¹³ For English law: the House of Lords, the Courts-Martial Appeal Court, the High Court or the Court of Appeal (section 4(5) HRA).

1.1.6 Preliminary conclusion

Summarising, a practical or workable definition of ‘fundamental rights’, for legal practice as well as for legal analysis, seems to be a formal one, that includes the rights that have explicitly been worded in a Constitution or an international treaty such as the ECHR or that can be derived from these rights. For Germany, the rights of the *Grundgesetz* are thus the most relevant, while the ECHR generally is less influential because of its overlapping with constitutional rights. In the Netherlands, on the other hand, the Convention figures prominently beside the *Grondwet*, especially in the case of judicial review. In Italy, like in Germany, the ECHR plays a smaller part, given its non-constitutional status and, besides that, the constitutional review of laws conducted by the *Corte costituzionale* on the basis of the *Costituzione*. English law, finally, has recognised a number of common law liberties and has given further effect to the ECHR through the Human Rights Act 1998.

1.2 Freedom of contract and the general clauses of private law

As will be set out more in depth in Chapter 2, the influence of fundamental rights in contract law for an important part has been felt in the interpretation of general clauses of law, at least in the civil law systems included in this analysis. In order to understand this tendency, some attention should be paid to the function of such general clauses as ‘good morals’, ‘good faith’ or – to a greater or lesser extent – ‘tort’ in the various legal systems. As a basis, the application of these general legal concepts to contractual relationships regards the question to what extent private parties are free to decide on their contractual arrangements (section 1.2.1). It depends on the formulation and functioning of the various clauses in the different countries (1.2.2) what can be the intensity of the limitation through the ‘colouring’ of general clauses by means of fundamental rights (1.2.3).

1.2.1 The principle of freedom of contract and its limits

Freedom of contract may be described as a person’s freedom to arrange his relations with others by means of contracts.¹¹⁴ On the one hand, this implies that parties in principle are free to enter into a contract of their choice and on the terms they wish. On the other hand, it also means that a party is usually not obliged to conclude a contract; freedom of contract includes the freedom *not* to enter into an agreement.¹¹⁵

The principle of freedom of contract is, however, not unlimited. Contract law provides rules for the way in which parties use their freedom, both relating to the formal aspects of the agreement and to the substance of the contract.¹¹⁶ In this context, a distinction can be made between a positive and a negative side of freedom of contract.¹¹⁷ The positive side of the principle regards the freedom of self-determination and development of one’s personality, whereas freedom

¹¹⁴ Palandt/Heinrichs 2007, Einf v § 145, no. 7.

¹¹⁵ Palandt/Heinrichs 2007, Einf v § 145, no. 7; Asser/Hartkamp 2005 (4-II), no. 34; McKendrick 2000, p. 5; Alpa 2001, p. 349. See also Article 1:102 PECL (freedom of contract) and Article 2:301 PECL (negotiations contrary to good faith).

¹¹⁶ Compare Loth 2000, p. 18 ff.

¹¹⁷ Loth 2000, p. 26.

of contract in the negative sense refers to the freedom from (state) intervention in the contractual relationship.¹¹⁸ Paradoxically, however, interference in the contractual relationship is sometimes required in order to guarantee that both contract parties can fully enjoy their freedom of self-determination. Legislative and judicial intervention may be needed to guarantee that parties are put in formally equal bargaining positions. Furthermore, judicial review of the contents of a contract may be necessary to make sure that parties have also been able to substantively contribute to the terms and conditions of the agreement.¹¹⁹

Rules of private law define the boundaries of (negative) freedom of contract.¹²⁰ Examples include rules on formation, (non-)performance of the contract and termination. They establish that, under certain circumstances, parties may not be able or allowed to enter into a contract (e.g. legal incapacity) or, on the other hand, may be obliged to do so (*Kontrahierungszwang*, for instance in the case of a party holding a monopoly position, such as a national railway company¹²¹). Furthermore, they allow for obligations that the parties had not explicitly agreed upon to be defined on the basis of the (pre)contractual relationship. Examples of such limitations of freedom of contract can be found in the case of liability for breaking off negotiations, and often in special relationships such as those regarding consumer sales or medical treatment. In general, the rules of contract law may be seen as demarcations of the playing field, and thus as limits to the parties' room for manoeuvre, set by the legislator.

In this respect, the general clauses of private law (good faith, good morals, and to some extent also tort¹²²) play an important role. They form the cornerstones of the continental systems of contract law, keeping in place the specific rules of contract law that may be derived from them. On the basis of good morals (§ 138 *BGB*, Article 3:40 *BW*, Article 1343 *c.c.*) parties, for instance, are prohibited from concluding a contract concerning theft or murder. In German, Dutch and Italian law, moreover, good faith is usually considered to govern the interpretation of a contract, as well as giving the courts the possibility to supplement or limit contractual clauses (§ 242 *BGB*, Articles 6:2 and 6:248 *BW*; Articles 1175 and 1375 *c.c.*). And, coming back to the example of pre-contractual liability, tortious liability under certain circumstances may be established in cases of broken-off negotiations.¹²³

These general clauses have, in accordance with their open nature, played an important part in the dynamics of contract law adjudication. They give judges the possibility to resolve cases that are not covered by existing rules of contract law, reaching back to the general underlying principles of this field. Moreover, given their relatively flexible nature,¹²⁴ general clauses provide the possibility to keep contract law in step with changes in society.

¹¹⁸ See also Nieuwenhuis 1999, p. 25-26.

¹¹⁹ See further section 4.2.2 below.

¹²⁰ See the authors mentioned in the previous footnote. See also the Comments to Articles 1:102 and 1:103 PECL, Lando & Beale 2000, p. 99-101.

¹²¹ In the case of a monopoly, the contract concluded with the individual client in fact might be said to be a fictitious contract, since the client has no choice with whom to contract and the monopolist, in principle, cannot refuse to contract. Asser/Hartkamp 2005 (4-II), no. 209.

¹²² See below, section 1.2.2 on the conceptions of these concepts in the selected legal systems.

¹²³ In the Netherlands, liability for breaking off negotiations is mostly considered to be of either a tortious or a *sui generis* nature; Asser/Hartkamp 2005 (4-II), no. 160 ff.; Hesselink 1999, p. 74-75, 80-81; Mak 2002a, p. 64-65.

¹²⁴ Although most civil law systems do not have a system of precedent, legal certainty and uniformity require that the courts do not take too great a liberty in filling in the general clauses of private law; compare Hesselink 1999, p. 400-401. Of course, this leaves open the question of what should be considered 'too great'.

As will be analysed in more detail in the subsequent chapters, judges have regularly made reference to fundamental rights when filling in the general clauses of private law. Indeed, the Dutch legislator explicitly requires that the norm of good faith be interpreted in the light of generally accepted principles of law (Article 3:12 *BW*). The German Constitutional Court, the *Bundesverfassungsgericht*, as early as 1958 established that the rules of private law should be interpreted in the spirit of the order of constitutionally protected values, indicating the general clauses as the ‘inroads’ for fundamental rights in private law.¹²⁵ In Italy, case law also shows a line of examples of the application of constitutional rights and principles, such as the principle of solidarity (Article 2 *Cost.*), in combination with rules of private law, e.g. the requirements of good faith (Article 1375 *c.c.*) or the rules on tortious liability and immaterial damages (Articles 2043 and 2059 *c.c.*).¹²⁶

Considering this filling in of open norms on the basis of constitutional values, it results in the fact that limitations of negative freedom of contract may in principle engage fundamental rights. At the same time, a fundamental-rights based interpretation of general clauses may help to protect and restore positive freedom of contract, i.e. the parties freedom of self-determination. For a further analysis of the case law in this field, a brief sketch of the constitutional fundamentals of the selected legal systems and the relevant general clauses of private law might thus help to clarify the framework of the discourse. The subsequent sections will therefore give a bird’s-eye view of the place of ‘good faith’, ‘good morals’ and ‘tortious liability’ in the selected systems, as well as describe the constitutional setting in which the application of fundamental rights in contract law has arisen.

It should be admitted that the structure of this overview undoubtedly attests to a civil law perspective, starting from the idea of a coherent civil code that includes open norms. From a comparative perspective, close attention should therefore be paid to the English common law system, in order to see how similar problems have been solved in a legal system that is based on case-by-case solutions rather than on general, abstract rules.

1.2.2 *Limits set by general clauses of private law*

The German, the Dutch and the Italian Civil Code¹²⁷ all contain several important general restrictions on freedom of contract, viz. the so-called ‘open norms’ or *Generalklauseln*. These include ‘good morals’ (§ 138 *BGB* and § 826 *BGB*; Article 3:40 *BW*; Article 1343 *c.c.*), ‘proper social conduct’, in Dutch law referring to traffic and safety norms as well as norms protecting against pure economic loss and immaterial damage,¹²⁸ (tortious liability: Article 6:162 *BW*; compare Article

¹²⁵ *BVerfG* 15 January 1958, *BVerfGE* 7, 198, p. 205-206. See section 2.2.2 below. It should be observed that freedom of contract has also been recognised as a constitutionally protected principle, included within the scope of Article 2(1) *GG* (general personality right).

¹²⁶ Chiarella 2004, p. 67-72, with further references. See also section 2.4 below. Note that, as in Germany, the principle of freedom of contract itself, as laid down in Article 1322 *c.c.*, has also obtained constitutional protection: according to the Italian Constitutional Court, Article 41 *Cost.* (private economic initiative, private property) indirectly protects freedom of contract; *Corte cost.* 21 March 1969, n. 37. See Alpa 2001, p. 348.

¹²⁷ Respectively the *Bürgerliches Gesetzbuch* (in force since 1 January 1900, reform of the law of obligations in 2002), the *Burgerlijk Wetboek* (Books 3, 5, 6 and 7, containing the provisions on patrimonial law, in force as of 1 January 1992), and the *Codice civile* (approved by *Regio decreto legge* of 16 March 1942, n. 262, in force since 21 April 1942).

¹²⁸ T&C *BW* 2005 (Lindenbergh), Article 6:162, note 2d.

2043 *c.c.*) and ‘good faith’ (§ 242 *BGB*; Articles 6:2 and 6:248 *BW*; Articles 1175 and 1375 *c.c.*) as well as the expression of these norms in more specific provisions. Although English law has not recognised a doctrine of good faith,¹²⁹ it encompasses specific rules on immoral contracts as well as torts.

The general clauses in Dutch, Italian and German law provide the judge with a basis to test the parties’ behaviour against norms of proper conduct, good faith and fair dealing, which underlie considerable parts – if not the whole – of patrimonial law. The general wording of these provisions makes it possible to take into account changes in society and, in connection with that, the underlying values of law.

English law, on the other hand, does not have a tradition of general clauses, but tends to solve cases on the basis of more specific rules. The norms that in the continental legal systems are expressed in *Generalklauseln* thus also in England come to the fore, although more on a case-by-case basis. Some standards that have been provided in case law, for instance, resemble general clauses. Think, for example, of the caution expected from the ordinary ‘man on the Clapham omnibus’, referring to average or typical behaviour. It seems interesting to compare the English use of such standards as well as specific rules in cases of illegal contracts and torts with the continental approach based on general clauses. In the following chapters, English solutions may therefore serve as material for comparison with Dutch and German as well as Italian solutions, in order to see what differences and similarities exist between the effects of fundamental rights through general clauses and by means of more specific rules of contract law.

Chapter 2 will investigate the effects of fundamental rights, including those taking place through general clauses in contract cases. In this section, I will however first provide a brief overview of the relevant general clauses and standards that may serve as ‘inroads’ for fundamental rights in German, Dutch, Italian and English private law. These are respectively: a) good morals, b) good faith and c) tort. A full overview of the contents of the various open norms will not be given;¹³⁰ rather, the relevant aspects for the interpretation of these norms in light of fundamental rights will be described.

a) *Good morals*

In the laws of contract of the continental legal systems included in this overview, ‘good morals’ forms a yardstick for assessing the validity of juridical acts, including contractual obligations. If a contractual provision is held to infringe good morals, it is null and void. English common law has recognised the illegality of various contracts infringing public policy, which largely resemble the contracts brought under the general clauses of good morals and public order in Germany, the Netherlands and Italy. Good morals and public policy thus serve as a limit to the parties’ (negative) freedom of contract.

Germany: ‘gute Sitten’

The German provision on ‘good morals’ (*gute Sitten*), laid down in § 138 *BGB*, reads as follows:

[Legal transaction against good morals; usury] (1) A legal transaction which is against good morals is void.

¹²⁹ McKendrick 2003, p. 533.

¹³⁰ References to general studies will be given in the footnotes.

(2) A legal transaction by which a person exploiting the need, inexperience, lack of sound judgment or substantial lack of will-power of another, causes to be promised or granted to himself or to a third party in exchange for a performance, pecuniary advantages which are in obvious disproportion to the performance is also void.¹³¹

The first part of the article formulates a general rule on the nullity of legal acts infringing good morals, whereas the second part governs a specific form of immoral contract, viz. usury. A reference to ‘public order’ is not explicitly made, since an offence against public order would in most cases also constitute an infringement of good morals.¹³²

The Netherlands: ‘goede zeden’ and ‘openbare orde’

In Dutch civil law, the general clause of ‘good morals’ (*goede zeden*) has been laid down in Article 3:40(1) *BW*:

‘A juridical act which by its content or necessary implication is contrary to good morals or public order is null.’¹³³

Article 3:33 *BW* defines a juridical act as an act with intended juridical effects. If the content or necessary implication of such an act is contrary to good morals or public order, the juridical act is null and void, so states Article 3:40(1) *BW*. The concepts of ‘good morals’ and ‘public order’ in this context both refer to norms of unwritten law that are felt to be fundamental in a certain social constellation; the former emphasises morality, whereas the latter focuses on the organisation of society.¹³⁴ A sharp line can however not be drawn between these categories.¹³⁵

No precise definition can be given of the content of ‘good morals’, because that is the nature of an open norm and the interpretation of the norm moreover changes with the place and time. Nevertheless, in case law and literature on Article 3:40(1) *BW*, several indicative interpretations of the concept can be found. For the purposes of this book, of most relevance is the impact of fundamental rights on the application of the general clause. In a case that will be more profoundly discussed later on, the so-called *Mensendieck* decision of 1969,¹³⁶ the Dutch Supreme Court (*Hoge Raad*) made clear that a contractual waiver of a fundamental right could offend against good morals. A justification for such an infringement might however be found in the interest served by the contract, so stated the Supreme Court. Although, after this decision, the *Hoge Raad* has not again spoken so explicitly on the effects of fundamental rights through the

¹³¹ Adaptation of the translation by Goren 1994, p. 21. The original German text reads: ‘[Sittenwidrige Rechtsgeschäft; Wucher] (1) Ein Rechtsgeschäft, das gegen die guten Sitten verstößt, ist nichtig. (2) Nichtig ist insbesondere ein Rechtsgeschäft, durch das jemand unter Ausbeutung der Zwangslage, der Unerfahrenheit, des Mangels an Urteilsvermögen oder der erheblichen Willensschwäche eines anderen sich oder einem Dritten für eine Leistung Vermögensvorteile versprechen oder gewähren lässt, die in einem auffälligen Missverhältnis zu der Leistung stehen.’

¹³² Palandt/Heinrichs 2007, § 138, no. 3; Asser/Hartkamp 2005 (4-II), no. 243.

¹³³ Translation by Haanappel & Mackaay 1990, p. 23. The Dutch text of Article 3:40(1) *BW* reads as follows: ‘Een rechtshandeling die door inhoud of strekking in strijd is met de goede zeden of de openbare orde is nietig.’

¹³⁴ T&C *BW* 2005 (Hijma), Article 3:40, note 2a.

¹³⁵ Asser/Hartkamp 2005 (4-II), no. 243.

¹³⁶ *HR* 31 October 1969, *NJ* 1970, 57 (*Mensendieck I*); see section 2.3.1 below.

general clause of ‘good morals’, its case law to this day is still consistent with the *Mensendieck* case.¹³⁷

Unlike in Germany, the specific rules on usury have not been included in the Dutch provision on good morals. A provision similar to § 138(2) can however be found in Article 3:44(4) *BW* regarding abuse of circumstances (*misbruik van omstandigheden*):

‘(4) A person who knows or should know that another is being induced to execute a juridical act as a result of special circumstances – such as state of necessity, dependency, wantonness, abnormal mental condition or inexperience – and who promotes the creation of that juridical act, although what he knows or ought to know should prevent him therefrom, commits an abuse of circumstances.’¹³⁸

Usury contracts can be brought under this provision as well. Furthermore, it has been observed that all situations covered by Article 3:44(4) *BW* concern the protection of a party having a weaker position in relation to its counterpart.¹³⁹ According to the current Dutch Civil Code, abuse of circumstances – other than infringement of good morals – does not entail the nullity of the contract, but determines its avoidability (Article 3:44(1) *BW*).¹⁴⁰

Italy: ‘causa illecita’

The Italian rule on immorality of contracts is related to the theory of the *causa* of the contract, which requires a contract to be based on a valid objective motive or reason, in short the *causa* (Article 1325 *c.c.*). This term is commonly interpreted as referring to the specific social-economic function that the contract serves.¹⁴¹ Classic examples are the exchange of a good for the sales price in a sales contract, and the construction of a work in exchange for a compensation in a building contract.¹⁴²

Article 1343 *c.c.* stipulates under what circumstances the *causa* of a contract should be deemed unlawful:

‘The *causa* [of a contract] is illegal when it is contrary to mandatory rules, to the public order or to good morals.’¹⁴³

Seeing that the latter two grounds for illegality are general clauses, it has been observed that it is in the hands of the judges to decide what exactly should be understood by these terms as mentioned

¹³⁷ Van den Brink 2002, p. 42-44, with further references.

¹³⁸ Article 3:44(4) *BW*: ‘Misbruik van omstandigheden is aanwezig, wanneer iemand die weet of moet begrijpen dat een ander door bijzondere omstandigheden, zoals noodtoestand, afhankelijkheid, lichtzinnigheid, abnormale geestestoestand of onervarenheid, bewogen wordt tot het verrichten van een rechtshandeling, het tot stand komen van die rechtshandeling bevordert, ofschoon hetgeen hij weet of moet begrijpen hem daarvan zou behoren te weerhouden.’

¹³⁹ T&C *BW* 2005 (Hijma), Article 3:44, note 6a.

¹⁴⁰ Under the *Burgerlijk Wetboek* in force up until 1992, the circumstances covered by the current Article 3:44(4) *BW* would have resulted in the nullity of the contract on the basis of an immoral *causa*. Compare the current Italian law on illicit contracts.

¹⁴¹ Alpa 2005, p. 569; Navarretta 2003, p. 273. The same concept is used in French contract law (Article 1131 *C.c.*) and also formed part of the Dutch Civil Code which was in force up until 1992 (Article 1356 ff. *Oud BW*).

¹⁴² Di Majo 2001, p. 391.

¹⁴³ Beltramo 2006. The original text of Article 1343 *c.c.* reads: ‘Causa illecita. La causa è illecita quando è contraria a norme imperative, all’ordine pubblico o al buon costume.’

in Article 1343 *c.c.*, taking into account the social and political context at the moment a case is decided.¹⁴⁴ ‘Public order’ (*ordine pubblico*) in the private law context refers to the external, collective order of society, as well as to the unalterable principles underlying the legal system.¹⁴⁵ ‘Good morals’ (*buon costume*) indicate not only principles of sexual morality, but rather the collection of social and moral principles that form the basis of a society and are respected by the majority of participants to that society.¹⁴⁶

The unlawfulness of the *causa* entails the nullity of the contract in all its parts (Article 1418(2) *c.c.*). Nullity implies that the contract has been without any legal effect since the day it was concluded.

England: illegality and public policy

Although the English common law system does not have a civil code providing a general provision on the compliance of contracts with ‘good morals’, case law has defined a number of circumstances that entail the illegality of a contract. When systemising these results and comparing them to the crystallisation of ‘good morals’ by the German, Dutch and Italian courts, the differences in approach may thus in practice be less pronounced than would be expected in light of the different starting points of civil law and common law.¹⁴⁷ However, there may be some differences in the content that is given to the open norm.

English writers classify contracts that are affected by illegality in several ways. Prentice,¹⁴⁸ for instance, distinguishes between the position of contracts at common law and their unenforceability by statute. Within the first category, he makes the following subdivision: objects which are illegal by common law or by statute, objects injurious to good government, objects injurious to the proper working of justice, objects injurious to morality and marriage and contracts in restraint of trade. Treitel¹⁴⁹ makes a distinction between two main categories of ‘contracts involving the commission of a legal wrong’ and ‘contracts contrary to public policy’. Under these headings, he further distinguishes twenty-two subcategories. Special attention is paid to the important type of ‘contracts in restraint of trade’, which fall under the second category, contracts that are contrary to public policy. McKendrick,¹⁵⁰ finally, does not aspire to make a classification, but instead enumerates various circumstances in which the courts have concluded that a contract is illegal or contrary to public policy: statutory illegality, agreements contrary to good morals, agreements prejudicial to family life, agreements prejudicial to the administration of justice, agreements to commit a crime or a civil wrong, agreements which are injurious to good government, and agreements which are in restraint of trade.

¹⁴⁴ Di Majo 2001, p. 395; Alpa 2005, p. 131-133.

¹⁴⁵ Alpa 2005, p. 134.

¹⁴⁶ Alpa 2005, p. 135.

¹⁴⁷ This might especially be true in the field of fundamental rights and contract law, in which most civil law countries have seen developments in case law rather than in legislation. English law, on the other hand, encompasses a vast number of statutes in many fields of contract law. In the end, therefore, the differences in the approach to specific issues of contract law may be less relevant than the different legal cultures would suggest. Specific examples will follow in Part II, chapter 3.2.

¹⁴⁸ Prentice 2004, nos. 16-001 to 16-157.

¹⁴⁹ Treitel 2003, p. 430-480.

¹⁵⁰ McKendrick 2003, p. 805-811.

Overall, the concept of ‘public policy’ may be qualified as a form of ‘public order’, although its scope is much wider than the Dutch notion expressed in Article 3:40 *BW*. Van den Brink observes that the English conception comes closer to the French term ‘*ordre public*’.¹⁵¹

b) Good faith

Good faith, like good morals and public policy, may set limits to (negative) freedom of contract. On the basis of this general clause, judges in Germany, the Netherlands and Italy have the possibility to interpret, supplement and correct contracts¹⁵² and, thus, to keep an eye on the way in which parties make use of their autonomy.

Germany: ‘Treu und Glauben’

§ 242 *BGB* expresses the notion of ‘good faith’ for the German law of obligations:

[Performance according to good faith] The debtor is bound to effect performance according to the requirements of good faith, giving consideration to common usage.¹⁵³

Although a grammatical interpretation of the text would imply that the provision merely regulates the way in which performance should take place, it has since long been acknowledged that its scope is much wider.¹⁵⁴ In case law and literature, a general principle of law has been derived from this provision, holding that everyone should act in accordance with good faith when effectuating his or her rights and fulfilling his or her obligations.¹⁵⁵

In general, several functions or modes of application (*Funktionskreise*) of § 242 are distinguished. These encompass:¹⁵⁶ a) a concretisation function (*Konkretisierungsfunktion*), which concerns the manner of performance; b) a supplementary function (*Ergänzungsfunktion*), as a basis for certain secondary obligations (*Nebenpflichten*); c) a limitation function (*Schrankenfunktion*), in setting immanent limits to all rights; d) a corrective function (*Korrekturfunktion*), that allows for adaptations to a contract in cases of changed circumstances; and e) the provision can sometimes constitute a basis for a claim for compensation,¹⁵⁷ whereas the secondary obligations based on § 242 may also underlie a claim. Within these functions, a number of *Fallgruppen* have been developed, in which the relevant cases have further been arranged.¹⁵⁸

The effects of fundamental rights can, in principle, take place in each of the *Fallgruppen*, since these rights can be an inspiration for the interpretation of the general clause in all of them.

¹⁵¹ Van den Brink 2002, p. 140.

¹⁵² Ignoring the subtleties, this trichotomy could thus be seen as the European common core; Hesselink 2004c, p. 477.

¹⁵³ Goren 1994, p. 41. In German: ‘[Leistung nach Treu und Glauben] Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern.’

¹⁵⁴ Palandt/Heinrichs 2007, § 242, no. 1.

¹⁵⁵ MünchKomm/Roth 2007, § 242, no. 17-19, 29; Palandt/Heinrichs 2007, § 242, no. 1; Hk-BGB/Schulze 2001, § 242, no. 1. Reference is made to *BGHZ* 85, 48.

¹⁵⁶ Staudinger/Schmidt 2005, § 242, no. 113 ff.; MünchKomm/Roth 2007, § 242, no. 61 ff.; Palandt/Heinrichs 2007, § 242, no. 13. Compare Hesselink 1999, p. 47 ff. on the functions of reasonableness and fairness in various European legal systems. See on Dutch law also my comments on Article 1:201 PECL, in Hondius, Schelhaas et al. 2002, p. 48-50.

¹⁵⁷ Although it constitutes no ground for a claim (*Anspruchsgrundlage*) in its own right; Palandt/Heinrichs 2007, § 242, no. 14.

¹⁵⁸ Palandt/Heinrichs 2007, § 242, no. 42 ff.

Fundamental rights thus run through the entire concept of ‘good faith’. This is in accordance with the idea of fundamental rights underpinning the law of obligations in its entirety, as a system of values.

Good faith can, furthermore, be found outside § 242. Special provisions that refer to good faith are, for example, § 307 *BGB* (unfair terms),¹⁵⁹ § 315 *BGB* (unilateral determination of a contractual obligation) and § 75(1) of the *Betriebsverfassungsgesetz* (*BetrVG*; protection of employees)¹⁶⁰.

The Netherlands: ‘goede trouw’/ ‘redelijkheid en billijkheid’

The obligation of parties to act in compliance with ‘reasonableness and fairness’ (*redelijkheid en billijkheid*) has been laid down in Article 6:2 *BW* (general law of obligations) and Article 6:248 *BW* (contract law):

Article 6:2:

‘(1) A creditor and debtor must, as between themselves, act in accordance with the requirements of reasonableness and fairness.

(2) A rule binding upon them by virtue of law, usage or a juridical act does not apply to the extent that, in the given circumstances, this would be unacceptable according to criteria of reasonableness and fairness.’

Article 6:248:

‘(1) A contract has not only the juridical effects agreed to by the parties, but also those which, according to the nature of the contract, result from the law, usage or the requirements of reasonableness and fairness.

(2) A rule binding upon the parties as a result of the contract does not apply to the extent that, in the given circumstances, this would be unacceptable according to criteria of reasonableness and fairness.’

Since the coming into force of the parts on patrimonial law in the new *Burgerlijk Wetboek* in 1992, the term ‘reasonableness and fairness’ (*redelijkheid en billijkheid*) is used instead of ‘good faith’ (*goede trouw*) in order to avoid confusion with the notion of good faith in the subjective sense. The latter refers to good faith as a requirement for the acquisition of property where the transferor is not the owner of the good (Article 3:11 *BW*, Articles 3:86 and 3:88 *BW*).¹⁶¹

Much has been written on the content and the methods of applying the general clause.¹⁶² In general, Dutch writers distinguish three functions of good faith: a) interpretation, i.e. all contracts must be interpreted according to the principle of reasonableness and fairness; b) supplementation, i.e. identification of supplementary rights and duties that parties have not expressly agreed upon in

¹⁵⁹ The former § 9 of the *Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen* (*AGBG*), *Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen*, 9 December 1976, *BGBI I* 3317. Incorporated in the *BGB* as of 1 January 2002.

¹⁶⁰ *Betriebsverfassungsgesetz*, 23 December 1988, *BGBI/89*, 1. § 75(1) *BetrVG* stipulates that the employer should guarantee that all employees will be treated according to the requirements of law and equity (*Recht und Billigkeit*). This includes, in particular, the prevention of discrimination on the basis of descentance, religion, nationality, origin, political or labour union activities, sex, sexual identity, and age. § 75(2) *BetrVG* adds that the employer should also protect the possibilities for employees to freely develop their personalities and to develop personal initiatives.

¹⁶¹ See Mak 2002b, also for a comparison with the Principles of European Contract Law on the concept of ‘good faith’.

their contract; and c) limitation or derogation, i.e. a rule which is binding upon the parties as a result of the contract does not apply to the extent that, given the circumstances, this would be unacceptable according to the criteria of reasonableness and fairness.¹⁶³ Like in German law, the general clause is usually further concretised by distinguishing a number of *Fallgruppen* within these functions, thereby developing an ‘inner system’ of good faith.¹⁶⁴

Fundamental rights may, as said earlier, also be taken into account when filling in the open norm of good faith. Article 3:12 *BW* supports this idea, since it provides that, ‘in determining what reasonableness and fairness require, 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.’¹⁶⁵ These generally accepted principles of law and juridical views can be considered to include fundamental rights.¹⁶⁶

Italy: ‘buona fede’

A duty to act in good faith has been codified in several provisions of the Italian civil code. Article 1175 *c.c.* provides:

[Fair behaviour] The debtor and the creditor shall behave according to rules of fairness.¹⁶⁷

While Article 1366 *c.c.*, with respect to the interpretation of contracts, reads:

[Interpretation according to good faith] The contract shall be interpreted according to good faith.¹⁶⁸

And Article 1375 *c.c.*, for the performance of the contract, stipulates:

[Performance according to good faith] The contract shall be performed according to good faith.¹⁶⁹

Although the terminology in these provisions varies, it has been established in case law and legal literature that the norm set by Articles 1375 and 1366 *c.c.* (*buona fede*) is equal to the one given by Article 1175 *c.c.* (*correttezza*).¹⁷⁰ Good faith, in an objective sense, is understood as prescribing the way in which the debtor should act in performing his obligations. It is a general clause that is to be

¹⁶² For instance: Abas 1972; Valk 1993; Hesselink 1999. See also Asser/Hartkamp 2005 (4-II), nos. 300-341a; T&C *BW* 2005 (Valk), Articles 6:2 and 6:248.

¹⁶³ Asser/Hartkamp 2005 (4-II), nos. 307 and 312; Hartkamp & Tillema 1995, no. 32; Hesselink 1999, p. 51-52.

¹⁶⁴ Hesselink 1999, p. 61-64; T&C *BW* 2005 (Valk), Article 6:2, note 3 ff. and Article 6:248, notes 3d, 4b and c, 5.

¹⁶⁵ Haanappel & Mackaay 1990, p. 6. In Dutch: ‘Bij de vaststelling van wat redelijkheid en billijkheid eisen, moet rekening worden gehouden met algemeen erkende rechtsbeginselen, met de in Nederland levende rechtsovertuigingen en met de maatschappelijke en persoonlijke belangen, die bij het gegeven geval zijn betrokken.’

¹⁶⁶ Hartkamp 2000, p. 118.

¹⁶⁷ Beltramo 2006. Article 1175 *c.c.*: ‘[Comportamento secondo correttezza] (1) Il debitore e il creditore devono comportarsi secondo le regole della correttezza.’

¹⁶⁸ Beltramo 2006. Article 1366 *c.c.*: ‘[Interpretazione di buona fede] Il contratto deve essere interpretato secondo buona fede.’

¹⁶⁹ Beltramo 2006. Article 1375 *c.c.*: ‘[Esecuzione di buona fede] Il contratto deve essere eseguito secondo buona fede.’

¹⁷⁰ *Correttezza* corresponds to objective good faith; Mengoni 1997, p. 8-9; Alpa 2005, p. 136. See also Hesselink 1999, p. 28-29.

filled in by the principles that are fundamental to society and that, accordingly, are bound to change with the ideology, mentality and social consciousness in which society has its basis.¹⁷¹

In contract law, a principle that has had a significant impact on the interpretation and application of good faith is Article 2 of the *Costituzione*. This provision is interpreted as imposing a duty of solidarity on the parties, requiring them to safeguard each other's interests as long as this does not imply a considerable sacrifice of their own interests.¹⁷² In light of fundamental rights, the principle of good faith has thus been read as allowing for a judicial review of the contents of the contract.

England: good faith?

English law does not recognise a general doctrine of good faith. Although it requires good faith in particular situations and in particular types of relationships,¹⁷³ a general, comprehensive duty to act in accordance with this norm has not been recognised.¹⁷⁴ By more specific rules, nevertheless, English law often reaches results similar to those that are achieved on the basis of open norms in German, Dutch and Italian law.¹⁷⁵

Recently, the Unfair Terms in Consumer Contracts Regulations 1999 have introduced a requirement of good faith in English law, implementing Council Directive 93/13/EEC dealing with this subject. As a consequence, the question has arisen whether good faith will also extend to contracts that are beyond the scope of these Regulations. Writers on this subject are mostly inclined to answer in the negative. As McKendrick points out, the leading case of *Walford v. Miles* stands in the way of recognising a general doctrine of good faith, since the House of Lords in this case held that an obligation to negotiate in good faith was not enforceable.¹⁷⁶

Teubner, furthermore, has argued that English law considers good faith a 'legal irritant'.¹⁷⁷ In his opinion, the reconstruction of the term in English law will inevitably lead to transformations of its meaning. The intention to converge national contract laws through Directives could then backfire, as it would lead to new divergences on the domestic level.¹⁷⁸

c) Tort

The law on tortious liability affects contractual relationships insofar as it defines the norms of social conduct that parties should adhere to. In certain cases, consequently, it is possible to base a claim on tort law as well as on contract law.¹⁷⁹

Another reason for including the rules on tortious liability in this overview, however, is that some examples of the application of fundamental rights in private law that will be described in the subsequent Chapters deal with tort claims rather than contract claims. They serve to explain the bigger picture concerning the impact that fundamental rights have had in the case law of the

¹⁷¹ Alpa 2005, p. 135-136.

¹⁷² *Cass. civ.* 20 April 1994, n. 3775, *Giust. civ.* 1994, p. 2159-2173. See also section 2.4.2 below.

¹⁷³ Goode 1992, p. 4-5; Whittaker 2004, nos. 1-024 to 1-028.

¹⁷⁴ *Walford v. Miles* [1992] 2 AC 128.

¹⁷⁵ Goode 1992, p. 7. Compare Lando & Beale 2000, p. 117.

¹⁷⁶ McKendrick 2003, p. 535-543, commenting on *Walford v. Miles* [1992] 2 AC 128.

¹⁷⁷ Teubner 1998, p. 11.

¹⁷⁸ Teubner 1998, p. 13, p. 23-24.

¹⁷⁹ Compare section 2.3.2 below on the Dutch *dentist case* of 2003.

various legal systems.¹⁸⁰ In order to better understand these examples, the relevant provisions on tortious liability will be briefly highlighted in this section.

Germany: 'unerlaubte Handlung'

A specific application of 'guten Sitten' can be found in § 826 BGB, which provides for damages when someone deliberately causes damage to another in a way that infringes good morals:

[Wilful damage contrary to good morals] A person who wilfully causes damage to another in a manner contrary to good morals is bound to compensate the other for the damage.¹⁸¹

The provision has been incorporated in the civil code as an addition to § 823 BGB, which governs tortious liability. German law does not recognise a broad, general concept of tort. Instead, several specific grounds for liability have been laid down in § 823,¹⁸² viz. an infringement of the life, body, health, freedom, property or other right of another person (first clause), or an infringement of the protection offered to a person by law (second clause). Although these cover a large part of the cases that would also be solved on the basis of a general tort, they nevertheless do not cover all of these. Even the concept of 'other right' (*sonstiges Recht*), which is considered a 'minor general clause' (*'kleine' Generalklausel*)¹⁸³ has its limits.

In addition to this provision, § 826 BGB includes another minor general clause. The importance of the Article lies in the fact that it provides for compensation in cases of intentionally inflicted damage in which none of the specific interests or rights named in § 823 have been injured. It has a supplementary function (*Ergänzungsfunktion*).¹⁸⁴ The open concept of 'good morals' included in § 826 BGB, moreover, allows for a dynamic development of the law of torts, since it opens the door to taking changing values in society (*Entwicklungsfunktion*) into account.¹⁸⁵ Through this door, as well as through § 823 BGB,¹⁸⁶ fundamental rights may enter into German tort law. This resembles their effect through the more general provisions on good morals laid down in § 138 BGB.

¹⁸⁰ See also section A of the Epilogue to Part I of this book.

¹⁸¹ Adaptation of the translation by Goren 1994, p. 153. In German: '[Sittenwidrige vorsätzliche Schädigung] Wer in einer gegen die guten Sitten verstoßenden Weise einem anderen vorsätzlich Schaden zufügt, ist dem anderen zum Ersatze des Schadens verpflichtet.'

¹⁸² § 823 BGB: '[Duty to compensate for damage] (1) A person who, wilfully or negligently, unlawfully injures the life, body, health, freedom, property or other right of another is bound to compensate him for any damage arising therefrom. (2) The same obligation is placed upon a person who infringes a statute intended for the protection of others. If, according to the provisions of the statute, an infringement of this is possible even without fault, the duty to make compensation arises only in the event of fault'; Goren 1994, p. 153. In German: '[Schadensersatzpflicht] (1) Wer vorsätzlich oder fahrlässig das Leben, den Körper, die Gesundheit, die Freiheit, das Eigentum oder ein sonstiges Recht eines anderen widerrechtlich verletzt, ist dem anderen zum Ersatze des daraus entstehenden Schadens verpflichtet. (2) Die gleiche Verpflichtung trifft denjenigen, welcher gegen ein den Schutz eines anderen bezweckendes Gesetz verstößt. Ist nach dem Inhalte des Gesetzes ein Verstoß gegen dieses auch ohne Verschulden möglich, so tritt die Ersatzpflicht nur im Falle des Verschuldens ein.'

¹⁸³ Medicus 2000, no. 744.

¹⁸⁴ Staudinger/Oechsler 2003, § 826, no. 1; Palandt/Sprau 2007, § 826, no. 1; Hk-BGB/Staudinger 2001, § 826, no. 1.

¹⁸⁵ Hk-BGB/Staudinger 2001, § 826, no. 1.

¹⁸⁶ § 823 BGB has been of great importance for the construction of the general personality rights; see BGH 25 May 1954, BGHZ 24, 12 (*Schacht*) and BGH 14 February 1958, BGHZ 26, 349 (*Herrenreiter*).

The Netherlands: 'onrechtmatige daad'

In Dutch law the concept of 'tort' (*onrechtmatige daad*) has been broadly defined. Insofar as it refers to 'unwritten rules pertaining to proper social conduct' it may be said to include an 'open norm'. Article 6:162 *BW* provides the following rules on tortious liability:

- '(1) A person who commits an unlawful act toward another which can be imputed to him, must repair the damage which the other person suffers as a consequence thereof.
- (2) Except where there is a ground of justification, the following acts are deemed to be unlawful: the violation of a right, an act or omission violating a statutory duty or a rule of unwritten law pertaining to proper social conduct.
- (3) An unlawful act can be imputed to its author if it results from his fault or from a cause for which he is answerable according to law or common opinion.¹⁸⁷

Three acts may thus constitute a tort: 1) a violation of a right; 2) an act or omission violating a statutory duty; and 3) an act or omission violating a rule of unwritten law pertaining to proper social conduct.¹⁸⁸ If there is a ground for justifying an act falling within the scope of the provision, however, then this act is no longer unlawful. In relation to the possible effects of fundamental rights, the first and third category of acts governed by Article 6:162 *BW* are of most relevance.

The first category of unlawful acts concerns the infringement of subjective rights, which rights are mostly understood to comprise patrimonial rights (*vermogensrechten*) and personality rights (*persoonlijkheidsrechten*).¹⁸⁹ Patrimonial rights include absolute rights, such as the right to property, pawn and mortgage, and they encompass the rights of tenants and leaseholders. Personality rights concern 'the various aspects of the essence of the human personality' and 'seek to safeguard the dignity of the human being as a person, including his integrity, identity and independence'.¹⁹⁰ Examples of personality rights are the right to physical integrity, to freedom, to honour and reputation, to protection of the private sphere and possibly to a healthy environment.¹⁹¹ The link to the fundamental rights laid down in the Dutch Constitution is obvious, seeing that personality rights are often deemed to be private law equivalents of these rights.¹⁹²

The third category of unlawful acts, consisting of acts and omissions violating a rule of unwritten law pertaining to proper social conduct, appeals to what is thought to be proper behaviour in relations between people. A person has to strike a balance between his interests and the interests of another person, taking into account these norms of social conduct. If he does not

¹⁸⁷ Haanappel & Mackaay 1990, p. 298. In Dutch, Article 6:162 *BW* reads: '(1) Hij die jegens een ander een onrechtmatige daad pleegt, welke hem kan worden toegerekend, is verplicht de schade die de ander diensgevolge lijdt, te vergoeden. (2) Als onrechtmatige daad worden aangemerkt een inbreuk op een recht en een doen of nalaten in strijd met een wettelijke plicht of met hetgeen volgens ongeschreven recht in het maatschappelijk verkeer betaamt, een en ander behoudens de aanwezigheid van een rechtvaardigingsgrond. (3) Een onrechtmatige daad kan aan de dader worden toegerekend, indien zij te wijten is aan zijn schuld of aan een oorzaak welke krachtens de wet of de in het verkeer geldende opvattingen voor zijn rekening komt.'

¹⁸⁸ This is a codification of the case law that was developed under the old Article 1401 *BW*; Asser/Hartkamp 2006 (4-III), no. 29.

¹⁸⁹ Asser/Hartkamp 2006 (4-III), no. 35; T&C *BW* 2005 (Lindenbergh), Article 6:162, note 2b.

¹⁹⁰ Lindenbergh 1999, p. 1705 (summary). See also *Onrechtmatige daad* (Jansen), note 33 ff.

¹⁹¹ Asser/Hartkamp 2006 (4-III), no. 35.

¹⁹² Lindenbergh 1999, p. 1674-1675; Asser/Hartkamp 2006 (4-III), no. 35. See also Nehmelman 2002, p. 99-100; Verheij 2002, p. 38-39.

act with sufficient care, his conduct will be unlawful.¹⁹³ Norms of proper social conduct comprise: a) traffic and safety norms (*verkeers- en veiligheidsnormen*); b) norms protecting against pure economic loss; and c) norms protecting against immaterial loss.¹⁹⁴ As will become clear in the following chapters, fundamental rights may not only play a part in the process of defining these norms, but fundamental rights may also be limited themselves on the basis of norms of proper social conduct.¹⁹⁵

Italy: 'fatto illecito'

Article 2043 of the Italian *Codice Civile* provides that:

[Compensation for unlawful acts] Any fraudulent, malicious, or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages.¹⁹⁶

In order for a person to be liable in tort for the unjust damage caused to another, his conduct has to be negligent (*colpa*) or intentionally fraudulent or malicious (*dolo*).¹⁹⁷ Article 2044 *c.c.* adds that a person is not liable if he acted in defence of himself or others, while Article 2045 *c.c.* stipulates that the amount of damages to be paid may be mitigated by the judge if the tortfeasor acted as he did because of an emergency. Moreover, a person who had no legal capacity at the moment he committed a tortious act, will not be held liable (Article 2046 *c.c.*).

England: torts

English law does not have a general rule on tortious liability like Article 6:162 BW. Instead, it distinguishes many different types of torts, each having their own requirements.¹⁹⁸ The main tort is the one of negligence. Although its scope is wider than the scope of other torts, it is limited by the notion of 'duty of care': liability in negligence requires that the plaintiff shows that the defendant owed a duty of care to him.¹⁹⁹ Since courts link the duty of care to the kind of prejudice suffered by the plaintiff, a certain 'hierarchisation' of protected interests can be found in English common law, which may be compared to the enumeration of interests in the German § 823 BGB.²⁰⁰ The enactment of the Human Rights Act 1998 raised the expectation that fundamental rights will affect the further evolution of tort law.²⁰¹

1.2.3 Freedom of contract and fundamental rights

In the context of the theme of 'fundamental rights and contract law' an interesting question is whether freedom of contract could be deemed to be a fundamental right.²⁰² Although it has not

¹⁹³ Asser/Hartkamp 2006 (4-III), no. 36.

¹⁹⁴ Asser/Hartkamp 2006 (4-III), nos. 45-51*L*.

¹⁹⁵ Compare HR 12 December 2003, NJ 2004, 117 (*biv-test II; dentist*).

¹⁹⁶ Beltramo 2006. Article 2043 *c.c.*: 'Risarcimento per fatto illecito. Qualunque fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno.'

¹⁹⁷ Jannarelli 2001, p. 593.

¹⁹⁸ Markesinis & Deakin 2003, p. 19-21.

¹⁹⁹ Van Gerven 2000, p. 2.

²⁰⁰ Van Gerven 2000, p. 2.

²⁰¹ Markesinis & Deakin 2003, p. 68-69. For an overview of the effects the Act has had until now, see section 2.5 below.

²⁰² See also Asser/Hartkamp 2005 (4-II), no. 45*a*.

been codified in any of the Constitutions of the selected countries, freedom of contract has been said to find protection as an unwritten fundamental right.²⁰³ The answer to the question, however, appears to be of lesser importance if it is accepted that in contract law cases the judges weigh *interests* rather than *rights*.²⁰⁴ Freedom of contract, as a recognised principle of contract law, in this view already has intrinsic weight that apparently does not need formal acknowledgement as ‘fundamental’.²⁰⁵

Freedom of contract has been recognised as a principle of contract law in Germany, the Netherlands, Italy and England. In all four countries it has moreover been recognised that this principle is limited. However, the extent to which and the method in which freedom of contract may be limited is not the same in each legal system.

In Dutch and German law, general clauses have for a long time provided the possibility to set limits on the parties’ freedom of contract, requiring compliance with certain standards of morality or fairness in contract relations. This is also the case in Italian law. Since general clauses have to be filled in on the basis of the values and principles shared in society, they seem to offer an ‘inroad for fundamental rights into contract law’.²⁰⁶

In English law, on the other hand, the framework for the entrance of fundamental rights into contract law differs on at least two important points. First, the concept of freedom of contract and the binding force of the contract still appear to have a somewhat stronger position than in Dutch, Italian or German law. Freedom of contract is considered a background norm of contract law and the courts stick to the formal doctrines that have been developed in the nineteenth century.²⁰⁷ Second, and related to this first point, the English common law system seems considerably adverse to the use of general clauses. This has for instance come to the fore in the problems that have arisen as a consequence of the implementation of the European Directive on unfair terms in consumer contracts.²⁰⁸ Nevertheless, it is regularly pointed out that the more specific solutions that in English law have been developed for particular situations often lead to results which are very similar to those achieved in other legal systems on the basis of general clauses. Although the courts may not openly admit to changes in formal contract doctrine, the solutions reached seem to bear witness to a recognition of such duties as that of good faith.²⁰⁹ In the end, therefore, there could be inroads of fundamental rights in English contract law as well as in German, Dutch and Italian law, even though the form of such effects of fundamental rights might be different.

In this context, it should be observed that even a system of contract law that would seem to prohibit an appeal to fundamental rights in civil cases in another sense may always be considered

²⁰³ Maris 1969, p. 12 ff. Consider also the protection granted to freedom of contract in Germany on the basis of Article 2 GG and in Italy on the basis of Article 41 *Cost.* See, respectively, Stern 1992, p. 98 and Palandt/Heinrichs 2007, § 145, no. 7 on German law; and Trabucchi 2005, p. 166-167 on Italian law.

²⁰⁴ See section 3.2.3.a below.

²⁰⁵ For further comments and references on the possible fundamental rights status of freedom of contract see Alkema 1999; Asser/Hartkamp 2005 (4-II), nos. 45a-45b; and, on German law, Kirchhof 2003, p. 1227 ff. On the inclusion of freedom of contract in Article 2 of the German *Grundgesetz*, see Nannen 2000, p. 58, with references to the case law of the *Bundesverfassungsgericht*; Höfling 1991, p. 6-8; Zöllner 1988, p. 330, footnote 5.

²⁰⁶ *BVerfG* 15 January 1958, *BVerfGE* 7, 198 (*Lüttl*), p. 206.

²⁰⁷ McKendrick 2003, p. 6-7.

²⁰⁸ See, for instance, McKendrick 2003, p. 494 ff.

²⁰⁹ McKendrick 2003, p. 6-7.

an expression of these rights. Depending on the extent to which the *legislator* is bound by fundamental rights, it will already have taken into account these rights when drafting new provisions of private law.²¹⁰ Think, for instance, of the regulation of non-competition clauses, which involves a balance of the employee's freedom of profession against the employer's interests in having his 'company's debit'²¹¹ protected. Or take the example of surrogacy contracts, the legislative prohibition of which could be interpreted in the light of the fundamental rights of the child.²¹² If such regulations offer relatively few possibilities for a judicial review or consideration of fundamental rights, this thus does not mean that these rights do not play any role in private law.

1.3 Conclusion

In this Chapter, the place of freedom of contract, general clauses and the relevant fundamental rights documents have been briefly described. The scope of this description was merely to give an indication of the positions in order to clarify the framework of the interaction between private law concepts, in particular freedom of contract and general clauses, and fundamental rights. Although a conclusion can therefore be no more than general,²¹³ it appears that in each of the selected legal systems freedom of contract, to a greater or lesser extent, is considered as a leading principle of contract law. Furthermore, German, Dutch, Italian and English law have all set limits to this freedom and have developed general clauses as well as more specific rules for doing so. As will be shown in the following chapter, the fundamental rights that have been recognised in the various legal systems increasingly often affect this limitation of private parties' (negative) freedom of contract.

²¹⁰ On the question to what extent the legislator is bound by fundamental rights and principles, see further section 2.1 on direct and indirect effect. See also Canaris 1999, p. 11-23.

²¹¹ Grapperhaus 1995, p. 105 defines a 'company's debit' as 'a company's sales opportunities on the basis of goodwill, special knowledge and insights and investments made'.

²¹² See section 6.2.5 below.

²¹³ For an in-depth analysis and comparisons of the concepts and conceptions of freedom of contract, general clauses and fundamental rights in the various legal systems, the literature mentioned in the footnotes provides further references.

2 Interaction between fundamental rights and contract law

This Chapter will provide an overview of the application of fundamental rights in private law cases and in particular those concerning contractual relationships. The tension between constitutional law and private law in contract cases seems to shine through most clearly in the restrictions which parties may experience concerning their rights: on the one hand, the possibility of fundamental rights being limited by contractual provisions; on the other hand, the limits that may be set on freedom of contract on the basis of fundamental rights. It is this interaction or *Wechselwirkung* between fundamental rights and contractual principles, such as the general clauses mentioned in the previous chapter, that will form the core of the argument presented here.

In this Chapter, after a brief introduction to the various theories on the question whether fundamental rights apply directly or indirectly in private law (section 2.1), the relevant case law on this topic will be described. Since German law has the longest history in this field, its theory of '*Wechselwirkung*' will be the starting point (section 2.2). Subsequently, a comparison with Dutch law (section 2.3) will be drawn, in order to see how the relation of fundamental rights and contract law has developed there and what the differences and similarities with Germany are. Furthermore, some comparative notes will be made with an eye on Italian and English law, placing the theory of interaction or *Wechselwirkung* in a broader, comparative framework (sections 2.4 and 2.5). Finally, a brief conclusion will be drawn, consisting of a summary of this chapter and a look ahead at the issues that will be further explored in the subsequent chapter (section 2.6).

Two preliminary remarks should be made here. The first is that the emphasis in the overview will lie on the 'leading cases' concerning the effects of fundamental rights in the law of obligations, since these provide the most elaborate insights in the courts' reasoning. Additional case law will, where appropriate, be referred to in the footnotes; other solutions (e.g. in legislation) to certain 'typical cases' will be further analysed in Part II. The second remark is that, in order to obtain a complete view of the question dealt with, the scope of the research will in this chapter be wider than contract law alone. Several cases based on tortious liability will be included to provide a broader view of the way fundamental rights have affected relations between private parties. These cases also serve to explain the starting points for these developments, since the pioneer cases on 'horizontal effect' mostly emerged in tort law. Nevertheless, as far as possible examples will be chosen that at least have some relevance for contract law as well.

2.1 Theories of direct and indirect effect

One of the most discussed aspects of the possible impact of fundamental rights on contract law is undoubtedly the question whether these rights should be given direct effect in this area.¹ Giving direct effect in principle implies that fundamental rights are used in contract law in the same way as in the State-citizen relationship, meaning that they are applied in contractual relations in the form in which they have been recognised on a constitutional level. An alternative, apart from

¹ For an overview of the discussion in various European countries see, for instance: Canaris 1999, p. 16-18, p. 34-36; Smits 2003, p. 15-29, p. 49-64; Barak 2001; Morelli 1996 and Morelli 1999; Asser/Hartkamp 2005 (4-II), nos. 45a-45b; each with further references.

rejecting any effect of fundamental rights in relations between private parties,² is an indirect application of fundamental rights, using them as a source of inspiration for interpreting and applying norms of contract law.³

This section will provide a short overview of the different theories developed around the distinction between direct and indirect effect. It serves as an introduction to the following sections, in which a description will be given of the main developments regarding the application of fundamental rights in the case law of the various countries included in the research. In these sections, further references will be made to the evolution of the discussion on the national level. Subsequently, in Chapter 3, the general argument will be taken up again, in which the distinction between direct and indirect effect will be reconsidered in the light of the results of the comparative case law analysis.

2.1.1 *Direct effect*

The theory of direct effect was introduced in German law by Hans Nipperdey, who in the 1950s and early 1960s was the first President of the *Bundesarbeitsgericht* (Federal Labour Court).⁴ In 1950, he expressed his views on the subject of fundamental rights and private law in an article on equal pay for men and women.⁵ Nipperdey rejected the interpretation of Article 1(3) of the *Grundgesetz*⁶ in the sense that it would imply that private parties were not bound by basic rights, in this case Article 3 GG (equality). He felt that this interpretation failed to appreciate the meaning and aim of modern democratic Constitutions. He predicted that basic rights would develop into directly binding provisions instead of mere goals or guidelines⁷ and argued that these '*Normen höchsten Grades*' could only be fully guaranteed when not only the legislator, the executive powers and the judges were bound by them, but also the citizens. Under Nipperdey's lead, the *Bundesarbeitsgericht* adopted an approach of direct effect.

This theory of direct effect (*unmittelbare Drittwirkung*) in Germany has found support from, among others, Leisner,⁸ Ramm,⁹ Bleckmann¹⁰ and Hager¹¹. Their arguments build on the idea that all fields of law are in the end based on constitutional values, values which should therefore *generally* be applied and given effect.¹² Hence, private actors are also bound by fundamental rights.¹³

² Barak 2001, p. 18-21. I will not discuss this model here, since it has virtually been of no importance for the discussion in any of the legal systems analysed here. Compare also Barak 2001, p. 28-29, who negates the non-application model because 'it draws too sharp a line between public and private law'.

³ Variations of these theories have also be defended. See, for instance, Schwabe 1977, who emphasises the role of the State. For relativising remarks, see also sections 2.1.3 and 2.1.4 below.

⁴ Compare Starck 2001, p. 98-99; Vogenauer 2006, p. 637-638 and p. 642-643.

⁵ Nipperdey 1950.

⁶ Art. 1(3) GG: 'Die nachfolgenden Grundrechte binden Gesetzgebung, vollziehende Gewalt und Rechtsprechung als unmittelbar geltendes Recht.' Translated by Tschentscher 2003 as: 'The following basic rights are binding on legislature, executive, and judiciary as directly valid law.'

⁷ Nipperdey 1950, p. 124. Compare the status of fundamental rights in the Weimar Republic.

⁸ Leisner 1960, p. 332.

⁹ Ramm 1960, p. 38 ff. and 1991, p. 6-7.

¹⁰ Bleckmann 1988, p. 942.

¹¹ Hager 1994, p. 383.

¹² Nipperdey 1950, p. 124 and 1961, p. 12 ff., p. 14-15.

¹³ See also Hesselink 2002a, p. 189.

From a more pragmatic point of view, the same conclusion results from the examples in which private parties pose threats to other private parties' rights in the same way as the State.¹⁴ Private individuals or enterprises have even been said to infringe fundamental rights more often and to a greater extent than public authorities.¹⁵ In particular one could think of (multinational) private corporations, which might abuse their power in respect of individual employees or consumers.¹⁶

Another argument for direct application, which recalls the traditional common law view of human rights, derives from the idea that fundamental rights in essence are 'liberties' that have their basis in private autonomy.¹⁷ In this view, fundamental rights safeguard the individual's freedom and autonomy not only in relation to the State but also in relation to other individuals, who are as likely to infringe these liberties as are public authorities. The weak point of this argument, however, is that both individuals involved in a legal dispute can usually invoke their rights – fundamental rights as well as other rights – in an equal manner. A fully direct application of fundamental rights, similar to the application in State-citizen relations, is therefore not possible. Direct application in its strongest form would entail an immediate liability of an individual for the infringement of the fundamental right of another, without taking into consideration the rights of the former with respect to the latter. It could thus, paradoxically, harm the freedom and autonomy of the infringing party while aspiring to safeguard the other party's liberties.¹⁸

In general, moreover, the problematic side of the direct effect theory seems to be its practical application. Even if it is accepted that private parties in principle are bound by fundamental rights in the same measure as state authorities,¹⁹ the differences between private and public actors require adaptations to fit in the fundamental rights argument in judicial reasoning in contract law cases. In particular the application of 'limitation clauses', which constitutionally regulate the manner and situations in which certain fundamental rights may be restricted,²⁰ seem difficult to transplant as such from the constitutional level to contract law disputes.²¹ These clauses have been written with an eye on the relation between the State and its citizens and it may not therefore be possible to apply them as such to private-party relationships. Since certain limitations of (fundamental) rights are nevertheless inherent to the nature of contractual relationships, considering that the autonomy of one party ends where it harms the other, a direct effect in the strictest sense of the term seems to be excluded beforehand.

¹⁴ Nipperdey 1960, p. 13-14, speaking about constitutional rights that safeguard certain legal institutions, such as marriage and the family, property and succession. Compare Hesselink 2002a, p. 180; Barak 2001, p. 15; and Smits 2003, p. 6.

¹⁵ Barak 2001, p. 15.

¹⁶ Compare Van Bijsterveld 2002; Smits 2003, p. 16; Hesselink 2002a, p. 179-180.

¹⁷ Barak 2001, p. 15. See section 1.1.5 above for further references on English law. See also De Hert & Gutwirth 2000, who advocate a renewed freedom-based approach to substitute the current rights-based tradition.

¹⁸ Compare Kortmann 1996, who also for this reason argues against the consideration of fundamental rights as 'subjective rights'; p. 153.

¹⁹ I will not elaborate on this question here. For an analysis of the German law on this point, see Canaris 1999, p. 34-36. For Dutch law, see Kortmann 1996. Both argue that private parties should not be seen as addressees of fundamental constitutional rights.

²⁰ To give an example, freedom of expression according to the German *Grundgesetz* is 'subject to limitations in the provisions of general statutes, in statutory provisions for the protection of the young, and in the right to personal honour' (Article 5(2) *GG*). The Dutch *Grondwet* stipulates that freedom of expression finds its limits in 'the responsibility of every person according to the law' (Article 7(1) and (3) *Gw*). Cases in which the application of these 'limitation clauses' in private-party relations has arisen will be discussed in the subsequent sections.

2.1.2 Indirect effect

An alternative to direct effect is a theory that in principle limits the role of fundamental rights in contract law to a source of inspiration for the application of provisions of law.²² According to advocates of this doctrine of indirect effect (*mittelbare Drittwirkung*),²³ citizens are not addressees of fundamental rights and are therefore not directly bound by these rights. Authors supporting this view emphasise that a distinction should be made between the public and the private sphere: fundamental rights have been developed for the former context, that is to protect citizens against the State, and can therefore not directly be applied in the latter sphere.

Dürig, for instance, states that the fact that courts in civil cases, as organs of the State, are bound by the rights laid down in the *Grundgesetz* does not imply that these rights also directly affect substantive private law.²⁴ Since relations between citizens are essentially different from those between the citizens and the State, fundamental rights that have been designed to serve public interests cannot be equally applied in contract law. They should be taken into account indirectly, in particular as sources for filling in the open-textured norms of private law.

This view does justice to the idea that private law in itself already forms the expression of an underlying system of fundamental values. As Barak observes, indirect application is based on the assumption that specific private law rules and doctrines ‘reflect the rights of the private individual (as against the State and other private parties). At the same time, “value” concepts such as “good faith”, “reasonableness” and “negligence” reflect, *inter alia*, an appropriate balance of opposing human rights.’²⁵ Fundamental rights thus permeate private law by means of existing or new private law doctrines.²⁶

In a very strict reading of this indirect effect theory, fundamental rights would only have a role in contract law in so far as they import new values that were not previously recognised in the private sphere.²⁷ They serve as a ‘safety net’, filling in the gaps that there might be in the system of private law rules so as to make it comply with ideals such as self-determination and dignity.

While an obvious advantage of this technique of giving effect to fundamental values is that it does not pose the difficult question of how to integrate constitutional rights in their ‘crude’ form into contract law reasoning, it bears a certain danger of diluting the protection given to the fundamental rights of contract parties. Indeed, considering fundamental values merely as an ‘inspiration’ for the interpretation of private law rules does not appear to give them any special weight. They might be placed on the same level as ordinary private law interests and, thus, be outweighed by these without any special regard for the recognition they have received on the constitutional level. In the most restricted form of indirect application, even the mere fact that the legislator has contemplated fundamental rights while drafting private law rules would qualify as

²¹ Smits 2003, p. 17; Barak 2001, p. 17.

²² Compare De Graaf & De Haas 1984, p. 1354. They do not make a distinction between the direct and indirect effects of fundamental rights in private law, but rather distinguish between ‘horizontal effect’ and ‘taking inspiration from fundamental rights’.

²³ For German law, among others: Dürig 1956; Rübner 1992, no. 58, with further references. For Dutch law, see Smits 2003, p. 49 ff.

²⁴ Dürig 1956, p. 157-158; Canaris 1984, p. 225 ff.

²⁵ Barak 2001, p. 21-22; Smits 2003, p. 22-23.

²⁶ Barak 2001, p. 21.

²⁷ De Vos 2005, p. 288.

such and reference to these rights would no longer have to be made when applying the private law provisions.²⁸

2.1.3 *Relativising the direct/indirect effect distinction*

Of course the brief descriptions of direct and indirect effect given in the previous sections cannot pretend to capture the full range of the discussion on the choice between the direct or indirect effect of fundamental rights. In fact, several additional remarks should be made in order to provide a somewhat sharper picture of the nature and importance of the distinction.

a) *Differentiation according to legal actors*

First of all, attention has to be paid to the roles of the different legal actors in giving effect to fundamental rights in contract law. The *legislator* in general is considered to be obliged to take into account constitutional rights – or in the English case: human rights²⁹ – when drafting rules of private law. Article 1(3) of the German *Grundgesetz*, for instance, is usually understood as directly binding the legislature also in the field of private law.³⁰ In the Netherlands, the legislator is expected to keep an eye on the constitutionality of new provisions during the drafting process.³¹ The Italian *Costituzione* requires the constitutionality of laws and provides for a judicial review by the Constitutional Court (Article 134 *Cost.*). In England, last but not least the Human Rights Act 1998 requires the Minister in charge of a Bill to make a statement regarding the compatibility of the Bill with the rights safeguarded by the European Convention on Human Rights (Article 19(1) HRA 1998).

As we will see in the case law analysis hereafter, more ink has been spilt on the question whether the *judges* in civil cases are bound by fundamental rights and, if so, whether they should give direct or indirect effect to these rights. If they are considered as public authorities, a responsibility for the protection of citizens' fundamental rights could be justified.³² However, the extent to which the courts may apply fundamental rights in contract cases might not be easy to pinpoint: it depends on the extent to which the citizens themselves are considered to be bound by fundamental rights in their interrelations.

Opinions differ on the question whether private *individuals* in contractual relations should be considered to be bound by fundamental rights.³³ Many legal scholars reject a theory of the direct application of fundamental rights to individuals. As Taylor has written on English law, but as is also valid for the mainstream opinions on this point in other legal systems:

²⁸ Compare the classification of Boesjes 1973, p. 911, which was followed by the Dutch constitutional legislator when revising the *Grondwet* in 1983, but has had very little success in practice. See section 1.1.3 above. See also Smits 2003, p. 161-162, who expresses scepticism as to the role of fundamental rights in patrimonial law, since fundamental rights for the greatest part have already been given effect in private law rules and disputes between private parties should therefore be resolved on the basis of the system of private law. See also De Vos 2005.

²⁹ Meaning the ECHR rights incorporated in English law by the Human Rights Act 1998. See section 1.1.5.

³⁰ Canaris 1999, p. 11-12, who moreover explicitly rejects the indirect binding nature of fundamental rights on the legislator in private law, p. 16 ff.

³¹ TK 1975-1976, 13 872, nr. 3, p. 14.

³² Compare, for German law, Canaris 1999, p. 38. For English law, a similar reasoning has been developed on the basis of section 6(1) in conjunction with section 6(3) of the Human Rights Act 1998; see section 2.5.1.

³³ Hesselink 2002a, p. 181.

‘The reason for this is that private individuals are not the addressees of human rights provisions, because the law allows them more freedom than it allows to the state and does not expect them to live their lives in accordance with the strict criteria of non-discrimination and fairness which are appropriate for the state, which is more powerful than individuals and from which a greater degree of neutrality is expected.’³⁴

Direct application would imply that private individuals could invoke these rights as subjective rights against one another. This idea often is not supported, on the ground that in private law cases the judges balance the opposing *interests* of the parties rather than recognising and awarding *rights*.³⁵ An indirect application, giving effect to the values protected by fundamental rights in the private law context in this view would be more suitable, since it leaves room for balancing the parties’ interests. Moreover, it would respect the distinction between a ‘public sphere’ and a ‘private sphere’, in the context of which fundamental rights have historically developed, since it recognises the differences between state action and the conduct of private parties.³⁶

The question of private individuals being bound by fundamental rights thus closely relates to the question of what role the courts play in giving effect to these rights in private law. If a direct binding nature on individuals were accepted, the judges would also be directly bound, having to apply fundamental rights in the form given to them in the Constitution and possibly having to apply them even *ex officio*. In case of the indirect binding nature on individuals in contractual relations, the courts might in theory be bound either directly or indirectly: directly in the sense that as state organs they are called upon to protect fundamental rights also in private law relations, or indirectly in the sense that they have to interpret and apply the rules of private law in the light of the system of values safeguarded by these rights. The practical implications of these varying perspectives will be further examined in the subsequent sections and, in the light of legal theory, in Part II.

b) *Differentiation according to fundamental rights*

Besides the distribution of tasks among the various legal actors, it is important to notice that a preference for direct or indirect effect or, for that matter, any effect of a fundamental right in private law may change in accordance with the fundamental right that is involved in a specific case.³⁷ The German *Bundesarbeitsgericht*, for instance, gave direct effect to the right to marry (Article 6(1) *Grundgesetz*) in a judgment concerning a student nurse whose training contract stipulated that she would be laid off if she became married (a so-called ‘celibacy clause’ or ‘non-marriage clause’).³⁸ In a very similar judgment, the *Cour d’appel* of Paris held that the stipulation that Air

³⁴ Taylor 2002, p. 218. Compare Canaris 1999, p. 34-36; Kortmann 1996, p. 153. Compare Smits 2003, p. 50-53 and, furthermore, p. 69 ff. on the question whether discrimination is allowed in the ‘private sphere’, which he answers in the affirmative. Smits points out that the rejection of the idea of citizens being directly bound by fundamental rights assumes a sharp distinction between the public and the private sphere; p. 50. The theory of indirect effect would do more justice to this distinction.

³⁵ Kortmann 1996, p. 152.

³⁶ Smits 2003, p. 50-51, referring to the *trias politica* of Montesquieu and Locke’s theory of the ‘inalienability’ of fundamental rights, coming to the fore in the French *Déclaration des Droits de l’Homme et du Citoyen* (1789) and the American *Declaration of Independence* (1776).

³⁷ At this point, only some indicative examples will be given. A more comprehensive analysis will follow in chapter 3 of Part I, on the basis of the cases presented in the subsequent descriptions of the state of the various selected legal systems with regard to effects of fundamental rights in the private sphere.

³⁸ BAG 10 May 1957, *BAGE* 4, 274. The president of the Court was Nipperdey, who developed the theory of *unmittelbare Drittwirkung*.

France stewardesses must remain unmarried was void, considering that the freedom to marry, though at the time of the decision it was not entrenched in a constitutional document, was a 'subjective right of public order' that in principle could not be contractually limited or waived.³⁹ A right safeguarding a choice as personal as the one to marry thus appears to have obtained a similar status in private law relations as in the relationship between state and citizen.

Other fundamental rights tend to enter into private law in a more moderate way. Freedom of expression, for example, usually becomes subject to a balance of interests, since in the private sphere it has to be weighed against the other parties' interests, regarding privacy or the insulting character of the statements made.⁴⁰ A balance of interests is also the technique usually applied in judicial reasoning to safeguard human dignity⁴¹ or freedom of information (mostly versus the owner's rights).⁴² The development of personality rights in private law adjudication, furthermore, could be seen as an indirect application of fundamental rights in the private sphere, since it translates these rights into subjective rights of a private legal nature.⁴³

The choice to apply a fundamental right in private law and, if so, to apply it either directly or indirectly may thus be said to depend not only on the extent to which the various legal actors are bound by these rights, but also on the nature of the rights themselves. It should, however, be emphasised that *in abstracto* no hierarchical ranking of fundamental rights seems to result from this observation. In particular the theory of indirect effect presupposes that the circumstances of the case determine which right prevails *in concreto* – or rather, which *interest* carries the most weight in the balance made by the judge.

c) *Differentiation according to legal relationships*

A further shading of the general distinction between direct and indirect effect results from the fact that in certain contractual relationships a fundamental rights issue may arise more readily than in others. Employment cases, for instance, were in many countries among the first in which fundamental rights obtained an effect. Think of the aforementioned case law of the German Federal Labour Court, which already in the 1950s addressed topics such as equal pay of men and

³⁹ *Cour d'appel Paris* 30 April 1963, *D.* 1963, *Jurisprudence* 428, with a comment by Rouast (*Époux Barbier c. Cie. Air France*). Compare also the later case *Cass. Ch. Mixte* 17 October 1975, *JCP* 76, II, 18238, with a comment by Lindon (*Madame Roy*), in which the French Supreme Court affirmed this protection of the 'freedom of marriage'. See also Raynaud 2003, p. 145 and p. 285-286.

⁴⁰ See, among many other examples, the German *Liith* case, *BVerfG* 15 January 1958, *BVerfGE* 7, 198 (see section 2.2.1 below); the Dutch *Goeree* cases, *HR* 5 June 1987, *NJ* 1988, 702 (*Goeree I*); *HR* 2 February 1990, *NJ* 1991, 289 (*Goeree II*) and the *Parool* case, *HR* 6 January 1995, *NJ* 1995, 422 (*Parool*); the English cases of *Douglas v. Hello! Ltd* [2001] QB 967, [2001] 2 WLR 992 and [2003] EMLR 31, and *Campbell v. MGN* [2002] EWCA Civ 1373, and [2004] UKHL 22; [2004] 2 AC 457 (HL) (both discussed in section 2.3.2 below).

⁴¹ See the German *Bürgerschaft* case, *BVerfG* 19 October 1993, *BVerfGE* 89, 214 (further examined in section 2.2.1 below).

⁴² Examples include cases regarding the placement of a satellite dish on a rented apartment: the German cases *BVerfG* 9 February 1994, *BVerfGE* 90, 27 (*Parabolantennen*) and *BGH* 2 March 2005, VIII ZR 118/04 (www.bundesgerichtshof.de); the Dutch case *HR* 3 November 1989, *NJ* 1991, 168. The Italian *Corte di Cassazione*, on the other hand, established the status of the right to place a satellite dish as a subjective right, based on the freedom to receive information: *Cass. civ.* 29 January 1993, *Rep. Foro it.* 1993, *Radiotelevisione* [5470], no. 75. The freedom to receive information, however, could be restricted in the light of the owner's rights, which meant that a certain balance of interests also had to be made. Another example is the request to campaign against plans of public concern in a privately-owned shopping centre, as in the English case leading up to ECtHR 6 May 2003, application no. 44306/98, *ECHR* 2003, 222 (*Appleby and others v. the United Kingdom*).

⁴³ Lindenbergh 1999, p. 1705; Nehmelman 2002, p. 17 ff. and, commenting on Lindenbergh, p. 93-98.

women for equal work⁴⁴ and the nullity of certain clauses included in employment contracts.⁴⁵ In Italy, the first examples of constitutional rights affecting contract law were also situated in the field of labour law: Articles 36 (right to a fair salary) and 37 (equal treatment of men and women in employment relations) of the Constitution of 1948 were continuously confirmed as having a direct effect on employment contracts from the late 1940s and early 1950s onwards.⁴⁶

An explanation for the early success of fundamental rights in these types of cases could be that the imbalance of power that often exists between employee and employer recalls the position of citizens in relation to the State. The ‘weaker’ party, from this point of view, deserves protection against a possible abuse of power by the ‘stronger’ party. The application of fundamental rights to realise this type of protection might be more easily translated from the constitutional level to the private sphere in cases in which a certain inequality on the part of the parties is almost inherent to the relationship, such as employment contracts, than to cases in which the parties in principle have equal bargaining positions.⁴⁷ Support for this line of reasoning can be found in the view that today’s contract law sees the emergence of a new paradigm alongside freedom of contract, that is solidarity.⁴⁸ Considerations on the need to safeguard the equilibrium in contractual relationships in which one party is usually ‘weaker’ than the other may be said to have given rise to the development of protective rules for e.g. consumers, tenants, patients and employees.

The examination of the effects of fundamental rights in contract law in terms of autonomy and solidarity brings into play the politics of contract law, since it engages the choices made by legislature and judiciary regarding the extent to which parties should take each other’s interests into account. This aspect of the subject will be further analysed in Part II of this book, in which I will look into the explanation for fundamental rights playing a part in contract law adjudication. For now, it seems sufficient to keep in mind that the preference for either direct or indirect effect relates to the type of contract involved and, probably, to the policy choices underlying the regulation of the specific type of contract.

2.1.4 A theory of relativity: versions of direct and indirect effect

Recapitulating, the distinction between direct and indirect effect cannot be seen only in black and white. Indeed, it has become clear that the definitions of direct and indirect effect in reality are more differentiated than appears from the brief introduction given previously. In order to provide a framework for the examination of case law in the subsequent chapters, I would therefore like to propose a schematisation of the various theoretical positions in four categories rather than two. This scheme is partially based on the idea that, in principle, there are ‘stronger’ and ‘weaker’ versions of indirect effect,⁴⁹ and partially on the idea that a distinction should be made according

⁴⁴ Nipperdey 1950.

⁴⁵ Compare the aforementioned case regarding non-marriage clauses, *BAG* 10 May 1957, *BAGE* 4, 274 (*Zölibatsklausel*).

⁴⁶ The first case granting a direct effect to Article 36 *Cost.* dates from no more than two months after the coming into force of the Constitution: *Trib. Firenze* 23 March 1948, *Monitore dei Tribunali* 1949, p. 12, n. 18. This judgment was affirmed by the *Corte di Cassazione* in its decision of 10 August 1953, n. 2696, *Giust. civ.* 1953, 2687.

⁴⁷ Compare Smits 2003, p. 52.

⁴⁸ Hondius 1999. Compare also my contribution to the collection of articles of the Amsterdam Institute for Private Law on the theme of ‘private law between autonomy and solidarity’, Mak 2003a.

⁴⁹ For a fruitful application of the distinction between ‘strong’ and ‘weak’ versions of key concepts in legal theory, see Lucy 1999. On ‘strong’ and ‘weak’ versions of ‘indirect horizontal effect’ in the common law, see Phillipson 1999, p. 830-833.

to the fundamental rights binding either the parties or the courts. Furthermore, this classification regards the application and effect of fundamental rights in case law and, as such, focuses on the courts and the parties being bound by these rights rather than emphasising the position of the legislator – which in general is considered to be directly bound in any case. It should be pointed out beforehand that not all forms may be realised in all legal systems included in this research, due to the institutional structure of the systems (e.g. existence of a Constitutional Court) or to rules of procedural law. The classification is in the first place therefore a theoretical one.⁵⁰

‘Strong’ direct effect. The ‘strong’ version of direct effect corresponds to the strict definition given in section 2.1.1 earlier, in so far as it assumes that private parties in their interrelations under certain circumstances may be directly bound by fundamental rights. One party accordingly has the possibility to sue the other directly for a breach of a fundamental right. Judges in this case apply the fundamental right in its ‘crude’ form, that is in the words in which it has been constitutionally acknowledged, granting the aggrieved party a subjective right which may only be limited on the conditions mentioned in the Constitution.

‘Strong’ indirect effect. Indirect effect in its ‘strong’ version,⁵¹ in my opinion,⁵² implies that the courts have to explicitly safeguard the *values* protected by fundamental rights in contract law cases, not the *rights* themselves. The judges should consider the rules of private law that are applicable in the specific case in the light of the fundamental values that lie at the heart of the problem addressed in the case. In the continental legal systems, such as Germany, the Netherlands and Italy, this form of indirect effect may be especially realised by means of the general clauses of private law, e.g. ‘good morals’ and ‘good faith’.⁵³

‘Weak’ indirect effect. The ‘weak’ version of indirect effect, in my classification, would be the effect given to fundamental values in contract law adjudication without any explicit reference being made to constitutional rights or human rights documents. Here the application of fundamental rights remains limited to the ‘inspiration’ taken from values that have been recognised as having a special status on the constitutional level. The effect on the parties involved in the contractual dispute, as in the ‘strong’ version of indirect effect, cannot by definition be more than indirect.

Procedural effect. This effect of fundamental rights in adjudication, last but not least, does not concern the contract parties themselves: they are not necessarily considered directly bound by

⁵⁰ For its practical application, see Chapter 3 below.

⁵¹ To avoid misunderstandings, it should be pointed out that ‘strong’ and ‘weak’ here refer to the *effect* of the fundamental rights and not to the adjective ‘indirect’. Otherwise, of course, the ‘strong’ version would be the one that gave the *most indirect* application to fundamental rights and, thus, the least effect in practice.

⁵² Here my opinion differs from that of Phillipson, whose ‘strong version of indirect horizontal effect’ comes closer to what I will here define as a ‘procedural effect’; see Phillipson 1999, p. 830-831. While Phillipson bases his definitions on the duty of the courts to apply and develop the (common) law in compliance with fundamental rights, I would like to emphasise the possible actions against infringements of fundamental rights and, thus, the binding nature of these rights on the courts and private parties. In Phillipson’s view, only the development of new private law causes of action would constitute a direct effect. In my opinion, however, it is not so much the question of distinguishing between ‘existing law’ or ‘new actions’ that matters, but rather the form in which the fundamental right is introduced in the private law discourse (constitutional right, or ‘merely’ the value safeguarded by this right) that determines whether its application should be deemed ‘direct’ or ‘indirect’.

⁵³ Compare the German *Lith* case, analysed in section 2.2.1.

these rights and, as a consequence, might not be able to invoke them against one another.⁵⁴ The courts, on the other hand, have to guarantee the rights as safeguarded by the Constitution. In practice this means that a claim could be made, usually before a Constitutional Court, on the ground that the judgment of a court in a civil case infringes a certain fundamental right.⁵⁵

This theoretical model of forms of direct and indirect effect provides a background against which the case law regarding fundamental rights and contractual relationships may be explored. Beforehand it should, nevertheless, already be said that this type of classification might not be so easy to apply in practice. In this context, we may recall the destiny of the ‘sliding scale of horizontal effect’ adopted by the Dutch constitutional legislator⁵⁶ on the occasion of the revision of the *Grondwet* in 1983: due to a lack of practical applicability this ‘sliding scale’ has remained deprived of any mentionable acceptance or impact in case law and legal literature.⁵⁷

Moreover, it should be observed that the differentiation between varieties of direct and indirect effect might make it difficult to keep up the distinction between these two concepts. In fact, only the ‘strong’ version of direct effect assumes that private individuals can be directly bound by fundamental rights, while the distinction between the other three categories also depends on the tasks attributed to the judges in regard to the protection of these rights in private legal relations. In practice, only minimal differences might be expected between the results of the latter three forms of application of fundamental rights, since the cases will probably all be resolved on the basis of a balance of the interests of the parties involved. Considering, moreover, that even the direct binding nature of fundamental rights on private individuals leaves room for the interests of the allegedly ‘infringing’ party to be taken into account,⁵⁸ the black-and-white distinction between direct and indirect effect seems to fade into grey.

I will come back to the theoretical discourse on the direct and indirect effects of fundamental rights in Chapter 3 of this Part I. First, however, the development of the application of fundamental rights in contract law cases in respectively Germany and the Netherlands will be examined, followed by some comparative notes on Italian and English law.

2.2 Germany

2.2.1 *Wechselwirkung*

In the German *Grundgesetz*, special limitation clauses have been laid down in the specific provisions of its catalogue of fundamental rights. It would not be possible to fully describe the interpretation in German private law of all these clauses here. I will therefore focus on the limits on the freedom of expression, which have played a leading part in a couple of the most representative cases

⁵⁴ Although, in theory, an overlap with the category of ‘strong’ direct effect is possible if it is accepted that the contract parties are directly bound and the judgment of the courts may also be subjected to a direct test as to their constitutionality.

⁵⁵ See, for instance, the German *Bürgerschaft* case, discussed in section 2.2.2. Compare Canaris 1999, p. 38 ff.

⁵⁶ *TK* 1975-1976, nr. 3, p. 15-16. The ‘sliding scale’ has its origins in a distinction made by Boesjes 1973, p. 911.

⁵⁷ Compare Smits 2003, p. 30-31.

⁵⁸ Think of the property owner’s interests in cases of the installation of a satellite dish by a tenant, or the balancing of freedom of expression and privacy interests in cases of publications concerning the private lives of public persons.

regarding the interaction between fundamental rights and the rules of private law. The freedom of expression is safeguarded by Article 5 GG and is ‘subject to limitations in the provisions of general statutes, in statutory provisions for the protection of the young, and in the right to personal honour’ (Article 5(2) GG).⁵⁹

A landmark decision: the Lüth case

In a pioneer case on the effects of fundamental rights between private parties, the *Bundesverfassungsgericht* has formulated some general considerations on the interaction of limitation clauses with the open norms of private law. This was the *Lüth* case of 1958.⁶⁰

The events that led up to the case took place in 1950, when Erich Lüth, who at the time was Chief of Senate and head of the press department of Hamburg, made a statement in a private capacity at the opening of the ‘Week of the German movie’. At that time, Lüth also actively participated in a group seeking to rebuild relations between Christians and Jews after the Second World War. His statement concerned a new film by the German director Veith Harlan, who under the Nazi regime had directed a couple of controversial, anti-Semitic films. Lüth called on German cinema owners, film distributors and the public to boycott Harlan’s latest film, entitled ‘*Unsterbliche Geliebte*’, for reasons of morality, even though this new film was not itself offensive.

The production company as well as the distributor of the film then sued Lüth, asking the court to prohibit him from further stimulating a boycott. The *Landgericht* Hamburg granted this claim, since it deemed Lüth’s course of action to be contrary to good morals in the sense of § 826 BGB⁶¹. Lüth’s call for a boycott was aimed at preventing Harlan’s comeback as a ‘creator of representative German films’. According to the court, the actual consequence would be that Harlan was prevented from producing normal films, which could become ‘representative’ for German cinema. Since Harlan had already been acquitted of criminal allegations regarding his anti-Semitic film ‘*Jud Süß*’ and he had not been prevented from further practising his profession, Lüth’s conduct violated the ‘democratic view of the law and of morals of the German people’. In other words: Lüth was not reproached for stating his disapproval of Harlan’s comeback, but for calling on the public to act in a way that would prevent Harlan’s films from being shown and thus make his comeback as a film director impossible. The call for a boycott moreover affected the production company and the distributor of the film, since they would suffer damage if less people paid to see the film. In the court’s opinion, this all added up to an illegal act in the sense of § 826 BGB and an injunction thus had to be given.

In reaction to this decision, Lüth brought a claim before the *Bundesverfassungsgericht*. His constitutional complaint stated that the *Landgericht* had infringed his freedom of expression as laid down in Article 5(1), first sentence GG.

⁵⁹ Translation by Tschentscher 2003. The right itself is formulated thus: ‘(1) Everyone has the right to freely express and disseminate his opinion in speech, writing and pictures and to freely inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There may be no censorship.’ In German: ‘(1) Jeder hat das Recht, seine Meinung in Wort, Schrift und Bild frei zu äußern und zu verbreiten und sich aus allgemein zugänglichen Quellen ungehindert zu unterrichten. Die Pressefreiheit und die Freiheit der Berichterstattung durch Rundfunk und Film werden gewährleistet. Eine Zensur findet nicht statt. (2) Dies Rechte finden ihre Schranken in den Vorschriften der allgemeinen Gesetze, den gesetzlichen Bestimmungen zum Schutze der Jugend und in dem Recht der persönlichen Ehre.’

⁶⁰ BVerfG 15 January 1958, *BVerfGE* 7, 198. See also Markesinis 2001b.

⁶¹ § 826 BGB: ‘Wer in einer gegen die guten Sitten verstoßenden Weise einem anderen vorsätzlich Schaden zufügt, ist dem anderen zum Ersatz des Schadens verpflichtet.’ This provision is an addition to § 823 BGB, which

In its decision in the *Lüth* case, the Constitutional Court included several important considerations on the relation between fundamental rights and the general clauses of private law. It emphasised the primary function of these rights as defences for the citizens against the State and then went on to say that:

‘It is equally true, however, that the Basic Law is not a value-neutral document [citations from numerous decisions]. Its section on basic rights establishes an objective order of values, and this order strongly reinforces the effective power of basic rights. This value system, which centers upon dignity of the human personality developing freely within the social community, must be looked upon as a fundamental constitutional decision affecting all spheres of law [public and private]. It serves as a yardstick for measuring and assessing all actions in the areas of legislation, public administration, and adjudication. Thus it is clear that basic rights also influence [the development of] private law. Every provision must be compatible with this system of values, and every such provision must be interpreted in its spirit.’⁶²

According to the *Bundesverfassungsgericht*, the rights laid down in the *Grundgesetz* constituted an objective system of values that was built around the concept and value of human personality freely developing within a social context. This system underlay all areas of law, including private law. Each provision of private law should therefore be formulated as well as interpreted in accordance with the fundamental values that were expressed in the system. Concerning the manner in which this should be realised, the court stated:

‘The influence of the scale of values of the basic rights affects particularly those provisions of private law that contain mandatory rules of law and thus form part of the *ordre public*—in the broad sense of the term—that is, rules which for reasons of the general welfare also are binding on private legal relationships and are removed from the dominion of private intent. Because of their purpose these provisions are closely related to the public law they supplement. Consequently, they are substantially exposed to the influence of constitutional law. In bringing this influence to bear, the courts may invoke the general clauses which, like Article 826 of the Civil Code, refer to standards outside private law. “Good morals” is one such standard. In order to determine what is required by social norms such as these, one has to consider first the ensemble of value concepts that a nation had developed at a certain point in its intellectual and cultural history and laid down in its constitution. *That is why the general clauses have rightly been called the points where basic rights have breached the [domain of] private law* [citation of Dürig, in Neumann, Nipperdey, and Scheuner, *Die Grundrechte*, 2:525].’⁶³

provides specific grounds for tortious liability. § 826 BGB provides for damages when someone deliberately causes damage to another in a way that infringes good morals.

⁶² Kommers 1997, p. 363. *BVerfGE* 7, 198, 205: ‘Ebenso richtig ist aber, daß das Grundgesetz, das keine wertneutrale Ordnung sein will (...) in seinem Grundrechtsabschnitt auch eine objektive Wertordnung aufgerichtet hat und daß gerade hierin eine prinzipielle Verstärkung der Geltungskraft der Grundrechte zum Ausdruck kommt (...). Dieses Wertsystem, das seinen Mittelpunkt in der innerhalb der sozialen Gemeinschaft sich frei entfaltenden menschlichen Persönlichkeit und ihrer Würde findet, muß als verfassungsrechtliche Grundentscheidung für alle Bereiche des Rechts gelten; Gesetzgebung, Verwaltung und Rechtsprechung empfangen von ihm Richtlinien und Impulse. So beeinflusst es selbstverständlich auch das bürgerliche Recht; keine bürgerlich-rechtliche Vorschrift darf in Widerspruch zu ihm stehen, jede muß in seinem Geiste ausgelegt werden.’

⁶³ Kommers 1997, p. 363-364; emphasis added. *BVerfGE* 7, 198, 206: ‘Der Einfluß grundrechtlicher Wertmaßstäbe wird sich vor allem bei denjenigen Vorschriften des Privatrechts geltend machen, die zwingendes Recht enthalten und so einen Teil des *ordre public* – im weiten Sinne – bilden, d.h. der Prinzipien, die aus Gründen des gemeinen Wohls auch für die Gestaltung der Rechtsbeziehungen zwischen den einzelnen verbindlich sein sollen und deshalb der Herrschaft des Privatwillens entzogen sind. Diese Bestimmungen haben nach ihrem Zweck eine nahe Verwandtschaft mit dem öffentlichen Recht, dem sie ergänzend anfügen. Das muß

Thus, the general clauses of private law established their position as inroads for fundamental rights in this field. They referred to standards outside private law and were, therefore, affected by constitutional law. Consequently, they had to be interpreted in the light of the objective order of values codified in the *Grundgesetz*. These considerations on the so-called *Ausstrahlungswirkung*⁶⁴ ('reflex effect'; literally 'radiating effect') of fundamental rights in relations governed by private law, including the law of contracts, have been at the heart of all subsequent court decisions on the subject.⁶⁵

Fundamental rights, however, did not only affect private law; private law could also have effects on fundamental rights. In the *Lüth* case, the right that was at stake was the freedom of expression, codified in Article 5(1) *GG*. This right was subject to limitations by general laws (Article 5(2) *GG*), which meant that the civil and criminal legislator could set certain limits on the free expression of opinion.⁶⁶ This did, however, not mean that a general law restricting a basic right never constituted a violation of that right.⁶⁷ Rather, the effect of general laws that would limit a basic right should be evaluated in light of the importance of that basic right. There was a *Wechselwirkung* or 'reciprocal effect' between the basic right and the general laws, which implied that when a judge determined the extent to which the freedom of expression was limited by general laws, these laws should themselves be interpreted against the background of the entire legal order and the importance it attached to free speech.⁶⁸ According to the *Bundesverfassungsgericht*, this concept of 'general laws' included norms of private law, such as § 826 *BGB*.⁶⁹

For Lüth, this meant that his freedom of expression had to be interpreted in the light of this general clause, and *vice versa*. The Court found that Lüth's motives in calling for the boycott were not against 'good morals': he had not pursued his own economic interests, but he had wanted to prevent Harlan from being once more presented as a major German film director, since this might harm Germany's appearance on the world scene – it might appear that nothing had changed in German cultural life since the days of the Nazi regime under which Harlan was a successful director. Lüth's close personal relation to all that concerned the German-Jewish relationship even required him to express his view in public and, hence, Harlan's interests had to give way: 'Where the formation of public opinion on a matter important to the general welfare is concerned, private and especially individual economic interests must, in principle, yield.'⁷⁰ Since the *Landgericht* had not acknowledged this, its decision was overturned.

sie in besonderem Maße dem Einfluß des Verfassungsrechts aussetzen. Der Rechtsprechung bieten sich zur Realisierung dieses Einflusses vor allem die "Generalklauseln", die, wie § 826 BGB, zur Beurteilung menschlichen Verhaltens auf außer-zivilrechtliche, ja zunächst überhaupt außerrechtliche Maßstäbe, wie die "guten Sitten" verweisen. Denn bei der Entscheidung darüber, was diese sozialen Gebote jeweils im Einzelfall fordern, muß in erster Linie von der Gesamtheit der Wertvorstellungen ausgegangen werden, die das Volk in einem bestimmten Zeitpunkt seiner geistig-kulturellen Entwicklung erreicht und in seiner Verfassung fixiert hat. *Deshalb sind mit Recht die Generalklauseln als die "Einbruchstellen" der Grundrechte in das bürgerliche Recht bezeichnet worden* (Dürig (...)).' (emphasis added)

⁶⁴ *BVerfGE* 7, 198, 207.

⁶⁵ See, for example, references in *BVerfG* 7 February 1990, *BVerfGE* 81, 242 (*Handelsvertreter*), *BVerfG* 19 October 1993, *BVerfGE* 89, 214 (*Bürgerschaft*).

⁶⁶ Markesinis 2001b, p. 137.

⁶⁷ *BVerfGE* 7, 198, 208; Kommers 1997, p. 364.

⁶⁸ *BVerfGE* 7, 198, 208-209; Kommers 1997, p. 365.

⁶⁹ *BVerfGE* 7, 198, 211.

⁷⁰ Kommers 1997, p. 367; translation of *BVerfGE* 7, 198, p. 219.

The approach chosen by the *Bundesverfassungsgericht* shows how, on the one hand, a fundamental right may play a role in the interpretation of the general clauses of private law and, on the other, how these general clauses may be of relevance for determining the possible limitation of the fundamental right. It seems that a fundamental right may thus be adapted for its application in private legal relationships. Or, rather, the right itself remains the same as in the relation between State and citizen, but its restrictions may be adjusted to the private law context. This is done through the interpretation of the limitation clauses. At the same time, private law norms are being read in light of the fundamental rights involved and especially open norms may thus be concretised.

A collision of rights: the Wallraff case

Sometimes, both parties can invoke a right protected by Article 5 GG. The *Wechselwirkung* between the fundamental right and the ‘general laws’ may then help to strike a balance. An example can be found in the *Wallraff* case, decided by the *Bundesverfassungsgericht* in 1984.⁷¹

A writer, Wallraff, worked ‘undercover’ as a journalist at *Bild* magazine’s editorial office from March to July 1977, in order to gather information for a book he was writing. He had used a false name and lied about his intentions for working there. In the book that was eventually published, Wallraff criticised the journalistic methods, editorial work and contents of *Bild*, quoting parts of editorial meetings and phone calls. *Bild*’s publisher, Axel Springer Verlag AG, instigated a claim to remove several passages from the book. The claim was granted in its entirety by the *Landgericht* Hamburg, but the *Oberlandesgericht* rejected part of the claim on appeal. The case was then brought before the *Bundesgerichtshof*.

The *BGH* overturned the decisions of the *Landgericht* and *Oberlandesgericht* in light of the freedom of expression and freedom of the press (Article 5 GG).⁷² Balancing the interests involved, the *BGH* considered that a magazine’s interest in keeping its editorial meetings confidential must give way when the information that was published was limited to the internal structural process of work and decision making, and aimed at disclosing controversial means and attitudes towards the choice and arrangement of information. Public checks on editorial work did not restrict the freedom of the press, but served it. The public relevance of the wrongs that had been brought to light justified Wallraff’s depiction of the editorial meetings. According to the *BGH*, the means by which he had obtained the information did not alter this decision. The *Bundesverfassungsgericht*, however, judged differently.

According to the *Bundesverfassungsgericht*, Article 5(1), second sentence, GG encompassed the confidentiality of the editorial work of the press. In the court’s opinion, social forces and private parties could infringe this confidentiality as well as the State. Private law provisions therefore also had to be interpreted in light of the autonomy of the press, including the confidentiality of editorial work. However, like all rights protected by Article 5, the freedom of the press could sometimes be limited. The nature of private law relations could require narrower margins than when the freedom of the press was invoked against the State. In the present case, the question was whether limitations were set by Wallraff’s freedom of expression or his freedom of the press as a right to publish expressions of one’s opinion.

Different from the *BGH*, the *Bundesverfassungsgericht* considered the means by which Wallraff had obtained the information to be of vital importance, since neither the freedom of expression

⁷¹ *BVerfG* 25 January 1984, *BVerfGE* 66, 116.

⁷² *BGH* 20 January 1981, *BGHZ* 80, 25.

nor the freedom of the press or the freedom of information protected the unlawful obtainment of information. Nevertheless, the distribution of information that had been illegally obtained was, at least in part, safeguarded by Article 5(1) *GG*. According to the court, it was a function of the press to bring to light wrongs that were of public importance, and a total exclusion of illegally obtained information from the scope of Article 5 would mean that the distribution of this information lacked constitutional protection. Particular circumstances pertaining to specific cases had to be taken into account.

In this context, limits on the freedom of expression and the freedom of the press could be set by § 823 and § 826 *BGB* (tortious liability), which were deemed to be ‘general laws’ (*allgemeine Gesetze*) in the sense of Article 5(2) *GG*. Two aspects had to be taken into account: first, the aim (*Zweck*) of the disputed expression and, second, the means (*Mittel*) used to reach this goal. The freedom of expression was more important with regard to moral opinions expressed in a public debate than to private economic interests.⁷³ Obtaining information by means of deception usually infringed another person’s personal sphere and publishing the information would therefore not be allowed. An exception to this rule could only be made when the importance of the information for public opinion outweighed the disadvantages of the infringement. This was usually not the case when the information concerned did not reveal situations or conduct that were not unlawful in themselves.

In the present case, the *Bundesverfassungsgericht* found that the *BGH* had overrated the aims pursued by Wallraff. It had, moreover, underrated the infringement of Springer Verlag’s rights and the disadvantages for the legal order that resulted from Wallraff’s conduct not being punished. The depiction of *Bild*’s editorial meeting did not reveal anything that could be deemed unlawful. The *BGH* had not fully taken into account the importance of the means by which Wallraff had obtained his information, means which were considerably wrongful. According to the *Bundesverfassungsgericht*, Wallraff’s publication could therefore not be protected by Article 5(1) *GG* and, consequently, his freedom of expression did not limit the freedom of the press. The *BGH*’s decision in this case thus infringed Article 5(1), second sentence, *GG*.

The *Wallraff* case again illustrates how the unlawful conduct of a party may affect the court’s interpretation of the limitation clauses in light of the general clauses of private law. Since Wallraff had used unlawful means to obtain the information he needed for his book, the publication could not be protected by Article 5 *GG*. The information on *Bild*’s editorial meeting, on the other hand, did not reveal any unlawful practices and was therefore protected by the freedom of the press. *Bild*’s right to the confidentiality of its editorial work was consequently deemed to outweigh Wallraff’s interests in publishing the information. Like in the *Lüth* case, the *Wechselwirkung* between a limitation clause and ‘general law’ (here § 823 and § 826 *BGB*) thus entailed a careful balance of interests. The special feature of this case was, however, that both parties could invoke Article 5 *GG*. In the balancing process, the court resolved the collision between their fundamental rights.

⁷³ Here the court referred to the *Lüth* case.

(Pre-)contractual relations: the Betriebschlosser case

The question of *Wechselwirkung* between the ‘general laws’ and the limitations to the freedom of expression may also arise in a pre-contractual setting. According to the *Bundesverfassungsgericht*, this occurred in the *Betriebschlosser* case, in which it delivered its decision in 1992.⁷⁴

A young man had successfully finished his training as a fitter (*Betriebschlosser*) with a certain company at the beginning of 1982. After such a training programme, the company providing the training usually offered an employment contract to the trainees.⁷⁵ In the spring before finishing his training this trainee had however published an article in the magazine of his vocational school, describing his impressions of a demonstration against the building of a nuclear power station. Certain statements on the use of violence that he had made in this article had not pleased the company at which he trained. In October of 1981, the company had therefore informed the young man that it saw no possibility of offering him a position when he would finish his traineeship. After he passed his exams, the trainee brought a claim against the company, stating that an employment contract nevertheless existed between the parties as of 23 January 1982 and that the company should otherwise be ordered to conclude such a contract with him. At first instance, the *Arbeitsgericht* upheld the primary claim that there was an employment contract. The *Landesarbeitsgericht*, however, considered that no such agreement existed between the parties, since there was no consensus between them nor did the trainee have a valid claim to the conclusion of a contract.

The *Bundesarbeitsgericht* rejected the appeal against this decision. It ruled that the training programme had ended with the trainee’s examinations, in accordance with the contract concluded for this programme. In principle, there was no legal obligation to conclude an employment contract. Nevertheless, in the court’s opinion, the decision not to employ the trainee had not been formed in a legal vacuum. The company’s decision had to be tested against the general prohibition of arbitrariness (*Willkürverbot*) of § 75(1) *Betriebsverfassungsgesetz*. In this light, the decision not to employ the trainee was considered to be neither based on irrelevant points of view nor on arbitrary considerations. It was not based on the trainee’s political views or union membership, but rather on the views he expressed in his article in relation to violence and its use as a means to reach one’s goals. According to the *Bundesarbeitsgericht*, this indirect support for violence had led the company to the not unreasonable belief that situations might occur in which the man would justify the use of violence also within the company. Therefore, the company could not be held to have concluded a contract with its former trainee.

A constitutional complaint procedure followed, based on the trainee’s freedom of expression. The *Bundesverfassungsgericht* was of the opinion that the article written by the trainee was protected under Article 5(1), first sentence *GG*, which guaranteed the right to freely express one’s opinion in writing.⁷⁶ Although this right had not directly been restricted, the fact that publication of the article had had disadvantageous legal consequences also affected the freedom of expression. That is, the company had based its decision not to employ the trainee on the publication alone. Moreover, the *Bundesarbeitsgericht* had allowed this course of action.

In the Constitutional Court’s opinion, Article 5(1) *GG* required that the courts interpreted and applied the provisions of private law in light of this fundamental right when a labour law decision

⁷⁴ *BVerfG* 19 May 1992, *BVerfGE* 86, 122; on the *Wechselwirkung* see especially p. 129 ff.

⁷⁵ Although this is not explicitly stated in the judgment, certain facts of the case – as well as the phrasing of the court – indicate there was such a custom. For instance: the fact that the training company sent the trainee a letter in which it stated that it had no possibility of further employing him (p. 123); and the trainee’s claim not to be discriminated against (p. 125).

⁷⁶ Article 5(1) *GG*: ‘Jeder hat das Recht, seine Meinung in Wort, Schrift und Bild frei zu äußern und zu verbreiten und sich aus allgemein zugänglichen Quellen ungehindert zu unterrichten. (...)’ Translated by Tschentscher 2003: ‘Everyone has the right to freely express and disseminate his opinion in speech, writing, and pictures and to freely inform himself from generally accessible sources. (...)’

affected the freedom of expression.⁷⁷ However, the ‘reciprocal effect’ between fundamental rights and private law provisions had to be taken into account: since the freedom of expression was not unlimited, it had to be weighed against legal interests that were protected by the ‘general laws’ (Article 5(2) GG). From this constitutional perspective, the *Bundesverfassungsgericht* could not criticise the decision of the *Bundesarbeitsgericht* (Federal Labour Court) to give priority to the employer’s basic rights – in particular private autonomy (Article 2(1) GG) – over the trainee’s freedom of expression.⁷⁸

‘If this willingness [to solve conflicts within the company in a violent manner] emerges from the trainee’s expressions, then, following the opinion of the *Bundesarbeitsgericht*, an activity falling under the protection of Article 5(1), first sentence GG would indeed have detrimental consequences for his career. Freedom of expression, however, is not unrestricted, but is only guaranteed within the limits set by general laws. In case of conflicts between freedom of expression and interests that have to be protected by the general laws, a balance of interests should therefore be made. From the constitutional point of view, no objections can be made to the fact that the *Bundesarbeitsgericht* in the present case has allowed the employer’s fundamental rights, in particular his private autonomy protected by Article 2(1) GG, to prevail over the trainee’s freedom of expression.’⁷⁹

If the trainee’s expressions of opinion justified the conclusion that, under certain circumstances, he approved of the use of violence in the company, the company’s freedom of contract thus outweighed the trainee’s freedom of expression. Yet, the Federal Labour Court had failed to sufficiently and carefully consider the opinions which the trainee had expressed in his publication. Therefore, its decision was held to infringe Article 5 GG.

The *Bundesarbeitsgericht* had assumed, without any further examination, that the trainee’s article contained indirect support for violence and that based thereon, there was a not unreasonable fear that the trainee would also justify the use of violence in the company under certain circumstances. Thus, the court had infringed Article 5(1), first sentence GG.⁸⁰ According to the *Bundesverfassungsgericht*, the trainee’s article could not unambiguously be interpreted as support for violence; other interpretations were possible. For instance, it was possible that the trainee protested against labelling the demonstrators ‘*Gewalttäter*’, without promoting violent conduct himself. The *Bundesarbeitsgericht* should have analysed the text more profoundly to make sure of its meaning.

From its non-critical appreciation of the article, the court could moreover not have derived the trainee’s general willingness to use violence, including the possibility to use violence in the workplace. Even if his article advocated the use of violence against the realisation of nuclear power stations, this did not establish the fact that he would also promote a violent solution of work conflicts. To draw conclusions on someone’s personality from an opinion once expressed, may have particularly far-reaching

⁷⁷ *BVerfGE* 86, 122, 128-129, with reference to *BVerfGE* 7, 198 (*Lüttl*).

⁷⁸ Compare *BVerfGE* 7, 198, 207-208.

⁷⁹ *BVerfGE* 86, 122, 129-130: ‘Geht diese Bereitschaft [betriebliche Konflikte mit Gewalt zu lösen] aus Äußerungen des Auszubildenden hervor, so führt die Auffassung des Bundesarbeitsgerichts zwar zu der Konsequenz, daß eine von Article 5 Abs. 1 Satz 1 GG geschützte Betätigung nachteilige Rechtsfolgen für den Berufsweg hat. Die Meinungsfreiheit ist aber nicht unbeschränkt, sondern nur im Rahmen der allgemeinen Gesetze gewährleistet. Bei Konflikten zwischen der Meinungsfreiheit und den Rechtsgütern, die die allgemeinen Gesetze schützen sollen, muß daher eine Abwägung vorgenommen werden. Es ist von Verfassungs wegen nicht zu beanstanden, daß das Bundesarbeitsgericht im vorliegenden Fall dabei den Grundrechten des Arbeitgebers, insbesondere dessen durch Article 2 Abs. 1 GG geschützter Privatautonomie, den Vorrang vor der Meinungsfreiheit des Auszubildenden eingeräumt hat.’

consequences. In this context, it had to be taken into account that the man was a young trainee, who still had to form his opinions and gain experience of life. His statements could therefore not be scrutinised as closely as those of older, more mature persons and could not as such be interpreted as expressing his character.

Furthermore, the article was published in a school magazine, which young people published for their peers. School magazines were considered places where students could develop their participation in public debate. These magazines could only serve their function if students did not have to be afraid of endangering their careers by contributing to such journals. If this were otherwise, students might refrain from using their rights of free speech out of fear of harming their opportunities in life because of mindless, unbalanced or exaggerated expressions of opinion. In conclusion, therefore, the *Bundesarbeitsgericht*'s judgment was overturned.

In this case, the *Bundesverfassungsgericht* went further than merely establishing the unconstitutionality of the *Bundesarbeitsgericht*'s judgment. It undertook an interpretation of the trainee's publication itself and argued that the article could not be said to unambiguously express that the trainee would approve of the use of violence in certain work situations. The company therefore did not have a valid reason to refuse to employ the man after he had finished his training.

This decision has been severely criticised by Hillgruber and Boemke, who submitted that it might follow that the *Bundesverfassungsgericht* imposed an obligation on the company to conclude a contract with the trainee (*Kontrahierungszwang*).⁸¹ It may be pointed out that the court did not make such an elaborate balance of the interests involved as in the *Lüth* and *Wallraff* cases. Rather, it concentrated on the interpretation of Article 5 GG and, once it had determined that the trainee's publication did not contain support for violence, it came to the conclusion that the company's private autonomy (guaranteed by Article 2(1) GG) had to be set aside in favour of the protection of the trainee's freedom of expression. The *Wechselwirkung* between the 'general laws' and the limitation clause to Article 5 was thus hardly given shape.

Other than in the two cases discussed earlier, the question in this case was not whether the trainee's freedom of expression was limited by the tortious nature of his statements. Rather, the company's attachment of legal effects to the interpretation of these statements was tested as to their constitutionality. It may however be asked to what extent the freedom of expression was really restricted by the decision not to conclude a contract with the trainee. According to Hillgruber, it could be doubted whether this freedom was indeed limited, since Article 5(1) GG did not protect against the consequences which private parties attached to the expression of opinion of other private parties.⁸² This provision rather prevented *the State*, i.e. the judiciary, from intervening in the legitimate dialogue between two parties freely expressing their opinions and criticisms. It implied that the State did not have a duty to protect (*Schutzpflicht*) but should be neutral in these types of cases.⁸³ From this, in Hillgruber's opinion, it followed that the employer had the freedom to decide not to conclude a contract with the trainee on the basis of the opinions expressed in the article published in the school magazine.

⁸⁰ *BVerfGE* 86, 122, 130.

⁸¹ Hillgruber 1995, p. 6 ff.; Boemke 1993.

⁸² Hillgruber 1995, p. 8.

⁸³ Hillgruber 1995, p. 8. Compare Isensee 1992, p. 146.

Boemke reached the same conclusion, however following a slightly different line of reasoning. He emphasised the employer's freedom to turn down an applicant, based on the *BGB*⁸⁴ and § 105 *GenO*⁸⁵. Because of this freedom, the employer was not obliged to take into account the constitutional interests of the applicant when making his decision whether or not to employ the latter. He might even consider these interests as a basis for a decision not to conclude a contract, according to Boemke.⁸⁶ This would mean that an employer, for instance, would in general not have to take the principle of non-discrimination into account. Along the same lines, the right to autonomous self-determination (*privatautonome Selbstbestimmung*) gave the employer the possibility to refrain from concluding a contract on any grounds he wished, including an expression of opinion by the applicant. The situation of employing a former trainee, in Boemke's opinion, was no different: after the traineeship had ended, there was no duty for the employer to offer a (new) contract to the trainee.⁸⁷

Boemke thus reasoned that the employer was in no way obliged to conclude a contract with the trainee and could therefore not be considered to be bound to take into account the latter's constitutionally protected interests. Hillgruber, on the other hand, argued that the employer did not have to take Article 5(1) *GG* into account – moreover, the employer had not even restricted the freedom of expression as worded in this provision – and was therefore free not to conclude a contract on the basis of the trainee's opinions expressed in his publication.

Imposing a duty to conclude a contract in general would indeed be going very far. However, like Hillgruber,⁸⁸ I find it difficult to see why or how such a duty would directly follow from the *Betriebsschlosser* judgment. The *Bundesverfassungsgericht* established that the trainee's publication in itself did not justify the company's decision not to employ him, but did not say that *a contrario* this meant that the company had to offer a contract. It did not take into account any factors other than the trainee's freedom of expression, nor did it explicitly consider the reasonable expectations the trainee might have had regarding the conclusion of an employment contract. All the more reason why a duty to conclude the contract, in my opinion, does not follow from the judgment as such. Later decisions of the labour courts have also confirmed that the employer is in principle free to decide whether or not to offer a new contract to an employee or trainee after a contract for a determined period of time has ended.⁸⁹

Although a duty to conclude a contract on the sole basis of the infringement of a trainee's freedom of expression would thus be a bridge too far, additional circumstances might provide a basis for a limitation of the employer's freedom of contract.⁹⁰ In this context, the customs of a

⁸⁴ § 305 *BGB* (old), now § 311 *BGB*: 'Begründung. Zur Begründung eines Schuldverhältnisses durch Rechtsgeschäft sowie zur Änderung des Inhalts eines Schuldverhältnisses ist ein Vertrag zwischen den Beteiligten erforderlich, soweit nicht das Gesetz ein anderes vorschreibt.'

⁸⁵ § 105 *GenO*: 'Freie Gestaltung des Arbeitsvertrages. Arbeitgeber und Arbeitnehmer können Abschluss, Inhalt und Form des Arbeitsvertrages frei vereinbaren, soweit nicht zwingende gesetzliche Vorschriften, Bestimmungen eines anwendbaren Tarifvertrages oder einer Betriebsvereinbarung entgegenstehen. Soweit die Vertragsbedingungen wesentlich sind, richtet sich ihr Nachweis nach den Bestimmungen des Nachweisgesetzes.'

⁸⁶ Boemke 1993, p. 2084.

⁸⁷ Boemke 1993, p. 2085.

⁸⁸ Hillgruber 1995, p. 9.

⁸⁹ For instance: *BAG* 20 November 2003, 8 AZR 439/02, www.bundesarbeitsgericht.de (last consulted on 19 April 2007).

⁹⁰ The *Bundesverfassungsgericht* eventually redirected the *Betriebsschlosser* case to the *Bundesarbeitsgericht* for further deliberation.

particular branch seem highly relevant, in particular the question whether a trainee was usually offered an employment contract after the traineeship had ended. From the judgment of the *Bundesverfassungsgericht*, it appears that there was indeed such a custom. Analogous to the general doctrine of liability for breaking off negotiations (in Germany: *culpa in contrahendo*), it would then not seem so far-fetched to at least award damages to a trainee who reasonably expected an employment contract to follow the traineeship.⁹¹ An exception would be possible if there was a ‘good reason’ for breaking off negotiations, or in this case: non-conclusion of the contract. A reasonable fear of the use of violence, based on the opinions expressed in a publication such as the one concerned here, might constitute such a ‘good reason’, although a balance of the interests involved should be struck. In particular, the company would have to argue that and why the expressed opinions constitute a reasonable fear of the use of violence within the setting of a work environment.

Preliminary conclusion

The three examples that were taken from German case law give an impression of the development of the effects of fundamental rights in private law, especially regarding the theory of *Wechselwirkung*. The courts, the *Bundesverfassungsgericht* first and foremost, have established the ‘reciprocal effect’ between fundamental rights and the ‘general laws’. In the *Lith* case it was recognised that the limitation clause of Article 5 GG, which provided that freedom of expression could be limited by general laws, implied that judges had to examine whether in a specific case the freedom of expression was indeed limited as such. However, at the same time they had to interpret these general laws, for instance the concept of ‘tort’, in light of the constitutional order. The *Wallraff* case showed how the courts dealt with a situation in which both parties could invoke Article 5 GG; the doctrine of *Wechselwirkung* paved the way for a careful balance of interests regarding the publication of information that had been unlawfully obtained. In the *Betriebschlosser* case, finally, an example was found of an ‘incomplete’ reciprocal effect, in the sense that the emphasis lay on the right to freedom of expression itself – in this case the trainee’s freedom to publish his opinions without other private parties attaching consequences to the publication. The limitation of this freedom on the basis of the employer’s freedom of contract and the interpretation of freedom of contract against the constitutional background, however, were hardly elaborated upon.

Continuing the analysis of cases in the field of contract law, the following cases that will be discussed consider the possibility for contracting parties to (partly) waive a fundamental right. Two judgments of the *Bundesverfassungsgericht* that were handed down in the early 1990s have rekindled the debate on fundamental rights and private law in Germany.

2.2.2 Contractual restrictions on fundamental rights

The possibility for parties to agree on a contractual waiver of an interest protected by a fundamental right forms a specific example of the way a balance may be struck between freedom of contract and fundamental rights. In Germany, two famous cases that will now be discussed have dealt with the constitutional aspects of such a waiver: the *Handelsvertreter* and the *Bürgschaft*

⁹¹ Compare Hillgruber 1995, p. 7.

decisions of the German constitutional court. These cases demonstrate how the *Wechselwirkung* between fundamental rights and private autonomy or freedom of contract may open up established rules of contract law.⁹²

The Handelsvertreter case

On 7 February 1990, the *Bundesverfassungsgericht* delivered a decision that involved the (partial) waiver of the basic right to freely choose one's profession (Article 12(1) GG) in a commercial agency contract.⁹³ According to the courts in civil cases, up to and including the *Bundesgerichtshof*, the clause was valid, since the agent had had the opportunity to consider all the advantages and disadvantages of the (standard form) contract offered to him.

The facts of the case were the following: From 1 July to 31 December 1979, a man worked as a commercial agent (*Handelsvertreter*) for a company trading in wine. According to the standard contract that was signed, he could only work for this company and he had a duty of confidentiality with respect to company secrets, including the addresses of customers. The contract was concluded for an indeterminate period of time and, in the first three years, could only be terminated while taking into account a term of at least six weeks before the end of a quarter. Furthermore, a non-competition clause was included, which provided that the commercial agent would not be allowed to work for any competing company for a period of two years, if the contract would end as a result of a '*wichtige Grund*' ('important reason')⁹⁴ accountable to him. The principal would not have to pay compensation.

In conformity with the contract, the commercial agent handed in his notice for 31 December 1979 in a letter dated 11 November 1979. On 21 November 1979, he concluded a contract with a competing company, for which he would start working on 1 January 1980. His first principal, however, convinced him to withdraw his notice, offering several favourable changes to the contract. Nevertheless, the agent also started working for the competitor from 2 January 1980 onwards, without cancelling that contract. Consequently, his first principal dismissed him with immediate effect on 7 January 1980 and claimed for an injunction relying upon the non-competition clause.

The *Landgericht* (court of first instance) dismissed the claim for an injunction, but the principal's appeal to the *Oberlandesgericht* was successful. According to the regional Court of Appeal, the conditions for an injunction had been met, since the principal had dismissed the agent on the basis of a breach of contract for which he was to blame, i.e. an 'important reason'. In accordance with § 90a(2), second sentence *Handelsgesetzbuch* (HGB),⁹⁵ the principal was not required to give compensation for the period the

⁹² Compare the 'lever function' of fundamental rights (*befboomfunctie*) referred to by Smits 2003, p. 128.

⁹³ *BVerfGE* 7 February 1990, *BVerfGE* 81, 242 (*Handelsvertreter*). See also Hillgruber 1991; Smits 2003, p. 101-106. Article 12(1) GG provides that: 'Alle Deutschen haben das Recht, Beruf, Arbeitsplatz und Ausbildungsstätte frei zu wählen. Die Berufsausübung kann durch Gesetz oder auf Grund eines Gesetzes geregelt werden.' Tschentscher 2003: 'All Germans have the right to freely choose their occupation, their place of work, and their place of study or training. The practice of an occupation can be regulated by or pursuant to a statute.'

⁹⁴ Küstner 2001, HGB, § 89a, nos. 1-2: 'Ein wichtiger Grund, der den Kündigenden zur fristlosen Vertragskündigung berechtigt, setzt voraus, dass dem Kündigenden bei gerechter Abwägung der beiderseitigen Interessen und unter Berücksichtigung der gesamten Umstände des konkreten Falles eine Fortsetzung des Vertragsverhältnisses bis zum nächsten Kündigungstermin, zu dem das Vertragsverhältnis durch fristgerechte Kündigung beendet werden könnte, unzumutbar ist.' For examples, see the same author, no. 12 ff.

⁹⁵ § 90a(2): 'Der Unternehmer kann bis zum Ende des Vertragsverhältnisses schriftlich auf die Wettbewerbsbeschränkung mit der Wirkung verzichten, daß er mit dem Ablauf von sechs Monaten seit der Erklärung von der Verpflichtung zur Zahlung der Entschädigung frei wird. Kündigt der Unternehmer das Vertragsverhältnis aus wichtigem Grund wegen schuldhaften Verhaltens des Handelsvertreters, so hat dieser keinen Anspruch auf Entschädigung.' This provision was in force at the time the events of this case took place, but had already been replaced at the time the *Bundesverfassungsgericht* handed down its judgment. The decision

commercial agent would not be able to practice his profession. The *Bundesgerichtshof* rejected the commercial agent's appeal against this decision. Even if the exclusion of compensation in the situations enumerated in § 90a(2), second sentence *HGB* were unconstitutional, the validity of the non-competition clause would not be affected. Being an independent merchant, the agent had been free to weigh the advantages and disadvantages which the contract offered to him. Therefore, he was also bound by the non-competition clause.

The commercial agent then brought a constitutional complaint before the Federal Constitutional Court, claiming that the decisions of the courts in civil cases infringed several of his basic rights. His complaint was successful in so far as it was directed at the injunction.⁹⁶

According to the *Bundesverfassungsgericht*, the judgments of the courts in civil cases infringed the agent's freedom of profession (Article 12(1) *GG*), since they allowed a contractual non-competition clause that explicitly excluded the payment of compensation. In the court's opinion, the statutory provision of § 90a(2) *HGB* was incompatible with Article 12(1) *GG* to the extent that it permitted such non-competition clauses without setting any limitations. The *Oberlandesgericht* had failed to appreciate this fact; the *Bundesgerichtshof* had wrongly left the question open.⁹⁷

According to the *Bundesverfassungsgericht*, the judgments of the courts in civil cases limited the commercial agent's freedom of profession to an extent that came close to a restriction on his choice of profession and affected the economic basis of his existence (*Existenzgrundlage*).⁹⁸ The non-competition clause was formulated so broadly that it would effectively prevent the commercial agent from working in his line of business for two years. Although he might therefore be forced to change professions, compensation for the inherent disadvantages had been generally excluded.

A special circumstance in this case was, however, that the commercial agent had himself agreed to the non-competition clause. On the basis of their private autonomy, the agent and his principal had been able to independently arrange their interrelations. Nevertheless, private autonomy could be restricted, for it only existed within the framework of the laws and these, in their turn, were subject to the 'objective system of values' expressed by the basic rights.⁹⁹ Hence, private law provisions could set limits to private autonomy. One party's private autonomy then found its limits in the other party's autonomy.¹⁰⁰

therefore only affects the applicable law before the coming into force of the new legislation on 23 October 1989. See *BVerfGE* 81, 242, 263.

⁹⁶ *BVerfGE* 81, 242, 252.

⁹⁷ *BVerfGE* 81, 242, 252.

⁹⁸ *BVerfGE* 81, 242, 253: 'Dem Beschwerdeführer wird aufgrund der Verurteilung zur Wettbewerbsunterlassung seine berufliche Tätigkeit in einem Ausmaß verschlossen, das seine Existenzgrundlage berührt.'

⁹⁹ *BVerfGE* 81, 242, 254, with reference to the *Liith* decision, *BVerfGE* 7, 198.

¹⁰⁰ *BVerfGE* 81, 242, 255, referring to Articles 20(1) and 28(1) *GG*: 'Solche Schranken sind unentbehrlich, weil Privatautonomie auf dem Prinzip der Selbstbestimmung beruht, also voraussetzt, daß auch die Bedingungen freier Selbstbestimmung tatsächlich gegeben sind. Hat einer der Vertragsteile ein so starkes Übergewicht, daß er vertragliche Regelungen faktisch einseitig setzen kann, bewirkt dies für den anderen Vertragsteil *Fremdbestimmung*. Wo es an einem annähernden Kräftegleichgewicht der Beteiligten fehlt, ist mit den Mitteln des Vertragsrecht allein kein sachgerechter Ausgleich der Interessen zu gewährleisten. Wenn bei einer solchen Sachlage über grundrechtlich verbürgte Positionen verfügt wird, müssen staatliche Regelungen ausgleichend eingreifen, um den Grundrechtsschutz zu sichern (...). Gesetzliche Vorschriften, die sozialem und wirtschaftlichem Ungleichgewicht entgegenwirken, verwirklichen hier die objektiven Grundentscheidungen des Grundrechtsabschnitts und damit zugleich das grundgesetzliche Sozialstaatsprinzip.'

In the court's opinion, the limitation of private autonomy by the other party's autonomy followed from the need to safeguard the principle of self-determination (*Selbstbestimmung*), on which autonomy was based. If a party realised his autonomy to the extent that he would in effect unilaterally determine the contents of the contract, this would restrict the other party's autonomy to such a great extent that it caused *Fremdbestimmung*. Since the system of contract law, consisting primarily of default rules, would not by itself be able to redress this imbalance of power, mandatory statutory provisions should safeguard the weaker party's interests in case fundamental rights were at stake. If no such specific legislation were provided, the general clauses of private law might be applied in light of the basic rights. The task of safeguarding these rights would then be assigned to the judges.

In this case, the *Handelsgesetzbuch* provided rules from which contracting parties were not allowed to deviate.¹⁰¹ § 90a(1), third sentence, obliged a principal to pay compensation when his commercial agent's free choice of profession was limited by a contractual non-competition clause. The parties were in principle not allowed to deviate from this provision to the detriment of the agent (§ 90a(4) *HGB*). However, § 90a(2), second sentence, provided an exception: if the principal gave notice on the basis of a '*wichtige Grund*' (important reason) for which the agent was to blame, the principal would not have to pay compensation.

The contract agreed upon by the principal and the commercial agent took account of these provisions. It provided that the non-competition clause would only come into effect if the conditions of § 90a(2) *HGB* were met, that is not in the case of a 'normal' termination of the contract.¹⁰² In conformity with § 90a(2), second sentence, payment of compensation was explicitly excluded. According to the *Bundesverfassungsgericht*, the effectiveness of the clause thus depended on the constitutionality of this provision of the *HGB*. Therefore, the courts should have examined the constitutional objections against the provision.¹⁰³

The Constitutional Court considered the *general* exclusion of a claim for compensation in case of an exceptional dismissal incompatible with Article 12(1) *GG*, which safeguarded the right to freely choose one's profession. It underlined the legislator's assumption that the majority of commercial agents were economically dependent and hence did not have a bargaining position which was strong enough to freely negotiate their rights and duties, including non-competition clauses.¹⁰⁴ Although the legislator had provided rules to protect the agents as well as to do justice to the principals' interests, these however did not sufficiently protect the commercial agents' economic basis of existence, based on the freedom of profession. Therefore, § 90a(2), second sentence *HGB* was declared unconstitutional and the challenged judgments were set aside.¹⁰⁵

The *Handelsvertreter* case has been much discussed in legal literature.¹⁰⁶ In particular, it has been stated that the *Bundesverfassungsgericht* clarified the relation between the indirect effect of the basic

¹⁰¹ *BVerfGE* 81, 242, 256 ff.

¹⁰² *BVerfGE* 81, 242, 245 and 259.

¹⁰³ *BVerfGE* 81, 242, 259-260.

¹⁰⁴ *BVerfGE* 81, 242, 260.

¹⁰⁵ The *Bundesverfassungsgericht* has made similar considerations in recent case law regarding legislation on the transfer of life insurance contracts; *BVerfG* 26 July 2005, *NJW* 2005, 2363 and 2376. A brief remark on these cases will be made at the end of the next subsection, which deals with financial services contracts, in particular suretyships.

¹⁰⁶ For instance, Hermes 1990; Wiedemann 1990; Hillgruber 1991; Derleder 1995; Canaris 1999, p. 9.

rights and the State's duty to protect the constitutionally guaranteed interests against infringements by others. Hermes put forward that the court recognised a subjective right to protection (*Recht auf Schutz*) that addressed the legislator as well as the judge.¹⁰⁷ The legislator had to safeguard the commercial agent's freedom of profession (Article 12(1) GG) in its rules on non-competition clauses; the judge had to interpret these rules in light of the basic right.

Wiedemann¹⁰⁸ noted that this theory of State protection (*Schutztheorie*) mostly considered the relation between the State and its citizens in relation to the basic rights. The relation between contract partners nevertheless also had to be settled. This could be done preventively by the legislator or in retrospect by the judge. Because of the freedom of parties to arrange their contractual relations without State interference (legislation), fundamental rights had mostly been given effect by the judges through the general clauses of private law.¹⁰⁹ In order to optimise this judicial protection of fundamental rights, Wiedemann proposed that a new general clause should be introduced, which would provide the judges with the possibility to judge the contents of a contract on their compatibility with the *ordre constitutionnel*.¹¹⁰

In Wiedemann's opinion, the *Bundesverfassungsgericht* chose a controversial starting point for judging the contents of the contract. An 'imbalance of power between parties' (*gestörte Vertragsparität*) was often difficult to determine and imbalances could sometimes also lead to acceptable results.¹¹¹ According to Wiedemann, better criteria would be either the possibility of unilateral determination of contractual provisions by one of the parties or – closely related to this – the lack of possibilities for self-determination of the other party. As will be seen, these aspects also played an important role in the considerations of the *Bundesverfassungsgericht* in the *Bürgschaft* decision.

According to Hillgruber,¹¹² finally, the commercial agent in this case *in concreto* did not even have a weaker bargaining position. He had, for instance, been able to persuade the wine trading company to adjust the contract in his favour. Unlike the legislator, who had to make a general set of rules for non-competition clauses in commercial agency contracts, the judge should have considered the specific need to protect the parties. Since the *Bundesverfassungsgericht* based the right to protection on the imbalance of power between parties, it should have come to the conclusion that the State in this case had no such protective duty and that, accordingly, the agent's freedom of profession could not be infringed.¹¹³

Hillgruber and Wiedemann thus emphasise the (specific) *possibilities* for a contracting party to determine the contents of the contract. In my opinion, however, arguing in this way they seem to avoid the question whether a party can and should always be held bound to a waiver of his fundamental right, even if he was not able to use these possibilities for self-determination. Does a

¹⁰⁷ Hermes 1990, p. 1766-1767.

¹⁰⁸ Wiedemann 1990, p. 696.

¹⁰⁹ Compare Hillgruber 1991, p. 76.

¹¹⁰ Wiedemann 1990, p. 697. A similar reading of another German case, the *Bürgschaft* decision that will be discussed next, was recently defended in the Netherlands by Cherednychenko 2004c, p. 113-115.

¹¹¹ Wiedemann 1990, p. 697. Compare Hillgruber 1991, p. 85, who is of the opinion that even intolerable results may sometimes be justified because they were freely agreed upon.

¹¹² Hillgruber 1991, p. 79-80.

¹¹³ Hillgruber 1991, p. 80 ff., who, moreover, argues that even if a *Schutzpflicht* existed, the injunction had been justified, since the commercial agent's freedom of profession had not been limited disproportionately. Hillgruber, however, underwrites the *Bundesverfassungsgericht's* general considerations on a judicial review of contracts between private parties; see p. 85.

person who badly negotiates a contract literally have to pay for the rest of his or her life – or at least for a certain amount of time, as in the case of non-competition clauses without compensation? This topic seems to require a more profound analysis of the underlying interests of all actors in the field of contract law, the parties themselves as well as the legislature and the judiciary.¹¹⁴

The Bürgschaft case

Similar questions on the self-determination of contracting parties arise in the case of sureties given by a relative of the debtor. One of the most discussed cases in German legal literature on the effects of fundamental rights in contract law, as well as in recent Dutch legal literature on this subject,¹¹⁵ is the *Bundesverfassungsgericht's* *Bürgschaft* decision of 19 October 1993.¹¹⁶ It concerned a daughter who had entered into a suretyship contract with a bank for the debt of her father. Thus, it turned out, she had effectively limited her opportunity of leading a dignified life (*Existenzgrundlage*).

The daughter agreed to act as a surety towards a bank for her father's loan in 1982. At that moment, the father was a real estate agent and he had a credit limit of 50,000 DM (ca. 25,500 euro) at the bank. He asked for the credit limit to be raised to 100,000 DM (ca. 51,000 euro). His daughter, who was then 21 years old, signed the surety agreement required by the bank. The daughter had had no professional training, was mostly unemployed and earned only very low wages when she did work.

About two years later, the father gave up his business as a real estate agent and became a shipowner. The bank financed the purchase of a ship with 1.3 million DM (ca. 665,000 euro). However, the shipping company did not do very well and the debts mounted. In December 1986, therefore, the bank cancelled the credit that at that moment added up to about 2.4 million DM (ca. 1.2 million euro) and informed the daughter she would be held liable as surety. The woman was unable to pay and contested the validity of the surety agreement. The *Landgericht* rejected her claim, but awarded the bank's counterclaim for 100,000 DM plus interest.

The *Oberlandesgericht*, however, granted the daughter's appeal, since the bank had not properly informed her about the risks related to the suretyship.¹¹⁷ In fact, it was established that the bank employee had told the daughter, when she was asked to sign the agreement: '*Hier bitte, unterschreiben Sie mal, Sie geben dabei keine große Verpflichtung ein, ich brauche das nur für meine Akten.*' ('Please, sign here, you will not take on any substantial obligations, I only need it for my records.') Although the bank had no general duty to inform, an exception had to be made because it had affected the inexperienced surety's decision by downplaying the nature and scope of the liability. It could not be assumed that the woman would have agreed to act as a surety if she had been able to make a realistic estimation of the risks attached to the contract.

Yet, the *Bundesgerichtshof* overturned this judgment and reinstated the *Landgericht's* decision.¹¹⁸

According to the *Bundesgerichtshof*, the surety contract was a unilaterally binding legal act, in relation to which a creditor in principle neither had a duty to inform the surety nor a duty to convince itself of the surety's knowledge about the obligations involved. A person who had attained the age of majority in general knew that a surety statement entailed risks of liability, even if he or she had

¹¹⁴ Compare Kennedy 2002a and Hesselink 2004b on the politics of contract law. See further Part II.

¹¹⁵ Tjittes 1996, p. 25-30; Smits 2003, p. 106-111; Cherednychenko 2004a; Mak 2004, p. 127-128.

¹¹⁶ *BVerfG* 19 October 1993, *BVerfGE* 89, 214 (*Bürgschaft*).

¹¹⁷ *BVerfGE* 89, 214, 219.

no specific experience in trade. A surety contract could not be based on the surety's expectation that he or she would not be held liable on the basis of the suretyship.

Moreover, the *Bundesgerichtshof* found that the bank employee had done nothing to affect the daughter's estimation of the risks. If he gave her the impression that she ran little risk, since at that time there was no acute danger to her father's credit and little chance of her being held liable as surety, the bank employee may have underestimated the long-term risks. However, his statements had not constituted a special confidential relation with the daughter and she should herself have observed the development of her father's business and, hence, her risks of liability.

After this decision had been handed down, the daughter made a constitutional complaint to the *Bundesverfassungsgericht*, claiming that the *Landgericht* and the *Bundesgerichtshof* had infringed her basic rights under Articles 1(1) and 2(1) *GG* in conjunction with the principle of the social state (*Sozialstaatsprinzip*; Articles 20(1) and 28(1) *GG*).¹¹⁹ The question the court had to answer was thus whether the *Grundgesetz* required the courts in civil cases to evaluate the contents of surety contracts, in case impecunious relatives assumed high risks as a surety. It began its answer to this question with a reference to the *Lüth* case, which required the courts to interpret and apply the general clauses of private law, such as §§ 138 and 242 *BGB*, in the light of the basic rights.¹²⁰ The *Bundesverfassungsgericht* had to judge whether this had been properly done, that is whether the courts had reached their judgments on the basis of an accurate interpretation of the rights laid down in the *Grundgesetz*.

Here, the contract that was concluded essentially differed from everyday credit securities, since the daughter had taken on an exceptionally high risk without having any economic interest in the loan herself. Renouncing almost all protective provisions laid down in the *BGB*, she had accepted to stand surety for the risks related to her father's business, to an extent that by far exceeded her economic powers. It was to be foreseen, and the bank could have easily verified that the woman would not be able to free herself from the debts until the end of her life. By not asking whether and to what extent both parties could freely decide on the conclusion and contents of the surety contract, the *Bundesgerichtshof* had failed to appreciate the principle of party autonomy.

In this context, the Constitutional Court – like in the *Handelsvertreter* case – referred to the concept of self-determination. It defined private autonomy as '*Selbstbestimmung des Einzelnen im Rechtsleben*' (self-determination of the individual in legal life), which was guaranteed by Article 2(1) *GG*.¹²¹ The legislature should provide for adequate realisation and protection of this autonomy. However, the legislator had to take into account the fact that parties in private law could both invoke their autonomy in equal measure. Since a stronger party's domination of the contractual relation should be avoided, the interaction (*Wechselwirkung*) between the constitutional positions had to provide for the widest possible realisation of rights for all parties involved.¹²²

¹¹⁸ *BGH* 16 March 1989, *NJW* 1989, p. 1605-1606. See also *BVerfGE* 89, 214, 219-220.

¹¹⁹ *BVerfGE* 89, 214, 220.

¹²⁰ *BVerfGE* 89, 214, 229, referring to *BVerfGE* 7, 198 (*Lüth*).

¹²¹ *BVerfGE* 89, 214, 231.

¹²² *BVerfGE* 89, 214, 231-232: '[Der Gesetzgeber] muß der Selbstbestimmung des Einzelnen im Rechtsleben einen angemessenen Betätigungsraum eröffnen. Nach ihrem Regelungsgegenstand ist die Privatautonomie notwendigerweise auf staatliche Durchsetzung angewiesen. Ihre Gewährleistung denkt die justitielle Realisierung gleichsam mit und begründet daher die Pflicht des Gesetzgebers, rechtsgeschäftliche Gestaltungsmittel zur Verfügung zu stellen, die als rechtsverbindlich zu behandeln sind und auch im Streitfall durchsetzbare Rechtspositionen begründen.'

In contract law, the Constitutional Court held, the fair balance of interests in a case was determined by the ‘*übereinstimmende Wille*’ of the contract partners. Both parties bound themselves, meanwhile observing their individual freedom of action. If one contracting party predominated to such an extent that it could in fact unilaterally establish the contents of the contract, this caused *Fremdbestimmung* for the other party.¹²³ Nonetheless, the legal order could not take precautionary measures for all situations in which this might occur. On the basis of legal certainty, a contract could not be questioned or corrected for each disturbance of the negotiation balance. However, if a typical case arose which concerned a structural inferiority of a party and if the consequences of the contract were exceptionally detrimental to that party, civil law had to react and provide for corrections. This followed from the constitutional protection of private autonomy (Article 2(1) GG) and the principle of the social state (Articles 20(1) and 28(1) GG).

According to the *Bundesverfassungsgericht*, the law that was in force met these demands. The court recognised that to redress contractual imbalances (*gestörter Vertragsparität*) was one of the central tasks of private law. The general clauses (*Generalklauseln*) of the *BGB* played a leading role in this, as could for instance be determined from the wording of § 138(2) *BGB* as well as § 242 *BGB*.¹²⁴ The first provision enumerated circumstances that led to a weaker bargaining position of a party. If the other party misused this weakness to serve his own interests, the contract would be void. The second provision mentioned, § 242 *BGB*, underpinned the competence of courts in civil cases to check the contents of contracts. Although opinions differed on the intensity of this check, in any case it was clear that private law gave possibilities for redressing imbalances of power between parties. Judges in civil cases should take care that contracts were not used as a means of *Fremdbestimmung*, when they interpreted and applied the general clauses.¹²⁵ If parties had agreed on an arrangement that was allowed as such, a check of the contents would often be unnecessary. Nevertheless, if the contract weighed extraordinarily heavily on one party and the balance was evidently lost, the courts had to make sure whether the arrangements were a result of a structural imbalance of power. By means of the general clauses they should then redress this imbalance. The Constitution allowed private law much space to arrange how and in which cases the courts had to deal with these issues. If the courts, however, did not recognise the problem of *gestörter Vertragsparität* at all or if they solved it by unsuitable means, the constitutionally protected principle of private autonomy might be infringed. This was the case here.

The *Bundesgerichtshof* had rejected all claims to nullify the surety contract on the basis of the fact that the daughter had attained the age of majority and should have made certain what risks were attached to the agreement. However, the risk of liability she assumed – without having any economic interest of her own – was exceptionally high and also difficult to estimate. Even people

¹²³ *BVerfGE* 89, 214, 232, with reference to *BVerfGE* 81, 242 (*Handelsvertreter*).

¹²⁴ On these provisions, see also section 1.2.2 above.

¹²⁵ *BVerfGE* 89, 214, 234: ‘Haben die Vertragspartner eine an sich zulässige Regelung vereinbart, so wird sich regelmäßig eine weitergehende Inhaltskontrolle erübrigen. Ist aber der Inhalt des Vertrages für eine Seite ungewöhnlich belastend und als Interessenausgleich offensichtlich unangemessen, so dürfen sich die Gerichte nicht mit der Feststellung begnügen: “Vertrag ist Vertrag”. Sie müssen vielmehr klären, ob die Regelung eine Folge strukturell ungleicher Verhandlungsstärke ist, und gegebenenfalls im Rahmen der Generalklauseln des geltenden Zivilrechts korrigierend eingreifen. Wie sie dabei zu verfahren haben und zu welchem Ergebnis sie gelangen müssen, ist in erster Linie eine Frage des einfachen Rechts, dem die Verfassung einen weiten Spielraum läßt. Ein Verstoß gegen die grundrechtliche Gewährleistung der Privatautonomie kommt aber dann in Betracht, wenn das Problem gestörter Vertragsparität gar nicht gesehen oder seine Lösung mit untauglichen Mitteln versucht wird.’ See also Tjittes 1996, p. 30-34.

who had experience in business would have had trouble in assessing their chances; for the woman, who lacked experience and education, it was practically impossible to fathom them. Given the fact that she was clearly the weaker party, the *Bundesgerichtshof* should have examined the manner in which the contract had been concluded as well as the other party's conduct. By denying any duty to inform on the side of the bank, the *Bundesgerichtshof* had failed to protect the principle of private autonomy and, therefore, its decision could not be upheld. Whether the daughter's general personality right had also been infringed could therefore remain open.

The case was redirected to the *Bundesgerichtshof*, which then considered the surety agreement null and void, since it infringed good morals (§ 138(1) *BGB*).¹²⁶ Although a surety agreement by definition only favoured one party and the freedom of contract allowed a party to assume risky obligations, the contract might be held void under certain circumstances. Private autonomy (Article 2(1) *GG*) could only justify the conclusion of a contract that had considerable risks attached and that weighed heavily on one party, in so far as both parties were free to decide for or against being bound by the contract.¹²⁷

If a parent asked a daughter or son, who had just attained the age of majority, was still studying or had just started working and had no financial means to speak of, to stand surety for a loan, there was a high probability that the daughter or son would not be able to decide freely but would want to fulfil the parent's wish. Emotional considerations might colour their assessment of the risks related to the suretyship. The parent might then breach § 1618a *BGB*, which gave parents and children a mutual duty of assistance and consideration.¹²⁸ However, these circumstances did not only affect the relation between debtor and surety, but also involved the bank. If the bank required a suretyship and the circumstances mentioned here were known to it, the parent's conduct could be attributed to the bank and the surety agreement could be held void.¹²⁹ The suretyship the daughter had signed in this case thus had to be deemed invalid. To this conclusion it was added that the bank employee had given the woman the impression that signing the agreement was just a formality.

Comments on the case¹³⁰ emphasised its importance for the evaluation of the contents of a contract by the courts in civil cases. In this sense, the case built on the aforementioned *Handelsvertreter* decision. Nevertheless, a special feature of this case is the relation between a father and daughter, which undoubtedly influenced the daughter's decision to conclude the surety contract with the bank. This aspect played an important part in the considerations on the duties of care pertaining to the bank. In the case of the commercial agent, on the other hand, the extent of *Fremdbestimmung* was mainly determined on the basis of the relation between the contracting parties.¹³¹

The *Bundesverfassungsgericht* deviated from the established case law of the *Bundesgerichtshof* on suretyships. Until the *Bürgschaft* decision was handed down, the courts in civil cases had followed a considerably hard line on the liability of a family member or spouse as a surety.¹³² The principle of

¹²⁶ *BGH* 24 February 1994, *NJW* 1994, p. 1341-1344, in particular p. 1342.

¹²⁷ *NJW* 1994, p. 1342.

¹²⁸ § 1618a *BGB*: 'Eltern und Kinder sind einander Beistand und Rücksicht schuldig.'

¹²⁹ *NJW* 1994, p. 1342.

¹³⁰ Honsell 1994; Wiedemann 1994; Spieß 1994; Gernhuber 1995; Singer 1995.

¹³¹ See the description above and Hillgruber 1991, who argues that in this case, the commercial agent had not had a weaker bargaining position.

¹³² Honsell 1994, p. 565, with further references; Emmerich 1994, p. 251. See also Smits 2003, p. 108-109. It should, however, be noted, as did the *Bundesverfassungsgericht* (p. 217) in this case, that with regard to personal guarantees by relatives two Chambers of the *Bundesgerichtshof* had competence. While at the time of the *Bürgschaft* decision the XIth Chamber of the *Bundesgerichtshof* had already begun to mitigate its judgments in cases in which a

pacta sunt servanda dominated the judgments in this field, which tended to keep parties bound to the contract. The courts in general considered that a person who had attained the age of majority should be able to oversee the consequences of the suretyship. Against this background, it is not surprising that the *Bürgschaft* judgment of the *Bundesverfassungsgericht* attracted much attention.

Honsell pointed out that the decision had a meaning far beyond the case of the daughter who stood surety for her father's loan. Not only did it affect suretyship cases, but it might also have an impact on other contracts.¹³³ Emmerich added that the *Bundesverfassungsgericht* had affirmed the duty of the courts to check the contents of the contract in the case of an imbalance of bargaining power. In his view, the extension of the courts' duties meant that further limits had been set to private autonomy.¹³⁴

According to Wiedemann, legal science had to develop the criteria for determining in which situations and to what extent the courts should check the contents of a contract.¹³⁵ Judges did not have to strike a complete balance between all interests, including those that had not been taken into account in the contract. Rather, the courts should check whether the balance expressed in the contents of the contract was in conformity with the basic rights.¹³⁶ The review of the contents of the contract would thus be a 'marginal' one.

The extent of the 'judicial review' of the contents of the contract is of importance, since – like the *Handelsvertreter* and *Betriebsschlösser* decisions – the *Bürgschaft* case was seen as a threat to private autonomy. Spieß stated that a wide possibility for judges to check the contents of a contract might limit the parties' autonomy to a great extent.¹³⁷ It could, furthermore, endanger legal certainty and it missed its goal, since it did not re-establish the self-determination of the weaker party, but rather replaced *Fremdbestimmung* by the other party with *Fremdbestimmung* by the State, viz. the judge.¹³⁸

The judges' tasks have, moreover, been considered in the light of the contracting party's own responsibility. Since the surety had herself signed the contract, Singer posed the question to what extent fundamental rights should be applied in a private law context in order to protect an individual against him or herself.^{139, 140} He was of the opinion that freedom of contract could not

spouse was liable as co-debtor for the debt of the other spouse, the IXth Chamber still tended to uphold surety agreements. The XIth Chamber argued in favour of the courts testing the contents of a surety contract in the case of an imbalance of power between the parties, referring to the *Bundesverfassungsgericht's* considerations in the *Handelsvertreter* case. The *Bürgschaft* case, however, was heard by the IXth Chamber. See also Tjittes 2005, p. 302.

¹³³ Honsell 1994, p. 566.

¹³⁴ Emmerich 1994, p. 251.

¹³⁵ Wiedemann 1994, p. 412.

¹³⁶ Wiedemann 1994, p. 413.

¹³⁷ Spieß 1994, p. 1222.

¹³⁸ Spieß 1994, p. 1229.

¹³⁹ Singer 1995, p. 1134.

¹⁴⁰ On the State's duties to protect its citizens against themselves, see Schwabe 1998. Note that Schwabe explicitly distinguishes the theme of 'protection of the individual against himself' from the waiver of constitutional rights in the State-citizen relationship; see p. 68. In the cases he discusses the individuals involved do not waive a constitutional right as such, but rather the interest safeguarded by this right (*grundrechtliches Schutzgut*). His examples vary from forced feeding in the case of a hunger strike (interest involved: health) and the possible prohibition of 'dwarf throwing' (human dignity) to rules protecting consumers and workers (health) and the prohibition of dangerous sports (health). The *Bürgschaft* case fits in this enumeration insofar as we accept that the daughter (implicitly) renounced the protection of her human dignity by entering into the suretyship agreement. In relations between private individuals, moreover, the themes of 'protection of the individual against himself' and the '(partial) waiver of a fundamental right' appear to overlap, in the sense that private parties are usually not

be without limits, since private parties might feel economic and social pressures in their interrelations and might thus not be completely free in their choices. Where freedom of contract failed to provide a balance of power, the State had to apply the basic rights in order to limit this freedom.¹⁴¹

In a more recent publication in a series of articles addressing ‘classic’ cases in European private law adjudication, Tjittes observed that one of the remarkable features of the *Bürgschaft* case is that it illustrates how a judgment of the *Bundesgerichtshof* in a civil case can be overruled on constitutional grounds.¹⁴² As we will see in the next section, Dutch law in this respect is different, since it does not recognise the possibility of changing or rejecting a decision of the Supreme Court, the *Hoge Raad*, on the basis of the rights laid down in the Dutch Constitution.

In the context of financial services agreements, finally, it is interesting to note that the *Bundesverfassungsgericht* has affirmed its views on weaker party protection through fundamental rights in several recent decisions regarding life insurance contracts.¹⁴³ Referring to both the *Handelsverteter* and *Bürgschaft* decisions,¹⁴⁴ the Court considered that Article 2 GG placed the legislator under a duty to ensure that a party holding a weaker bargaining position could effectively make use of its contractual autonomy. In the present cases, also in light of Article 14 GG (protection of property), this meant that the legislator should have made sure that the insured persons could effectively defend their interests related to the insurance fees they had paid.¹⁴⁵

Preliminary conclusion

The *Handelsverteter* and *Bürgschaft* cases illustrate how fundamental rights may affect the outcome of cases between private parties and lead to results that the courts might not have reached when not explicitly considering the fundamental rights issues of the cases. The doctrine of *Wechselwirkung* in these contract law cases was further developed, in the sense that the interaction between freedom of contract and fundamental rights, in particular the waiver of a fundamental right, was considered and clarified.

In general, the *Bundesverfassungsgericht* reaffirmed that the courts in civil cases had to read the contractual clauses that affected the fundamental rights of a party in the light of the *objektive Wertordnung* expressed in the basic rights of the *Grundgesetz*. The contractual limitation of Article 12 GG thus had to be judged taking into consideration the commercial agent’s freedom of profession and the economic basis of his existence. Similarly, the daughter’s surety on behalf of her father, interpreted as constituting an implicit waiver of her right to a dignified life, had to be considered in the light of human dignity and the *Sozialstaatsprinzip*.

This application of the doctrine of *Wechselwirkung* subsequently brought the court to a balance of the autonomy of both parties. In both cases, the agreement on the contract at the same time constituted a limitation – in regard to the consequences the contract might have – as well as a

considered directly bound by fundamental rights and the question is therefore one of renunciation of constitutionally protected *interests* rather than *rights*.

¹⁴¹ Singer 1995, p. 1141, with reference to *BVerfGE* 7, 198 (*Lüth*).

¹⁴² Tjittes 2005, p. 308.

¹⁴³ *BVerfG* 26 July 2005, *NJW* 2005, 2363 and 2376.

¹⁴⁴ *NJW* 2005, 2363, 2365-2366 and 2378-2379.

¹⁴⁵ *NJW* 2005, 2363, 2366-2367.

realisation of the agent's respectively the daughter's private autonomy – seeing that entering into a contract was an act of autonomy. Against the background of the constitutional system of values, however, the courts had to establish whether the commercial agent and the daughter had indeed freely agreed on the contract and its terms. In cases of unequal bargaining positions, the 'weaker' party might not have been able to adequately assess the consequences of the contract or determine certain clauses in his favour. According to the *Bundesverfassungsgericht*, the legal system should provide for means to redress such imbalances of power, either by means of statutory provisions, or – in the absence thereof – through the courts.

Later on, in Part II, I will come back to the consequences and problems of this argumentation. For now, it may be concluded that in German contract law, the *Bundesverfassungsgericht* has determined that, under certain circumstances, the courts should explicitly consider fundamental rights in order to redress imbalances of power between contracting parties. It has distinguished several steps for dealing with these types of cases: 1) on the basis of the doctrine of *Wechselwirkung*, it has to be clarified which fundamental right is at stake and how it interacts with the freedom of contract; 2) a balance of interests should be made, based on the extent to which the 'weaker' party has been able to freely determine its contractual position (*Selbstbestimmung*). As a consequence, the courts may ultimately declare null and void or leave without effect a contract clause that excessively limits the weaker party's fundamental right.

2.3 The Netherlands

2.3.1 *Fundamental rights and general clauses*

Although a theory of 'reciprocal effect' has never been expressly formulated by the Dutch courts, the interpretation of fundamental rights in private law usually seems to come close. Often the application of these rights in cases between private individuals also entails a balance of the interests involved and, like in Germany, the general clauses of private law may be considered as inroads for the effects of fundamental rights. In this section, some of the cases most relevant to contract law will be discussed.

'Good morals' and fundamental rights: the Mensendieck case

A landmark decision that clarified the application of 'good morals' in light of a fundamental right in Dutch contract law was the *Mensendieck* case that the Dutch Supreme Court, the *Hoge Raad*, heard on two occasions, in 1969 and 1971.¹⁴⁶

The freedom of education was the subject of these two related pioneer decisions on the effects of fundamental rights in contract law. The facts leading up to the judgments were the following: In the autumn of 1963, a 19-year-old woman began her training to become a teacher of exercises based on the mensendieck method for the improvement of one's posture. The training programme was provided by the Dutch Mensendieck Union. On 10 February 1964, the woman signed a contract with this Union, which stated that she would abstain from teaching mensendieck exercises or assist in such teaching if her training was interrupted. When she failed her theoretical exam in 1966, the woman decided not to follow

the remaining part of the course, which decision was in accordance with the advice her instructors had given her. She also did not take the final exam. Subsequently, however, the woman began working as an assistant to her mother, who was a certified mensendieck teacher, and in 1967, she started her own practice.

The Mensendieck Union then obtained an injunction in order to make the woman stop her teaching practices and to prohibit her from presenting herself as a mensendieck teacher. The appellate court (*gerechtshof*) in The Hague, however, overturned this decision on the basis of the woman's freedom to teach (at that time laid down in Article 208(2) *Gw*, nowadays in Article 23(2) *Gw*). Although certain restrictions on this freedom could be justified, the contract factually prohibited the woman's freedom to give mensendieck lessons for the rest of her life and was therefore considered to infringe public order and good morals. The fact that the woman was only 19 years old at the time she signed the contract added to this conclusion.

The Supreme Court, however, did not uphold this decision.¹⁴⁷ It rejected the Court of Appeal's assumption that the fact that the clause factually took away the woman's opportunities to ever teach mensendieck exercises by itself constituted the immorality of the contract. The court should also have taken due account to the interest the contract aimed at serving. Furthermore, the appellate court should have considered whether this contractual interest could justify the restriction of the freedom of education. The *Hoge Raad* did however not specify the interests involved, but redirected the case to one of the other *gerechtshoven* to reconsider these factual questions.

After the Court of Appeal in Arnhem reinstated the injunction, the case was again brought before the Supreme Court.¹⁴⁸ The Court of Appeal had considered that the agreement between the student and the Union also served the public interest, since a diploma given by the Union after a successful examination provided a guarantee for the practice of the paramedical profession of a mensendieck teacher. This interest justified a limitation of the freedom to give lessons and, therefore, the contract did not infringe against good morals.

The *Hoge Raad* upheld this judgment. It considered that the contractual prohibition to teach mensendieck exercises if one failed the exam did not infringe the right of education laid down in Article 2 of the First Protocol to the ECHR. It also confirmed the judgment of the Court of Appeal that there were no other circumstances that, in light of reasonableness and fairness, would have prevented the Union from enforcing the contract.

This decision made clear that the morality of a contract may be considered in light of a fundamental right, in this case the freedom of education. If the contractual provision had infringed the woman's freedom to teach mensendieck exercises to too great an extent, it would have been against good morals. However, the interests protected by the contract, viz. the aim to have the mensendieck system practised in its pure form and to prevent unqualified persons from practising this method, justified a limitation of the fundamental right.

In his comment on this case,¹⁴⁹ G.J. Scholten emphasised the indication which the *Hoge Raad* had given of how judges should assess a clause that might restrict a contracting party's freedom to too great an extent in light of the public interest and good morals. The courts in such cases had to consider 1) the interest the contract aimed to serve and 2) whether that interest was of such

¹⁴⁶ HR 31 October 1969, NJ 1970, 57 (*Mensendieck I*) and HR 18 June 1971, NJ 1971, 407 (*Mensendieck II*). See also Van den Brink 2002, p. 41 ff., with references to other cases.

¹⁴⁷ HR 31 October 1969, NJ 1970, 57 (*Mensendieck I*).

¹⁴⁸ HR 18 June 1971, NJ 1971, 407 (*Mensendieck II*).

¹⁴⁹ Published along with the case in NJ 1970, 57.

importance that it justified the restriction of the party's freedom. Referring to an older case,¹⁵⁰ Scholten pointed out that not only the interests of the contracting parties might be at stake, but also those of the members and future members of the Dutch Mensendieck Union and possibly the public interest. He agreed with Drion¹⁵¹ that in cases like this, in which a constitutionally protected interest collided with a private law interest, the way in which these interests had to be balanced could not be derived from either of these interests. While Drion sought a standard for the balance of interests in the general clauses of private law, Scholten however doubted the practical relevance of this approach, since these provisions did not give a specific criterion. In his opinion, case law might provide a pattern for dealing with these kinds of situations.

The *Hoge Raad* in this case appears to have adopted an approach fairly similar to the German doctrine of *Wechselwirkung* of fundamental rights and general laws. It considered the contractual limitation of the woman's freedom to teach mensendieck exercises in the light of the freedom of education. Balancing the interests involved, the *Hoge Raad* then found that the contract did not restrict this freedom too much and, therefore, did not infringe 'good morals'. Like the German *Bundesverfassungsgericht* in, for instance, the *Lüth* case, the Dutch Supreme Court thus interpreted a general clause in the light of a fundamental right – in *Lüth* it was the legitimacy and morality of the call for a boycott that was judged on the basis of the freedom of expression; in the *Mensendieck* case the morality of the waiver of the woman's right to teach was interpreted through the freedom of education. At the same time, in both cases, the courts considered the possibility to limit the fundamental right on the basis of the private law concepts – since Lüth's motivation for calling for a boycott did not infringe 'good morals', the restriction of Harlan's freedom of expression was allowed; and since the contractual prohibition teaching mensendieck was deemed not to be immoral, a restriction of the freedom to teach was possible. The Dutch approach thus came very close to the German one.

Freedom of expression and tort: the Boycot Outspan Aksie case

Another judgment on fundamental rights and private law also recalled the *Lüth* case, both in its facts and in its outcome. In its decision in the *Boycot Outspan Aksie* case,¹⁵² the Court of Appeal in Amsterdam had to decide on a party's freedom of expression being restricted by the conduct of other parties. The Dutch Constitution safeguards the right to freedom of expression in Article 7(1) *Gw*, which provides that 'no one shall require prior permission to make public thoughts or opinions through the press, without prejudice to the responsibility of every person under the law'. The last part forms a limitation clause.

The case was the following: A foundation called 'Boycot Outspan Aksie' (BOA) took action against the South-African politics of apartheid. In order to put economic pressure on the country, the foundation called for a boycott of South-African oranges of the Outspan brand. For the promotion of this action, an advertisement was used that portrayed a white hand squeezing a coloured person's head on a lemon squeezer, accompanied by the phrase: 'Pers geen Zuid-Afrikaan uit' ('Do not squeeze out a South-African'). The Dutch Advertising Code Committee (*Reclame Code Commissie*), a self-regulatory body supervising the compliance of advertising with the Advertising Code, publicly declared that it found that the

¹⁵⁰ HR 18 December 1941, NJ 1942, 250 (*Bakkerijstichting*).

¹⁵¹ Drion 1969.

¹⁵² Hof Amsterdam 30 October 1980, NJ 1981, 422.

advertisement, especially the illustration, offended against the requirements of good taste and decency laid down in the Advertising Code.¹⁵³ As a result of this declaration, a number of consumer, press and advertising organisations urged their members to refuse publication of the advertisement. BOA claimed that its freedom of expression was thus unjustifiably infringed. Although BOA's claim for damages in tort was rejected at first instance, its appeal to the *Hof* (Court of Appeal) in Amsterdam was successful.

The approach taken by the Court of Appeal had similarities with the road followed by the German *Bundesverfassungsgericht*, where it found that BOA's advertisement did not offend against standards of good taste and decency and was therefore safeguarded by Article 7(1) *Gm*. The court moreover investigated whether instigating a boycott against BOA was tortious because it hindered BOA in an unjustifiable way from expressing and spreading its opinion. This approach resembled the *Bundesverfassungsgericht's* method of considering whether the freedom of expression was justifiably limited, while at the same time judging whether the infringement of the fundamental right constituted a tort, i.e. *Wechselwirkung*.

The judge at first instance had considered that BOA had not in general been deprived of the possibility to express its opinion through advertisements. Only the possibility to use the picture that was disapproved of had been taken away. It was considered unlikely that BOA could not express her opinion likewise by using a different picture.

The Court of Appeal did not follow this line of reasoning. It considered that the freedom of expression was already restricted when a concrete expression of an opinion, in the formulation and form chosen by the author, was prevented. In this case, a boycott of BOA's advertisement by the members of the national organisations in the newspaper, weekly and magazine branch meant that BOA could not publish the advertisement in almost any paper, weekly or journal. Since the boycott thus severely hindered BOA in effectuating its freedom of expression, causing the boycott was held to constitute a tort, unless important interests of the consumer, press and advertising organisations could justify their way of acting.

In relation to freedom of contract of these organisations, the court considered that granting BOA's claim would relieve individual publishing companies from the obligation to refuse BOA's picture, though it did not in any way oblige them to accept the advertisement in the future. Granting BOA's claims would thus repair the principle of freedom of contract the organisations had partly waived by committing themselves to comply with the recommendations of the *Reclame Code Commissie*. The parties' freedom to commit themselves to one another to comply with these recommendations did moreover not exclude the possibility that causing a boycott of the advertisement constituted a tort against BOA.

Furthermore, individual and collective interests of the media were considered not to be harmed. An individual publisher could always refuse the picture, also in the absence of a recommendation in that sense by the *Reclame Code Commissie*. Regarding the collective interests, the court accepted that the institution of the *Reclame Code* served the interest of a uniform policy on refusal of advertisements. Nevertheless, such uniform standards of content, nature, tenor and form had to be applied with considerable reservation when an advertisement was concerned that merely promoted a certain view or idea – as opposed to advertisements promoting products and services. In that case, the general interest of the existence and staying in existence of the media faced the factual possibility to realise the freedom of expression.

According to the Court of Appeal, BOA's advertisement should only have been disapproved of on the basis of good taste and decency, if to a serious extent it amounted to bad taste or indecency according to the prevailing opinion in the larger part of Dutch society, and caused readers to have an aversion to the

¹⁵³ Reclame Code Commissie, public recommendation, 23 September 1975, *NJ* 1976, 369.

magazine in which it was published. In the court's opinion, this was not the case and the public interest had thus not been harmed. BOA's claim was therefore granted.

A balance of the interests of the parties was thus made, based on the freedom of expression of BOA and the general interest of the media. Noteworthy is the fact that the court made a distinction between commercial and ideal advertisements. Only in the latter case did it appear to consider freedom of expression to be involved. The court then considered BOA's advertisement in light of societal standards of good taste and decency, in order to establish whether a limitation of BOA's freedom of expression was allowed. This test is comparable to the one the *Bundesverfassungsgericht* made in the *Lüth* case, where it had to decide whether Lüth's freedom of expression had to be limited because his statements constituted a tort against Harlan.

In the *BOA* case, a second question was whether the media organisations had acted in a tortious manner. Since the advertisement did not offend good taste and decency, the media's interests as well as the general interest did not have enough weight to justify the infringement of BOA's freedom of expression. Therefore, the organisations could be held liable in tort.

Finally, from a contract law perspective, a striking feature of the case was the possibility for the media organisations to limit freedom of contract through a contract. That is, the fact that the organisations' agreement to comply with the recommendations of the *Reclame Code Commissie*, being an act of autonomy, at the same time restricted the organisations' possibility of concluding a contract with BOA. The Court of Appeal did not elaborate on the legitimacy of such a waiver of rights, which might be interpreted as an acceptance of such practices. However, the court did observe that granting BOA's claims would repair this waiver, meaning that the organisations would then again be fully capable of deciding for themselves whether or not to carry the advertisement. Although only a side aspect of this case, it is thus interesting to see how the court – indirectly – reversed the waiver of freedom of contract.

Contract law: the Maimonides case

Although it was not a 'hard core' contract law case, but rather occurred in the field of education, the *Maimonides* case¹⁵⁴ offers insights on the way courts might handle claims of admission and questions concerning the possible duty to conclude a contract (*Kontrahierungszwang*). The case concerned a private school's refusal to admit the plaintiff's son on the basis of its admission policy. The father claimed the right to freely choose the education of his child and invoked several anti-discrimination provisions, whereas the school, as a private institution, claimed the freedom to limit the group of pupils on religious grounds.

The case was about a boy who was not admitted to the Maimonides Lyceum in Amsterdam, which was the only school in the Netherlands that provided the form of Jewish education his parents thought appropriate for him. According to the school's interpretation of the Halacha, the religious comments on the Jewish law (Torah), the boy was not Jewish and could therefore not be admitted. The boy's father invoked several anti-discrimination provisions and claimed a right to freely choose the education of his child (Article 1 *Gw*, Articles 3 and 14 ECHR and Article 2 of the First Protocol to the ECHR). In his opinion, the school's admission policy, especially its refusal to admit his son, constituted a tort. The

¹⁵⁴ HR 22 January 1988, NJ 1988, 891 (*Maimonides*).

school, on the other hand, as a private institution relied on its freedom to limit the group of pupils on the basis of religious criteria (Article 23 in conjunction with Article 6 *Gw* and Article 27 ICCPR).

At first instance, the father's claim to have his son admitted to the Maimonides Lyceum was judged to be inadmissible by the President of the *Rechtbank* (district court) in summary proceedings (*kort geding*). According to the judge, there was no tort constituted by the school setting aside the father's interest in providing his child with the best education in an institution teaching his philosophy of life.¹⁵⁵ In addition, the judge considered that the father's claims would otherwise have been unsuccessful, because the school was allowed to limit its group of pupils to its own religious standards, according to which standards the boy did not fit within this group.

The Court of Appeal in Amsterdam set aside this judgment and allowed the father's claim. It considered that the father's interest in having his son admitted to the form of education deemed most suitable by the parents outweighed the school's interest in strictly following its admission policy. The school should therefore admit the boy after all. Of special importance were the circumstances of the father's affinity with Judaism, his interest in having his son educated at the Maimonides Lyceum, the absence of equivalent education, and the fact that the boy was not refused because he or his parents did not practice the Jewish religion – which they did –, but because he was not Jewish according to the school's interpretation of Jewish law.¹⁵⁶ According to the more liberal opinion of the parents, the boy was Jewish.

According to the *Hoge Raad*, this decision could not be upheld. Neither national nor international provisions gave parents a right to have their child follow education that was in conformity with their chosen religious and philosophical convictions. Though Article 2 of the First Protocol to the ECHR, as well as Article 23 *Gw*, gave the parents a claim *against the State* to have their choice of education respected, these provisions did not call into existence a claim *against a private institution* to provide their child with such education.¹⁵⁷ The Court of Appeal had, thus, wrongly come to the conclusion that the father could invoke such a fundamental right of free choice of schools against the Maimonides Lyceum. The school's interest in applying its religiously inspired admission policy, which was also protected by Article 23 *Gw*, outweighed the parents' interests, even if the parents had a strong and reasonable preference for the form of education offered by this school and despite the fact that no other institution provided education on the basis of this philosophy of life.

Although the context was different, the *Maimonides* case dealt with questions similar to those of the German *Betriebsschlosser* case. A starting point was that a private school, though receiving public funding, had a right to refuse a pupil, unless its decision was arbitrary.¹⁵⁸ This rule is similar to the one formulated in the *Betriebsschlosser* case, which concerned a company's decision not to employ a trainee because of a certain opinion expressed by him. In that case, the labour courts also started from the company's freedom of contract and judged its decision on arbitrariness. According to the *Bundesarbeitsgericht*, the decision did not infringe this principle. The *Bundesverfassungsgericht* did not further elaborate on the 'arbitrariness issue', but left it up to the *Bundesarbeitsgericht* to reconsider whether the company had justifiably refused to further employ its former trainee. Therefore, the

¹⁵⁵ Conclusion of the Advocate-General, no. 3.1.

¹⁵⁶ HR 22 January 1988, NJ 1988, 891 (*Maimonides*), no. 4.4 of the judgment of the *Hof Amsterdam*.

¹⁵⁷ HR 22 January 1988, NJ 1988, 891 (*Maimonides*), no. 3.3.

¹⁵⁸ Conclusion of Advocate-General Mok, no. 7 as well as 8.2. Mok notes that this general rule was not challenged in this case.

case involved the question whether there might be a duty to conclude a contract (*Kontrahierungszwang*).

In the *Maimonides* case, the general starting point of freedom of contract was not challenged, and neither did the boy's father claim arbitrariness on the part of the school's admission policy. Instead, the father argued that the school's interpretation and application of its policy, resulting in the refusal of his son, was mistaken. Since the courts in civil cases were not allowed to enter into the religious interpretation of the rules of admission,¹⁵⁹ the dispute then shifted to the fundamental rights of the parties. Nevertheless, the question was still whether the school could be forced to take the boy, which might be compared to the issue of *Kontrahierungszwang* that arose in the German case. The *Hoge Raad* eventually answered in the negative, considering that the parents could not invoke Article 23 *Gw* against the school, the latter being a private party, and neither did their other interests outweigh the school's 'freedom of direction' (*vrijheid van richting*). Still, the judgment seems to indicate a possibility to impose a duty to admit a pupil, which comes close to a duty to enter into a contract with a certain party.

In his comment on the case,¹⁶⁰ Alkema observed that the *Hoge Raad*, instead of applying the arbitrariness criterion mentioned in the Advocate-General's conclusion, chose to assess the preference of the parents asking for the admission of their child. The court, however, failed to specify under which circumstances the parents' preference was sufficiently strong and reasonable. Therefore, the relation between the principle of equality and freedom of education was not further clarified.

Alkema furthermore put forward that the father's claim might have been more successful had he based it on Article 13 of the International Covenant on Economic, Social and Cultural Rights. This provision, among other things, provided for freely accessible secondary education (section 2b) and the parents' freedom to choose schools for their children that comply with their philosophy of life.¹⁶¹ Alkema pointed out that this provision also covered relations between private parties. Although the Article in principle required incorporation in national legislation, it might nonetheless already serve as a guideline for the balance of interests or possibly for the

¹⁵⁹ Conclusion of Advocate-General Mok, no. 1; judgment Court of Appeal, no. 4.2.

¹⁶⁰ Published along with the text of the case in *NJ* 1988, 891.

¹⁶¹ Article 13 ICESCR: '1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right: (a) (...) (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education; (c)-(e) (...).

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.'

determination of the illegitimacy of a refusal to admit a pupil.¹⁶² Taking this provision into account, it would then have been possible to consider limitations of freedom of education in the light of other fundamental rights and principles. This approach, once again, recalls the German doctrine of *Wechselwirkung*.

Preliminary conclusion

The typical cases of Dutch law on the effects of fundamental rights in the law of obligations that have been discussed in this section give an idea of the questions that arose at a time when ‘horizontal effect’ was being quite extensively explored in legislation,¹⁶³ case law¹⁶⁴ and legal literature.¹⁶⁵ The *Mensendieck* case demonstrated a first recognition of the interpretation of the general clause of ‘good morals’ in the light of fundamental rights. The *Boycot Outspan Aksie* case further considered the interaction between fundamental rights and tort, and on the margins looked into some effects in contract law as well. The *Maimonides* case, last but not least, engaged the freedom of education in relation to the admittance policy of a private school. Thus, it recalled the problem of duties to conclude a contract.

All three cases were solved on the basis of the court balancing the interests of the parties, i.e. the usual private law method of resolving disputes. In the *Mensendieck* and *Boycot Outspan Aksie* cases the courts appeared to apply a method similar to *Wechselwirkung*. In the *Maimonides* case, the *Hoge Raad* did not reach this stage of balancing the fundamental right against general clauses of private law, since it held that the parents could not invoke a right to freely choose a school for their child against a private institution, but only against the State. The court did not, thus, reach the phase of considering the illegitimacy of refusing to admit the child in light of such a fundamental right. Still, as Alkema illustrated in his comment, the case had a potential for the application of this approach.

In the following section, the emphasis will be completely on contract law cases. It will be examined how the Dutch courts, in particular the *Hoge Raad*, deal with fundamental rights arguments in these types of cases and to what extent parties may contractually limit a fundamental right.

2.3.2 Contractual restrictions on fundamental rights

In Dutch contract law, there have so far not been many cases explicitly dealing with fundamental rights. Some of the most discussed ones, like in the case law of the German *Bundesverfassungsgericht*, deal with a contractual waiver of rights or with a restriction of fundamental rights because of a (post-)contractual duty.

¹⁶² Case note Alkema under NJ 1988, 891.

¹⁶³ Most importantly the revision of the *Grondwet* in 1983; TK 1975-1976, 13 872. See also section 1.1.3.

¹⁶⁴ Apart from the cases included in this section, see for instance also: HR 9 January 1987, NJ 1987, 928 (*Edamse bijstandsvrouw*); HR 5 June 1987, NJ 1988, 702 (*Goeree I*); HR 2 February 1990, NJ 1991, 289 (*Goeree II*); HR 15 April 1994, NJ 1994, 608 (*Valkenhors*); HR 6 January 1995, NJ 1995, 422 (*Parool*); HR 26 April 1996, NJ 1996, 728 (*Rasti Rostelli*).

¹⁶⁵ For example: Drion 1969; Boesjes 1973; De Graaf and De Haas 1984; Koekkoek 1985.

Again: the Mensendieck case

One of the pioneer cases of fundamental rights affecting Dutch private law, the *Mensendieck* case, already involved the question of the morality of a contractual waiver of a fundamental right. The contract that students signed with the Mensendieck Union stipulated that they would not teach or assist in teaching mensendieck exercises if the training programme was not successfully completed. For the student who brought the case to court, this meant that, since she had failed her theoretical exam and had not followed the remaining part of the course nor taken the final exam, she was prohibited from teaching mensendieck.

The question the courts had to answer was whether this partial¹⁶⁶ waiver of the freedom to teach was valid. As we saw in the previous section, the *Hoge Raad*'s assessment of the morality of the contract in the light of fundamental values was similar to the doctrine of *Wechselwirkung* adopted by the German courts. A difference with the later decisions of the *Bundesverfassungsgericht* in the *Handelsvertreter* and *Bürgerschaft* cases is, however, that the Dutch courts did not explicitly consider whether the student was in a 'weaker' bargaining position. They did not put their decisions in the ambit of a right to self-determination or of the need to redress imbalances of power in contractual relations. In that sense, the *Mensendieck* judgment appears to be less 'political' than its German counterparts.

The Kolkman/Cornelisse case

In the Netherlands, there have also been cases regarding the validity of non-competition clauses (*non-concurrentiebedingen*), meaning clauses that forbid an employee from working for a competitor of his former employer after the contract has ended for a certain period of time and in a certain area. These regularly consider questions similar to those dealt with in the German *Handelsvertreter* case.

Like in Germany, rules on non-competition clauses have been included in a Dutch provision of law, namely in Article 7:653 *BW*. Such legislation may be seen as a crystallisation of the balance between freedom of profession (Article 19(3) *Gw*) and freedom of contract, albeit still on an abstract level. Nevertheless, cases sometimes cannot be resolved on the basis of legislation alone and the courts then reach back to the fundamental right itself.

In a judgment of 1 July 1997, *Kolkman/Cornelisse*, the *Hoge Raad* dealt with the question of contractual limitation of the freedom of profession as well as the general personality right in so far as it included a 'right of professional development'.¹⁶⁷

The facts of the case were, in short, the following: Kolkman had an insurance office in Malden under the name 'Kolkman Assurantiën'. In August of 1991, he took on Cornelisse as an employee working outside the office (*buitendienstmedewerker*). Some time later, Kolkman decided to sell his firm for reasons concerning his health. On 20 July 1994, he sold the insurance office to Cornelisse, including all assets and liabilities as well as the company name. It was furthermore agreed that Kolkman would remain an employee of the company, as an advisor to Cornelisse. After the transfer of the company, however, problems arose in the relationship between both parties. Kolkman criticised Cornelisse's staff policy, unsuccessfully urged him to give up the use of the company name and even contacted his former clients in order to convince them to choose another agent instead of Cornelisse. Moreover, Kolkman began working once again as an

¹⁶⁶ 'Partial', since the waiver only concerned teaching mensendieck exercises. The contract thus did not prohibit mensendieck students from teaching other disciplines.

insurance agent under his own name. For this reason, his employment contract was terminated and Cornelisse brought the case to court.

In summary proceedings, Kolkman was prohibited from working as an insurance agent or advisor on insurances and from using the company name in the field of insurances. The *Hof* reinforced these prohibitions, while limiting the first one in the sense that it would only apply in a circular area with a radius of 25 km around the centre of Malden and for a period of five years from 1 January 1994 onwards. As Advocate-General Bloembergen later pointed out, the Court of Appeal appeared to base its decision on the contract between the parties, which was interpreted in the sense that Kolkman was not allowed to compete with the company he had transferred.¹⁶⁸ The *Hoge Raad* upheld this judgment.

In the present context, the *Hoge Raad's* considerations on the role of fundamental rights in this case were of particular importance. Kolkman had put forward that although it was possible to contractually limit the right to freely choose one's profession (Article 19(3) *Gw*¹⁶⁹) in conjunction with the general right to personality in so far as it included a 'right to professional development', a limitation could only be set in a written agreement that explicitly named this limitation. According to the Supreme Court, this proposition could not be followed, because it attributed fundamental rights with a further-reaching horizontal effect than was appropriate.

Kolkman had furthermore argued that contractual limitations on these fundamental rights could only go as far as was needed to protect the interests of the other contracting party. This argument, according to the Supreme Court, in this case could not lead to an overruling of the decision of the Court of Appeal, since the latter court had considered that the contractual limits set on Kolkman's freedom to work as an insurance agent were necessary for the protection of Cornelisse's contractual rights. Lastly, Kolkman had stated that the fundamental rights involved required stronger reasoning for the judgment than other decisions in summary proceedings. This argument failed as well, because the *Hoge Raad* did not recognise such a 'procedural effect' of the fundamental rights in question.

Summarising, the *Hoge Raad* recognised the possibility of contracting parties to limit the freedom of profession of one of them. Grapperhaus¹⁷⁰ has added that a correction to this agreement could be made on the basis of balancing both parties' interests. In this case, Cornelisse's interests in having the contract observed justified the contractual limitation of Kolkman's fundamental rights, which meant that the agreement could be upheld.

In the *Kolkman/Cornelisse* case, there was no explicit non-competition clause included in the transfer contract. Moreover, the case dealt with the transfer of a company by an independent businessman. The *BW* provisions on non-competition clauses did therefore not apply; they see to the protection of 'weaker' parties in labour law, that is a commercial agent or an employee, whose

¹⁶⁷ HR 1 July 1997, NJ 1997, 685. A general personality right was recognised in the landmark cases HR 15 April 1994, NJ 1994, 608 (*Valkenborst*) and HR 6 January 1995, NJ 1995, 422 (*Parool*).

¹⁶⁸ No. 2 of the Advocate-General's conclusion.

¹⁶⁹ Article 19(3) *Gw*: 'Het recht van iedere Nederlander op vrije keuze van arbeid wordt erkend, behoudens de beperkingen bij of krachtens de wet gesteld.' In English: '(3) The right of every Dutch national to a free choice of work shall be recognized, without prejudice to the restrictions laid down by or pursuant to act of parliament'; Besselink 2004, p. 19.

¹⁷⁰ Grapperhaus 2000, p. 64-65.

means of existence are at stake.¹⁷¹ Other cases have shed some light on the role of the freedom of profession in regard to the non-competition clauses regulated by Articles 7:443 and 7:653 *BW*. They sometimes make an explicit reference to the freedom to choose one's profession,¹⁷² that of course forms the basis of these provisions.¹⁷³

Even though in the case of *Kolleman/Cornelisse* there was no contractual non-competition clause, Loesberg observed that the injunction imposed by the judge in summary proceedings could be considered as such.¹⁷⁴ Loesberg agreed with the *Hoge Raad* that a partial waiver of a fundamental right did not necessarily have to be written, but noted that the court's reasoning in this judgment was not very clear. What did the court mean when it said that a requirement of a written non-competition clause 'would attribute fundamental rights with a further-reaching horizontal effect than was appropriate'? According to Loesberg, a possible reading might be that in case of such a further-reaching horizontal effect, the requirement of a written clause should be seen as the private law equivalent of the public law provision that restrictions should be made by or pursuant to an act of parliament (Article 19(3) *Gw*).¹⁷⁵ In other words, giving further effect to fundamental rights would imply that the non-competition clause had to be in writing, just like a public authority can only limit freedom of profession by or pursuant to a law.

Although this reading of the judgment cannot be excluded, I doubt whether the *Hoge Raad* implicated the analogy of the limitation clause of Article 19(3) *Gw*. It did not draw a parallel between State-citizen and citizen-citizen relations, but referred to the intensity effects that fundamental rights should have in contractual settings. Only in a theory of direct effect would this bring into play the constitutional limitations to the fundamental right.¹⁷⁶

Again, like in the *Mensendieck* case, the courts did not elaborate on the party's autonomy. This is a pity, since the appeal to the general personality right, especially insofar as it encompassed a 'right of professional development', seemed to give some room for this. That is, personal development seems clearly related to the possibilities of self-determination, also in contractual relations. In this case, the issue of self-determination would have been of particular interest, since the parties could be said to have equal bargaining power. The court could have clarified whether in such relations it was possible for a certain *Fremdbestimmung* to occur.

¹⁷¹ HR 1 July 1997, *NJ* 1997, 685, no. 3.8. Compare the German *Handelsvertreter* case; see section 2.2.2 above. See also Smits 2003, p. 104-105.

¹⁷² Some recent examples include: *Ktr. Amsterdam* 3 August 2001, *JAR* 2001, 202; *Ktr. Nijmegen* 17 May 2002, *JAR* 2002, 178; *Rb. 's-Gravenhage* 4 December 2002, *JAR* 2003, 9; *HR* 4 April 2003, *JAR* 2003, 107; *Ktr. Rotterdam (Voorzieningenrechter)* 19 September 2003, *JAR* 2003, 235; *Ktr. Rotterdam (Voorzieningenrechter)* 25 February 2004, *JAR* 2004, 199; *Hof 's-Hertogenbosch* 8 June 2004, *JAR* 2004, 236.

¹⁷³ On the expression of this fundamental right in the newly proposed Article 7:653 *BW*, see my article in *Ars Aequi*: Mak 2003b. Please note that in the *Gouden Gids* case discussed in this article, concerning the allegedly illicit competition by a former executive officer of the company, the Court of Appeal of The Hague has reversed the decision of the judge at first instance by a judgment of 9 May 2003, *JAR* 2003, 140. The company, the publisher of the Dutch version of the 'Yellow Pages', in this case had opted for a contractual confidentiality clause instead of a non-competition clause. The Court considered that a confidentiality clause usually only becomes of relevance after it has been violated, which in this case had not happened and, according to the Court, was not likely to happen. From the sole fact that the company's interests might be better served by prohibiting the former employee from accepting a position with its competitor it did not follow that the employee had acted illicitly by doing so (see no. 5.2 of the Court of Appeal's decision).

¹⁷⁴ See Loesberg's comment, published in *JAR* 1997, 109.

¹⁷⁵ Loesberg's comment in *JAR* 1997, 109, no. 2.4.

¹⁷⁶ Compare section 2.1 above.

The hiv-test cases

In the field of contracts concerning medical treatment, self-determination is also an important issue. A recent contract law case deals with the patient's right to physical integrity in relation to a request for an hiv test on behalf of the doctor.¹⁷⁷ For a better understanding of the case, a previous judgment of the *Hoge Raad* will first be considered, which concerned the request for an hiv test in a tort case. Though resulting from different chains of events, both cases led up to the question whether this fundamental right stood in the way of obliging a person to undergo an hiv test in order to limit the damage and uncertainty of another person.

The fundamental right to respect for the physical integrity of the person has been laid down in Article 11 of the Dutch Constitution and provides that 'everyone has a right to inviolability of his person, without prejudice to restrictions laid down by or pursuant to Act of Parliament'.¹⁷⁸ In particular the role of the limitation clause included in Article 11 *Gw* was of importance.

The first hiv-test case dates from 18 June 1993.¹⁷⁹ The question the courts had to answer was whether a rapist could be required to have his blood tested against his will, in order to determine if he could have infected his victim with the hiv virus. The *Hoge Raad* found for the victim, considering that the rules on tortious liability provided the perpetrator with a duty to limit the consequences of his act as far as possible or compensate for these consequences in an appropriate manner. The victim's uncertainty regarding infection with the hiv virus was a consequence of the tortious act, the rape, and she had a weighty interest in a quick ending of this uncertainty, since it deeply affected her personal life. While the perpetrator refused to have his blood tested, the victim's only possibility to obtain certainty was to undergo a new blood test herself, to which she had strong emotional objections. On these grounds, the victim had a right to the perpetrator's co-operation as regards a blood test. The latter could not successfully invoke his fundamental right of physical integrity (Article 11 *Gw*), since this right could be limited by or pursuant to an Act of Parliament.¹⁸⁰ Like in the German *Lüth* case, according to the court a limit to a fundamental right could be based on a general clause of private law, in this case the provision on tortious liability of Article 1401 old *BW* (Article 6:162 of the current *BW*, which came into force in 1992). The victim's interest in the perpetrator having his blood tested was deemed to provide a sufficient justification for a limitation of the latter's fundamental right to physical integrity. In addition, the *Hoge Raad* considered that this was the case irrespective of the question whether the victim could also justly invoke a fundamental right. The Supreme Court did not therefore have to elaborate on the question raised by the lower courts, whether the uncertainty about infection should be understood as a continuing infringement – after the rape – of the victim's person in the sense of Article 11 *Gw*.

The provision on *tort liability* was thus considered to put a limit on the fundamental right of physical integrity safeguarded by the Constitution. In the subsequent medical treatment case, the *Hoge Raad* considered that the limitation clause of Article 11 *Gw* might also be interpreted in the light of the principle of *good faith in contract law*. A contractual relationship, such as the one between doctor and patient, may require certain duties of care from both parties, which may even require a party to accept a restriction of his fundamental right.

¹⁷⁷ HR 12 December 2003, NJ 2004, 117.

¹⁷⁸ Translation taken from www.oefre.unibe.ch/law/icl/nl00000_.html (consulted 2 June 2004).

¹⁷⁹ HR 18 June 1993, NJ 1994, 347 (*Aids-test* or *hiv-test*).

In this second hiv-test case, also known as the dentist case,¹⁸¹ the *Hoge Raad* considered the implications of the first hiv-test judgment in contract law. The facts were as follows: An assistant dental surgeon removed a wisdom tooth of a patient who at the time was in prison. During surgery, the surgeon cut his own finger and his blood came into contact with the patient's blood. Since the patient belonged to a population group with a heightened possibility of hiv infection, the dentist requested the patient to have his blood tested for the virus. Considering the incubation period of the virus, the dentist himself would have had to wait for at least six months to have a reliable test done of his own blood. If the patient did not cooperate in a blood test, the dentist would have to take prophylactic medicines for a period of six weeks in order to prevent Aids. Since these medicines had serious side-effects, the doctor had an interest in avoiding the risks related to taking them. The patient, however, refused to have the blood test, on the ground that it would infringe his fundamental right of physical integrity (Article 11 *Gw*) and his fundamental right to privacy (Article 10 *Gw*).

In summary proceedings, the dentist's claim was allowed. The patient then allowed his blood to be taken and tested for the hiv virus and the results of the test were given to the dentist as well as to the patient's counsel. On matters of principle, however, the patient appealed against the first judgment, again invoking his fundamental and constitutionally protected interests. He argued that the dental surgeon had not sufficiently informed him about the risks of cutting himself during surgery and about the ensuing duty of the patient to give his blood for a test. Moreover, he stated that the fact that blood-on-blood contact had taken place could be completely attributed to the dentist.

The *Hof Amsterdam*¹⁸² upheld the original judgment. It considered the fear of the doctor being infected with the hiv virus was based on a specific reason, because the patient belonged to a group of the population with a heightened possibility of infection. In response to the latter's appeal to his fundamental rights, the court observed that these rights could be limited on the basis of Article 6:162 *BW* (tort; see the first hiv-test case) or, in this case, the treatment contract between the medical practitioner and patient. The parties' interrelation, established by the contract, implied that, under circumstances related to or ensuing from the performance of the contract, they had to observe a standard of care that would not apply to a random third party. In this case, the duty of care encompassed a post-contractual duty of the patient to do what was required, within reasonable margins, in order to limit the damage the dentist had suffered during the treatment. Since the risk of cutting oneself was inherent to the treatment contract, the fact that the dentist's own actions had led to a realisation of the risk did not alter this. Balancing both parties' interests in this case, the court came to the conclusion that the dentist's interest in knowing whether he could have been infected and needed to continue taking prophylactic medication outweighed the patient's interests. The infringement of the latter's fundamental rights was considered to be relatively small.

Procurer-General¹⁸³ Hartkamp advised the *Hoge Raad* to refuse the appeal against the *Hof's* decision. He considered that it had been acknowledged in a line of cases that Article 6:162 *BW* could set limits on fundamental rights and their realisation. This meant that 'a rule of unwritten law pertaining to proper social conduct'¹⁸⁴ might serve as a justification for limiting a fundamental right. The Procurer-General followed the *Hof's* conclusion that a limitation could also ensue from the contents of an agreement between private parties, interpreted in the light of reasonableness and fairness, in case the

¹⁸⁰ Article 11 *Gw*: 'Ieder heeft, behoudens bij of krachtens de wet te stellen beperkingen, recht op onaantastbaarheid van zijn lichaam.' In English: 'Everyone shall have the right to inviolability of his physical body, without prejudice to restrictions laid down by or pursuant to act of parliament'; Besselink 2004, p. 18.

¹⁸¹ HR 12 December 2003, NJ 2004, 117 (*hiv-test II; dentist*).

¹⁸² *Hof Amsterdam* 18 April 2002, TrGR 2003, p. 110-121.

¹⁸³ In procedures before the Dutch Supreme Court, the *Hoge Raad*, an Advocate-General presents an advice (*conclusie*) to the court, which summarises the state of the art in case law and legal literature regarding the legal questions presented in the case at hand and gives an opinion on the outcome the case should have. The Procurer-General is the head of the department of Advocates-General (*parket*). The *Hoge Raad* is not bound by the advice given by the Procurer-General and Advocates-General.

¹⁸⁴ Article 6:162 *BW*; see section 1.2.2.c.

fundamental right had a relevant connection with the contract. In its balancing of the facts of the present case, the court had, according to Hartkamp, not disregarded the patient's reliance on his fundamental rights, but it had found that the minor infringement of these rights was outweighed by the weighty interests of the dentist. The *Hof's* judgment of the fact that the patient was not in any way to blame for the occurrence of the blood-on-blood contact, unlike the rapist in the first hiv-test case, was considered just, since the relationship between the parties was of a different nature than in that case. In the first hiv-test case, the serious tortious act of the perpetrator was the cause of a possible infection with the hiv virus, whereas in the present case, the possibility of infection could be traced to the treatment contract between the patient and the dentist. On the basis of reasonableness and fairness, a duty to limit the damage which the dentist had suffered during the performance of the contract could be derived from the agreement. Hartkamp thus concluded that the court had applied a just standard in balancing the parties' interests.

The *Hoge Raad* followed the Procurer-General's advice and rejected the appeal. It followed the *Hof's* line of reasoning, deriving a post-contractual duty of care from the treatment agreement between the medical practitioner and patient and confirming the balance struck between the interests involved.

Vermaas and Dute commented on several aspects of the *Hof's* judgment.¹⁸⁵ With regard to the considerations concerning the patient's reliance on fundamental rights, Vermaas gave a fairly positive assessment of the judgment and its possible consequences. The criteria for accepting a duty of the patient to co-operate in order to alleviate the dentist's distress provided room for a careful balance of interests, taking into account the supplementing and limiting effects of reasonableness and fairness (*redelijkheid en billijkheid*). A duty to co-operate in any case could not be imposed any further than reasonableness and fairness allow. In this context, according to Vermaas, it was a desirable development that certain interests regarding the dentist's health could justify a breach of the patient's fundamental right.¹⁸⁶

Dute, on the other hand, criticised the framework which the Court of Appeal established in order to judge the case. This critique in particular concerned the formulation of a possibility to limit fundamental rights on the basis of a contract, the contents of which were established in part by 'the rules which, according to the nature of the contract, resulted from the requirements of reasonableness and fairness'. In Dute's opinion, the *Hof* thus stipulated a new, general limitation clause, which was not provided by the *Grondwet*.¹⁸⁷ From the perspective of the direct application of fundamental rights – defined in a strong sense¹⁸⁸ – this was problematic, because the constitutional structure in principle started from the idea of a closed system of special limitation clauses.

Furthermore, Dute argued that limitation on the basis of a contract was not necessary, since the norm of 'proper social conduct' (Article 6:162 *BW*) provided the same possibilities for regulating the realisation of fundamental rights. The different approach the *Hof* appeared to choose, in which reasonableness and fairness imposed further-reaching duties than proper social conduct, raised considerable objections in relation to medical care. Whether a treatment contract was concluded often depended on coincidental factors. Moreover, the idea of freedom of contract

¹⁸⁵ *Hof Amsterdam* 18 April 2002, *TrGR* 2003, p. 110-121.

¹⁸⁶ *TrGR* 2003, p. 117.

¹⁸⁷ *TrGR* 2003, p. 118.

¹⁸⁸ See section 2.1.4.

and private autonomy that underlay the court's reasoning hardly applied in health care; a patient had little choice when an operation proved to be a medical necessity.

On the fact that the patient was not to blame for the accident, Dute observed that the patient's conduct could only be deemed tortious in so far as it concerned the refusal of the blood test.¹⁸⁹ Therefore, the question arose whether the patient had had sufficient knowledge and could have foreseen that he would have to allow the infringement of his physical integrity. The court did not seem to give much importance to this issue, not even finding it necessary that a patient was informed beforehand of the possibility of an hiv test in the case of an accident resulting in blood having been spilt. All in all, in Dute's opinion, the judgment thus did not provide many starting points for defining the patient's duties to co-operate to certain tests on behalf of the medical practitioner.

In his comment on the *Hoge Raad's* decision, J.S. Kortmann also observed that the court mainly seemed to base the patient's duty of care on the special contractual relationship between medical practitioner and patient.¹⁹⁰ The *Hof* had considered that the patient, by refusing to co-operate, had failed to observe his duty of care following from the treatment contract, or in any case had acted tortiously towards the dentist. The *Hoge Raad* upheld this decision. However, it remained unclear whether the (post-)contractual relation was only one of the factors that had to be considered in the balancing process, or an actual condition for the creation of a duty to co-operate in the blood test,¹⁹¹ like Dute distilled from the *Hof's* decision.¹⁹² Such a condition would imply that (random) third parties, for instance another patient or a person involved in a traffic accident, could not compel a person to undergo an hiv test, because they had no contractual relationship with this person. The *Hoge Raad*, unfortunately, did not elaborate on this question. Still, as was also noted by Kortmann,¹⁹³ the *Raad's* timidity in expressing more general views on the duty to co-operate in an hiv-test may be explained by the sensitivity of the matter: establishing liability in this case constituted a limitation of a constitutionally protected interest.

Cherednychenko criticised the approach taken by the *Hof*, and affirmed by the *Hoge Raad*, which in her eyes constituted an unnecessary *direct* application of fundamental rights.¹⁹⁴ She argued that the courts could have reached a similar outcome on the basis of a purely private law approach, or maybe a balance of interests on the basis of private law norms interpreted in the light of fundamental rights. This would have given a clearer picture of what actually happens when a fundamental right is invoked in a relation between private parties. Moreover, the direct approach had several disadvantages, for instances regarding the interpretation of the limitation clauses formulated in the Constitution.¹⁹⁵

In the classification given in section 2.1.4, I would characterise the dentist case as an example of a 'strong' indirect effect rather than a 'strong' direct effect. The *Hof* balanced the dentist's interests against the interests of the patient, insofar as they were protected by the

¹⁸⁹ *TvGR* 2003, p. 120.

¹⁹⁰ Kortmann 2004, p. 135-137.

¹⁹¹ Kortmann 2004, p. 136.

¹⁹² *TvGR* 2003, p. 118.

¹⁹³ Kortmann 2004, p. 137.

¹⁹⁴ Cherednychenko 2004b, p. 192. I will come back to this issue in section 3.1.2.

¹⁹⁵ Cherednychenko 2004b, p. 191-192.

Constitution, rather than determining a given limit (in law) to an acknowledged infringement of the patient's physical integrity.

Whether there was a direct application of Articles 10 and 11 *Gw* or not, in my opinion the most important aspect of the *Hof's* approach was its assessment of the interaction between these fundamental rights and the general clauses of private law – tort and 'reasonableness and fairness' respectively. Its interpretation of the fundamental rights' limitation clauses in the light of these general clauses and, at the same time, the reading of these clauses against the constitutional background, once again constituted a *Wechselwirkung* of fundamental rights and private law norms. I would agree with Cherednychenko that the outcome of the case might have been the same if it had been resolved on the basis of a 'classical' balance of interests, but still the *Wechselwirkung* approach seems fruitful for clarifying 'what actually happens'.

I would read the *Hof's* decision, and the *Hoge Raad's* affirmation, as considering the contractual relationship between medical practitioner and patient as a strong indication for imposing a duty to co-operate in limiting the dentist's damage, thus limiting the patient's fundamental right. Although the courts did not explicitly state whether this meant that third parties could claim a similar duty, their judgments do not seem to exclude this possibility. The *Hof* expressly considered that liability in tort could justify a limitation to the patient's fundamental rights:

'In answering the question whether Y has a right to X's co-operation in testing his blood, the Court of Appeal presumes that X's fundamental right to privacy and physical integrity, protected by Articles 10 and 11 *Gw*, finds its limits in the restrictions set by or according to the law. Between citizens, such a limitation can in principle be based on Article 6:162 *BW*, also on the basis of the standards of proper social conduct included in this provision. If, as in the present case, these citizens have concluded a contract which has a relevant relation to the motive for the request for co-operation, such a limitation [of the right to privacy and physical integrity] may already be derived from the contents of the contract. The contents of the contract shall be determined in the light of the requirements of reasonableness and fairness that follow from the nature of the contract.'¹⁹⁶

A limitation to Articles 10 and 11 *Gw* could thus in principle be based on Article 6:162 *BW* (general provision on tort) and, in case there was a contract between the parties, 'such a limitation could *already* follow from the contents of the contract' (emphasis added). The use of the word 'already' seems to indicate that, according to the court, if there is a contractual relationship, the contract is the first thing to look at in order to determine whether a limitation on fundamental rights can be made. If the contract does not lead to such a limitation, it might be possible to find a

¹⁹⁶ *Hof Amsterdam* 18 April 2002, *TvGR* 2003, p. 112, no. 4.8: 'Bij beantwoording van de vraag of Y. recht heeft op medewerking van X. in de vorm van een door deze te ondergaan bloedonderzoek, gaat het hof ervan uit dat X.'s aan art. 10 en 11 *GW* ontleende grondrecht op privacy en de onaantastbaarheid van zijn lichaam zijn grenzen vindt in de bij of krachtens de wet te stellen beperkingen. Tussen burgers onderling kan een zodanige beperking in beginsel worden gegrond op art. 6:162 *BW*, zulks mede aan de hand van de in dat artikel besloten liggende normen die krachtens hetgeen in het maatschappelijk verkeer jegens elkaar betaamt in acht genomen moeten worden. Wanneer, zoals in het onderhavige geval, tussen deze burgers een overeenkomst is gesloten die in relevant verband staat met de reden die aan het verzoek tot medewerking ten grondslag ligt, kan een dergelijke beperking reeds voortvloeien uit de inhoud van de overeenkomst. De inhoud wordt mede vastgesteld met behulp van hetgeen naar de aard van de overeenkomst uit de redelijkheid en billijkheid voortvloeit.'

basis in tortious liability. This line of reasoning builds on the *Hoge Raad*'s decision in the earlier *hiv-test* case, in which it established that liability in tort may limit the realisation of a fundamental right.¹⁹⁷ If a limitation of a fundamental right may derive from a tortious act against 'an arbitrary third party', then it should certainly be possible to accept such a limitation on the basis of the norms of social conduct that govern a contractual relationship.¹⁹⁸

In the context of this case, I would agree with Dute and Kortmann that the courts thus seem to have established that 'reasonableness and fairness' entail further-reaching duties than the norm of 'proper social conduct' and therefore leave less room for parties to give full effect to their fundamental rights, like in this case the patient who saw his physical integrity infringed. I would also agree with Kortmann that the courts may, possibly unintentionally, have given the impression that 'an arbitrary third party' could not claim liability in the case of a person's refusal to co-operate in agreeing to an hiv test, because there was no contract between them.¹⁹⁹

On the other hand, however, the court has not stated its opinion on the issue whether tortious liability for the refusal to submit to the test required a contractual relation between the parties involved. Its judgment could therefore just as well be interpreted as opening the door to third parties to claim on the basis of negligence, since it assumed liability in a case in which the person subjected to the hiv test had *not* acted in a wrongful way – in this sense the case also differs from the 1993 case, in which a rapist was obliged to co-operate to an hiv test. In the present case, the wrongfulness of the patient's conduct only came into being at a later moment, when he refused to co-operate for the purpose of the blood test.

Finally, it seems that the courts' considerations relate to more general questions of direct and indirect effects of fundamental rights, on which both Cherednychenko and Dute commented. Furthermore, the political stakes in these types of cases may be investigated, in order to compare them to the German cases that have been described before. Since these aspects concern more general issues of fundamental rights and contract relations, they will be further looked into in Part II.

Preliminary conclusion

In the Netherlands, fundamental rights regularly appear in contract law cases. Strikingly, one of the pioneer cases on 'horizontal effects' occurred in the field of contract law: the *Mensendieck* case established the importance of fundamental rights for the 'filling in' of the general clause of 'good morals'. This application of fundamental rights was further developed in later case law, an example of which is the *Kolkman/Cornelisse* case, in which the reasonableness of a (post-)contractual duty not to compete with one's contracting partner was determined in the light of the right to freely choose one's profession. The recent dentist case, moreover, has raised the question whether a difference should be made between limitations of fundamental rights on the basis of tort or contract law.

¹⁹⁷ HR 18 June 1993, NJ 1994, 347 (*Aids-test* or *hiv-test*).

¹⁹⁸ Compare Procurer-General Hartkamp in his conclusion in this case, under no. 9: 'Immers, als de zorgvuldigheid die moet worden nageleefd in een verhouding tot een willekeurige derde al in de weg kan staan aan (de uitoefening van) een grondrecht, dan zal dit zeker ook het geval zijn met de ongeschreven gedragsnormen die gelden in de relatie tot een contractuele wederpartij.'

¹⁹⁹ Kortmann 2004, p. 136-137, referring to the opinion held by several Dutch authors that tortious liability for a failure to act requires a special relationship between victim and tortfeasor.

The selected cases thus show similarities with their German counterparts, insofar as the general clauses of private law have proved to be important ‘inroads’ or ‘breaches’ for fundamental rights. Moreover, the interaction between the general clauses and the fundamental rights or values recalls the doctrine of *Wechselwirkung*, which helps to identify what is at stake in the cases: on the one hand, the fundamental right that may limit the parties’ freedom of contract and, on the other, the conceptions of ‘tort’, ‘good morals’ or ‘good faith’ in the light of the fundamental right involved. On the basis of these, the Dutch courts usually strike a balance between the interests of the parties.

This balancing of interests, however, appears to differ from the one made by the German *Bundesverfassungsgericht* in, for instance, the *Handelsvertreter* and *Bürgerschaft* cases. Unlike the German Constitutional Court, the Dutch Supreme Court, the *Hoge Raad*, hardly ever explicitly considers the autonomy or self-determination of the contracting parties. Neither does it appear to have given as much importance to the ‘protection of the weaker party’ as an official objective of adjudication.²⁰⁰ In this sense, the Dutch cases may be deemed less ‘politically charged’ than the German ones.

A reason for this difference may be that the *Bundesverfassungsgericht* has a different role in the legal system than the Dutch *Hoge Raad* has, which may be more easily compared to the German *Bundesgerichtshof*. The *Bundesverfassungsgericht*, as a Constitutional Court, reviews the judgments of the courts in civil cases concerning their compliance with constitutional rights (Article 93(1)(4a) GG). The *Hoge Raad* and the *Bundesgerichtshof*, on the other hand, decide on the questions of law arising from specific cases, with an eye on the guarantee of legal certainty and uniform interpretation of the law (see respectively § 543(2) *Gerichtsverfassungsgesetz* and Article 79 *Wet op de rechterlijke organisatie*, Article 419 *Wetboek van Burgerlijke Rechtsvordering*). Almost by definition, the *Bundesverfassungsgericht* will thus probably be more easily inclined to address values such as self-determination and autonomy or weaker-party protection when considering the task of the courts in the light of the *Grundgesetz*.

The Dutch judges, moreover, in general seem to be less open when it comes to expressing their views on fundamental rights in contract law than their German colleagues, as for instance became clear in the discussion on the dentist case. Still, this does not mean that political stakes cannot also be identified in Dutch case law, since – at their core – the cases on fundamental rights in contract law touch upon the same questions as the German cases. So far, however, these questions have not been discussed in as much detail in Dutch cases or in legal literature.²⁰¹

2.4 Italy

For a better understanding of the merits of the theory of interaction between fundamental rights and norms of private law, it might be helpful to look somewhat further across the borders of Germany and the Netherlands. While the fact that Dutch contract law has experienced influences

²⁰⁰ See, however, Hondius 1999, who argues that the ‘principle of protection of the weaker party’ has arisen as a paradigm of contract law equal to the principle of freedom of contract.

²⁰¹ For the more recent debate on the politics of a European Civil Code, see however Hesselink 2002b and 2004b.

of its neighbouring counterpart²⁰² to some extent accounts for the emergence of the *Wechselwirkung* doctrine in Dutch case law, other legal systems might have developed different methods for dealing with fundamental rights in contract cases. Or they might have developed similar techniques in different contexts. Seeing the interaction of fundamental rights and private law in the light of other legal backgrounds could thus further clarify the relationship between these two fields of law also for Germany and the Netherlands.

In this section, some comparative notes will be made on Italian law, whereas English law will be looked at in section 2.5. The theory of ‘interaction of fundamental rights and norms of contract law’ will thus be looked at from a Romanistic and a Common Law perspective respectively, if we refer to the family names under which Zweigert and Kötz have classified the various legal systems.²⁰³

Although Italy, in the classification made by Zweigert and Kötz,²⁰⁴ is part of a different legal family (Romanistic tradition) than Germany and the Netherlands (Germanic tradition), the fact that all three belong to the civil law tradition of the European continent indicates several common features. Italian private law, like its German and Dutch counterparts, has for the greater part been written down in a civil code, namely the *Codice civile* of 1942.²⁰⁵ Given the tendency to systemise and use abstract legal rules and general clauses, ‘inroads’ for fundamental rights in private law would therefore in theory be available. Moreover, it is interesting to note that Italian constitutional law on the point of judicial review is closer to German law than to its French ‘parent system’.²⁰⁶

In this section, several issues regarding the effects of constitutional fundamental rights in Italian contract law will be taken up in order to see whether, given these basic similarities, a theory similar to the German *Wechselwirkung* might have developed. First, the role of Article 2 of the Italian Constitution as a facilitator for giving effect to fundamental values in disputes between private parties will be briefly introduced. Subsequently, a concise overview will be given of the main cases concerning the effects of fundamental rights in private law, in particular contract law. On the basis of this survey it may then be possible to define the similarities and differences in respect to the Germanic tradition of the Dutch and German legal systems.

2.4.1 *A fundamental right as a general clause? The case of Article 2 Cost.*

Article 2 of the *Costituzione* of 1948 is one of the central points around which the discourse on the effects of fundamental rights in Italian private law has evolved.²⁰⁷ It stipulates that

²⁰² The current Dutch civil code, the *Burgerlijk Wetboek*, of which the parts on patrimonial law came into force in 1992, follows the model of the German *BGB*, distinguishing several levels of abstraction and frequently using general clauses. It should be observed, however, that the *BW* also still contains elements of the romanistic tradition – in fact, the old civil code, of 1838, was based on the French *Code Civil*. Moreover, similarities with common law can be found on several points. See Zweigert & Kötz 1998, p. 103: ‘One can only conclude that it [the Dutch civil code; CM] has hit upon a style of its own, founded on the European *ius commune*.’

²⁰³ Zweigert & Kötz 1998, p. 73.

²⁰⁴ Zweigert & Kötz 1998, p. 63 ff.

²⁰⁵ The drafters of the code also took inspiration from German dogmatic constructions; see Comporti 2001, p. 23.

²⁰⁶ Both the Italian and the German Constitutional Courts have the authority to review the constitutionality of laws, whereas in France there is only the possibility of a preventive review by the *Conseil constitutionnel* before the law in question enters into force. Compare Zweigert & Kötz 1998, p. 65.

²⁰⁷ Barbera 1975, p. 65-66; Comandé 2004, p. 37.

‘The Republic recognises and guarantees the inviolable rights of man, as an individual, and in the social groups where he expresses his personality, and demands the fulfilment of the unalterable duties of political, economic and social solidarity.’²⁰⁸

As said earlier,²⁰⁹ this provision is sometimes understood as an open norm, which creates a certain space for the recognition of fundamental, or ‘inviolable’ rights that have not been expressly codified in the *Costituzione*.²¹⁰ In case law, reference has been made to this principle of solidarity for the purpose of establishing, for instance, a ‘fundamental right to housing’.²¹¹ Allowing this right to prevail over the opposing right of property on the house meant that fundamental rights affected the relation between the private parties involved, that is the landlord and the person formerly living together with the tenant of the house. In other cases, reference has been made to the Article 2 *Cost.* to establish a right of privacy.²¹²

Moreover, the principle of solidarity has regularly been related to general clauses of private law, such as ‘good faith’.²¹³ On various occasions this *combinato disposto* or ‘joint reading’ of provisions of the civil code with constitutional rights has played a central role in the changing of rules of private law by the Italian courts,²¹⁴ some of which will now be briefly looked into.

2.4.2 *Effects of fundamental rights in Italian private law cases*

The *principi fondamentali* and ‘rights and duties of the citizens’ that have been codified in the Italian Constitution have affected judicial reasoning in tort cases as well as contract law adjudication. Effects of fundamental rights in (employment) contract cases go back to the late 1940s, whereas effects in tort cases concerning personality rights date back to the 1960s.²¹⁵ The manner in which the impact of fundamental rights has taken shape in recent case law may be illustrated on the basis of the examples of non-pecuniary damages in tort law and the application of ‘good faith’ in contract law.

²⁰⁸ On the place of Article 2 in the Italian Constitution, see section 1.1.4. On its interpretation, see also section 1.1.1.

²⁰⁹ Section 1.1.1.

²¹⁰ Busnelli 1991a, p. 253; Navarretta 2004, p. 22-24; Chiarella 2004, p. 51-55.

²¹¹ *Corte cost.* 7 April 1988, n. 404, *Foro it.* 1988, I, 2515. The judgment regarded the constitutionality of a provision of law that did not foresee succession to a tenancy contract by a spouse after the factual separation of the couple; by a spouse after the death of the other spouse in the case of a non-registered, religious marriage; by a cohabitant, after the death of the partner with whom he or she lived together; or by a cohabitant after separation. The Court referred to its earlier decision of 25 February 1988, n. 217, *Giur. cost.* 1988, 833, in which it already recognised the ‘right to housing’ as a fundamental social right, which should be guaranteed by the State to the highest possible number of citizens. In that decision, however, the right to housing was not linked to the principle of solidarity expressed by Article 2. Note that in the decision of 7 April 1988 reference was also made to the human right to housing laid down in Article 25 of the Universal Declaration of Human Rights of the United Nations.

²¹² *Corte cost.* 12 April 1973, n. 38, *Giur. cost.* 1973, 354, in which the Court considered: ‘Non contrastano con le norme costituzionali ed anzi mirano a tutelare e a realizzare i fini dell’art. 2 affermati anche negli artt. 3, secondo comma, e 13, primo comma, che riconoscono e garantiscono i diritti inviolabili dell’uomo, fra i quali rientra quello del proprio decoro, del proprio onore, della propria rispettabilità, riservatezza, intimità e reputazione, sanciti espressamente negli artt. 8 e 10 della Convenzione europea sui diritti dell’uomo, gli artt. 10 del codice civile, 96 e 97 della legge 22 aprile 1941, n. 633, i quali del resto, come ha affermato la Corte nella richiamata sentenza n. 122 del 1970, non attengono alla materia del sequestro preventivo.’

²¹³ See, for instance, the cases discussed in the next subsection.

²¹⁴ Morelli 1996, p. 539.

²¹⁵ For an overview, see Chiarella 2004.

Tort law: 'new' non-pecuniary damage

In recent years, the application of Article 2 *Cost.* in personal injury cases has brought about a 'revolution' with regard to the recognition of non-pecuniary damage.²¹⁶ The *Corte di Cassazione* decided two cases concerning claims for compensation in damages by the relatives of people who had suffered serious physical harm, in which it considerably extended the possibilities for these relatives to obtain non-pecuniary damages.²¹⁷

Traditionally, the general tort provision of Article 2043 of the *Codice civile*²¹⁸ was interpreted as only allowing compensation for economic loss. Article 2059 *c.c.*,²¹⁹ which deals with non-pecuniary damage, was considered to merely cover cases specifically foreseen by statute, most notably those in which the wrongful act also constituted a criminal act in the sense of Article 185 of the criminal code. Consequently, in many cases neither of the two provisions gave the possibility to recover compensation for personal injury: if the victim did not suffer economic loss as a consequence of the injury and if there was no specific statutory cause of action for non-economic loss, damages would not be awarded.

With reference to Article 32 of the *Costituzione*, which protects the right to health, the Constitutional Court filled in the gap left by Article 2043 *c.c.* in a case concerning personal injury suffered as a consequence of a traffic incident.²²⁰ It held that a private person could claim damages from another private person for the compensation of a so-called '*danno biologico*', meaning the injury to the psycho-physical integrity of the person. Thus, it established that an infringement of the right to health always qualifies for compensation in the form of pecuniary damages, also in relationships between private parties.²²¹ The *Corte di Cassazione* implemented this judgment of the *Corte costituzionale* in its case law, though without giving up its traditional restrictive interpretation of Article 2059 *c.c.*: it handled claims for damages under Article 2043 *c.c.*

In its decisions of 31 May 2003, nevertheless, the *Corte di Cassazione* went a step further in awarding damages for non-pecuniary loss. It gave up the restrictive interpretation of Article 2059 *c.c.* The Court considered that the emotional distress suffered by the relatives of tort victims could be compensated on the basis of this civil code provision, even if the wrongful conduct that lay at the heart of the damage did not constitute a criminal act nor was covered by another specific statutory basis for non-pecuniary damage. It based this conclusion on the 'constitutional reading' of Article 2059 *c.c.* in conjunction with Article 2 *Cost.*:

'In the current state of the legal order, in which the Constitution – Article 2 of which recognises and guarantees the inviolable rights of man – assumes a prominent position, non-pecuniary damage should be

²¹⁶ Navarretta 2004, p. 5; Ponzanelli 2004; Comandé 2004, p. 31 ff., with further references.

²¹⁷ *Cass. civ.* 31 May 2003, n. 8827 and 8828, *Foro it.* 2003, I, 2273.

²¹⁸ Article 2043 *c.c.* provides that '[a]ny fraudulent, malicious or negligent act that causes an unjustified injury to another obliges the person who has committed the act to pay damages'. See also section 1.2.2.c.

²¹⁹ Article 2059 *c.c.*: 'Non-pecuniary damages shall be awarded in cases provided by law.' The original text says: 'Il danno non patrimoniale deve essere risarcito solo nei casi determinati dalla legge.' For a historical overview of the interpretation of this provision, see Bonetta, Fanelli, Plebani & Ponzanelli 2004.

²²⁰ *Corte cost.* 14 July 1986, n. 184.

²²¹ Compare Chiarella 2004, p. 70.

considered a broad category, which comprises all cases concerning the violation of a value inherent to the person [in this case: the psycho-physical integrity of relatives; CM].²²²

This judgment was confirmed by the *Corte costituzionale*, which was presented with the question of the constitutionality of Article 2059 *c.c.* in cases concerning the claim for compensation of non-pecuniary damage by the close relatives of people who had died in a traffic accident.²²³ The Court, explicitly referring to the aforementioned judgments of the *Corte di Cassazione*, affirmed that, according to the constitutionally oriented interpretation of Article 2059, this provision covered temporary emotional distress, as well as the infringement of the constitutionally protected psychological and physical integrity of the person (Article 32 *Cost.*), and the harm to (other) constitutionally guaranteed interests of the person.²²⁴

These cases show a remarkable effect of fundamental rights on the development of tort law. The courts have recognised the liability in tort for non-pecuniary damage resulting from the violation of constitutionally protected interests of the person, in particular the right to health. Fundamental rights may thus be said to have had an effect on the scope of liability for personal injury.

It is interesting to note that the manner in which the Italian courts have combined the application of civil code provisions with constitutional values differs from the technique of *Wechselwirkung* that has been developed and applied by the German and Dutch courts. In Germany, the judges considered the limitation of constitutional rights by ‘general laws’, including the rules of tort liability, while at the same time keeping in mind the constitutionally protected values when interpreting the tort provisions.²²⁵ In Italy, on the other hand, the developments in case law rather amount to ‘one-way traffic’: the ‘constitutional reading’ of Articles 2043 and 2059 *c.c.* has resulted in an extension of the scope of these tort provisions, while the limits which tort law may set on fundamental rights in private law relations has remained out of the limelight.

Moreover, the reference to fundamental rights has been made in a general way, indicating the abstract categories of interests the infringement of which merits compensation. The question has consequently arisen how the extension of the scope of Articles 2043 and 2059 *c.c.* should be specified *in concreto*, in other words: what are the limits of ‘new’ non-pecuniary damage?²²⁶

²²² *Cass. civ.* 31 May 2003, n. 8827, under 4.3; and n. 8828, under 3.1.3: ‘Nel vigente assetto dell’ordinamento, nel quale assume posizione preminente la Costituzione, - che, all’art. 2 Cost., riconosce e garantisce i diritti inviolabili dell’uomo -, il danno non patrimoniale deve essere inteso come categoria ampia, comprensiva di ogni ipotesi in cui sia leso un valore inerente alla persona.’

²²³ *Corte cost.* 11 July 2003, n. 233.

²²⁴ *Corte cost.* 11 July 2003, n. 233, under 3.4: ‘In due recentissime pronunce (*Cass.*, 31 maggio 2003, nn. 8827 e 8828), che hanno l’indubbio pregio di ricondurre a razionalità e coerenza il tormentato capitolo della tutela risarcitoria del danno alla persona, viene, infatti, prospettata, con ricchezza di argomentazioni – nel quadro di un sistema bipolare del danno patrimoniale e di quello non patrimoniale – un’interpretazione costituzionalmente orientata dell’art. 2059 cod. civ., tesa a ricomprendere nell’astratta previsione della norma ogni danno di natura non patrimoniale derivante da lesione di valori inerenti alla persona: e dunque sia il danno morale soggettivo, inteso come transeunte turbamento dello stato d’animo della vittima; sia il danno biologico in senso stretto, inteso come lesione dell’interesse, costituzionalmente garantito, all’integrità psichica e fisica della persona, conseguente ad un accertamento medico (art. 32 Cost.); sia infine il danno (spesso definito in dottrina ed in giurisprudenza come esistenziale) derivante dalla lesione di (altri) interessi di rango costituzionale inerenti alla persona.’

²²⁵ Compare the *Liith* case that was discussed in section 2.2.1.

²²⁶ Among many others: Navarretta 2004, p. 4-5; Ponzanelli 2004, p. 54-56. See also Wunsch & Panetti 2008.

Although several courts have already addressed the question, their considerations appear to lack precision when defining the basis for compensation of non-pecuniary damage. In a recent case²²⁷ regarding the claim for damages by two women who suffered injuries as a result of the police's conduct during the G8 meeting in Genoa in July 2001, the *Tribunale* (district court) of Genoa awarded pecuniary as well as non-pecuniary damages under the three heads of damage distinguished by the *Corte costituzionale* in its decision n. 233 of 2003. The *Tribunale* based this decision on the infringement of several fundamental rights, i.e. 'psycho-physical integrity, freedom of movement and moral, honour, freedom of assembly and of association, and freedom of expression', without explicitly indicating the constitutional provisions that safeguard these rights. For this reason, it is difficult to pinpoint which fundamental rights the court considers to be infringed and, thus, what types of injury may be compensated under the new rules.²²⁸ Further developments in case law have to be awaited to see how far the reading of the civil code provisions in light of the *Costituzione* has extended the scope of liability for non-pecuniary damage.²²⁹

Contract law: 'buona fede' in the light of fundamental rights

In Italy, like in Germany and the Netherlands, the effects of fundamental rights in the field of contract law have been fragmented, covering cases ranging from non-competition by former employees to arrangements for surrogate motherhood,²³⁰ and from freedom of religion of a schoolteacher²³¹ to the liability of the privatised postal service for the late delivery of a telegram.²³² Some of the – potentially – most far-reaching decisions, however, concern the interpretation of the general clause of 'good faith' in conjunction with constitutional provisions, in particular Article 2 *Cost.*²³³ On the basis of several examples from the case law of the *Corte di Cassazione* an image may be sketched of this interaction between fundamental principles and open norms of contract law.

The Italian Supreme Court in its judgment of 20 April 1994, n. 3775,²³⁴ dealt with the question of to what extent a judge should intervene in a contractual relationship on the basis of the principle of 'good faith'. The case concerned a contract between the municipality of Fiuggi and a private company concerning the exploitation of mineral water springs within the territory of the town. On the basis of the agreement, the private company obtained a licence to bottle and sell the mineral water. The sum which the company paid for this licence was linked to the production price of the water bottles. From a certain moment onwards, the company blocked the production price of the bottles and, consequently, also the contractual fee it was obliged to pay to the municipality. It did so, however, disregarding the monetary devaluation taking place during that period and the continuous increase in the commercial price of the bottles by the distributing companies. The municipality of Fiuggi argued that the bottling company was thus acting in bad faith.

²²⁷ *Trib. Genova* 25 April 2005, n. 2295, *Danno e responsabilità* 2006, 197.

²²⁸ Wünsch 2006, p. 945.

²²⁹ Compare Pedrazzi 2004, p. 132.

²³⁰ For an in-depth comparative analysis of both themes, see Part II.

²³¹ *Cass. civ.* 16 June 1994, n. 5832, *Foro it.* 1995, I, 875.

²³² *Corte cost.* 20 June 2002, n. 254, *Foro it.* 2002, I, 2209.

²³³ Compare Morelli 1996, p. 541 ff.; Mengoni 1997, p. 7-8; and Morelli 1999, p. 11.

In its final decision in the case, the *Corte di Cassazione* held that the courts in civil cases would have had to evaluate the contents of the contract as to their compliance with the principle of good faith. Although the contract gave the company ‘complete freedom’ to determine the production price of the water bottles, this did not mean that the company was released from the duty to act in ‘good faith and fair dealing’ (*correttezza*, Article 1175 *c.c.*). On the contrary, the Court considered that the principle of good faith constitutes an internal limit in the system of contract law, which seeks to ensure that the respect for the formal equality of contract partners does not result in disrespect for substantive justice and, consequently, the unalterable duty of solidarity (Article 2 *Cost.*). The principle of solidarity, according to the Court, integrally governs the effects of the contract (Article 1374 *c.c.*) as well as the interpretation (Article 1366 *c.c.*) and performance (Article 1375 *c.c.*) of the contract, in the sense that each of the contracting parties should take into account the interests of the other insofar as that does not entail a considerable sacrifice of his or her own interests.

For the specific case, this meant that the court at first instance should not have avoided evaluating the municipality’s expectation for the price of the bottles to be raised on the sole ground that the determination of the price of the bottles had allegedly been left to the discretion of the other party. The court should at least have verified whether the bottling company had an interest, worthy of protection, that justified it in blocking the price despite the monetary devaluation and, accordingly, the devaluation of the contractual fee.²³⁵

The constitutional reading of the principle of good faith when evaluating the contents of the contract has also been of importance for the case law regarding the reduction of contractual penalties. In its judgment of 24 September 1999, n. 10511,²³⁶ the *Corte di Cassazione* held that when assessing a penalty clause’s compliance with good faith, a balance should be struck between the freedom of enterprise (Article 41 *Cost.*) and the duty of solidarity in negotiations between private parties (Article 2 *Cost.*).

The case concerned a building contract that provided for a penalty of 200,000 lire (ca. 103 euro) for each day the building company might be in delay in delivering the work, if not because of *force majeure*. Since the building was completed too late, the buyer claimed a penalty of 48,000,000 lire (ca. 25,000 euro) as well as an amount in damages for non-conformity of part of the work carried out. The full sum was awarded by an arbitration committee, a decision which was upheld by the Court of Appeal of Perugia, while the possibility of reducing the amount of the penalty (Article 1384 *c.c.*) was not resorted to in the absence of a request to that effect by the building company.

The provision that was at stake in this case was Article 1384 *c.c.*, which provided:

²³⁴ *Cass. civ.* 20 April 1994, n. 3775, *Giust. civ.* 1994, p. 2159-2173.

²³⁵ *Cass. civ.* 20 April 1994, n. 3775, *Giust. civ.* 1994, p. 2164-2165.

²³⁶ *Cass. civ.* 24 September 1999, n. 10511, *Foro it.* 2000, I, 1929.

‘The penalty can be equitably reduced by the court, if the principal obligation has been partly performed or if the penalty is manifestly excessive, always taking into account the interest which the creditor had in the performance.’²³⁷

According to the *Corte di Cassazione*, this civil code provision should no longer be interpreted as excluding the possibility for the judge to *ex officio* reduce a contractual penalty. One of the reasons for this was related to the more general phenomenon of rereading the provisions of the civil code so as to make them comply with the ‘superior rules’ of the Constitution.²³⁸ In other words, the court explicitly raised the question of the role of fundamental rights in the interpretation of the civil code provisions governing contractual penalties.

The judges of the *Corte di Cassazione* observed that the wording of Article 1384 *c.c.* did not contain any references to a ‘request by the interested party’ for a reduction of the penalty and considered, furthermore, that the necessity for such a request could not be based on the argumentation that this would do justice to the ‘will of the parties’ or freedom of contract. In fact, the judicial review of contractual provisions, including penalty clauses, formed part of the check provided by the legal system on acts of private autonomy.

This check, in modern contract law, comprised a balance of freedom of enterprise (*iniziativa economica privata*, safeguarded by Article 41 *Cost.*) and the principle of solidarity (Article 2 *Cost.*). The *Corte di Cassazione* considered that the duty to act in accordance with the principle of solidarity could provide a normative basis for filling in the general clause of ‘good faith and fair dealing’ (Articles 1175, 1337, 1358, 1366, 1375 and 1391 *c.c.*). Colouring ‘good faith’, solidarity would thus require the contracting parties to take each other’s interests into account, to the extent these would not harm their own interests. Referring to its judgment in the case of the water bottling contract at Fiuggi,²³⁹ the court confirmed that ‘good faith’ posed a limit to contractual autonomy, requiring the courts to review the compliance of the contract with the principle of solidarity.²⁴⁰

In the light of these conclusions regarding the role of the courts in civil cases, the *Corte di Cassazione* held that there was no doubt that the judges could *ex officio*, without a specific request by the interested party, reduce a contractual penalty. Indeed, it was a duty attributed to them for the sake of the ‘realisation of the objective interests of the legal system’.²⁴¹ With this decision, the court deviated from earlier case law that advocated a more passive role of the judges when evaluating contractual agreements in the light of good faith.²⁴²

It took some time for this new approach to be unambiguously applied in the case law of the *Corte di Cassazione*. In fact, the single civil divisions of the Italian Supreme Court after the 1999

²³⁷ Article 1384 *c.c.*: ‘Riduzione della penale. La penale può essere diminuita equamente dal giudice, se l’obbligazione principale è stata eseguita in parte ovvero se l’ammontare della penale è manifestamente eccessivo, avuto sempre riguardo all’interesse che il creditore aveva all’adempimento.’

²³⁸ *Cass. civ.* 24 September 1999, n. 10511, no. 2.6.2: ‘Ma è persuaso questo Collegio che una siffatta esegesi non sia più in sintonia con la natura e funzione della clausola penale sub art. 1382 ss. c.c. e con il complessivo sistema della correlativa disciplina, quale si è venuto nel tempo evolvendo, anche per effetto di un più generale fenomeno di rilettura degli istituti codistici in senso conformativo ai precetti superiori della sopravvenuta Costituzione repubblicana.’

²³⁹ *Cass. civ.* 20 April 1994, n. 3775, *Giust. civ.* 1994, p. 2159-2173, described in this subsection.

²⁴⁰ *Cass. civ.* 24 September 1999, n. 10511, *Foro it.* 2000, I, 1929, no. 2.6.2.

²⁴¹ No. 2.6.2. In order to make this check the case was referred to the Court of Appeal of Rome.

²⁴² Morelli 1996, p. 542-543.

judgment expressed different opinions, usually reaffirming the traditional view,²⁴³ while only on rare occasions requiring an *ex officio* reduction of a manifestly excessive penalty.²⁴⁴ In a recent decision, nevertheless, the joint divisions of the Court have explicitly affirmed the course taken in decision 10511/99.²⁴⁵ The judgment was partly motivated by the renewed interpretation of institutions of private law in the light of constitutional norms, based on the duty of solidarity in relations between private parties (Article 2 *Cost.*), read in conjunction with the general principles of ‘good faith’ and ‘fairness’ of the *Codice civile*, which had to be balanced against the principle of freedom of enterprise. According to the Court, ‘the power given to the judge to reduce a contractual penalty sets a limit to private autonomy, intended to protect the general interest of the legal system’. This general interest would be to prevent that agreements between private parties, made in autonomy, surpassed the limits within which the system deemed it worthy to protect the opposing interests of the parties. Since these limits could not be determined beforehand, the judge had to establish them on a case-by-case basis.²⁴⁶ In order to adequately protect the general interest of the legal system, judges should thus be allowed to *ex officio* check the amount of the contractual penalties in individual cases and, if manifestly excessive, to reduce these penalties.

Apparently, the court with these judgments sought to confirm the role of ‘good faith’ – read in the light of ‘solidarity’ – for the assurance of the equilibrium between contract parties. It explained ‘solidarity’ as requiring the parties to take into account each other’s reasonable interests, which in the 1999 case could imply that the buyer of the building had to allow for the penalty to be reduced. As has been rightly pointed out in a comment to the case, however, this line of reasoning does not by itself guarantee the protection of the contractual equilibrium: while the judicial corrections of contractual clauses on the basis of ‘good faith’ may fit within a trend of protecting the ‘weaker’ contract party, it is not said that the party claiming the penalty will always be the stronger party in the relationship.²⁴⁷

This reading of ‘solidarity’ appears to be indifferent to the question whether a contract party is ‘weaker’ or ‘stronger’; both have to take into account the interests of the other party. The *Corte di Cassazione*’s description of the principle of solidarity in the earlier case of 1994, n. 3775, on the other hand, appears to pay attention also to the balance of power between the parties, pointing out that not only formal equality but also substantive justice has to be guaranteed.²⁴⁸

²⁴³ E.g. *Cass. civ.* 4 April 2003, n. 5324; 30 May 2003, n. 8813; 19 April 2002, n. 5691; 27 October 2000, n. 14172.

²⁴⁴ *Cass. civ.* 23 May 2003, n. 8188.

²⁴⁵ *Cass. civ.*, joint divisions, 13 September 2005, n. 18128, *Foro it.* 2005, I, 2985, with comment by Palmieri 2006 and by Bitetto 2006. See also *Cass. civ.* 28 September 2006, n. 21066, www.cortedicassazione.it (consulted on 8 November 2006).

²⁴⁶ *Cass. civ.*, joint divisions, 13 September 2005, n. 18128, under 6.9: ‘Può essere affermato allora che il potere concesso al giudice di ridurre la penale si pone come un limite all’autonomia delle parti, posto dalla legge a tutela di un interesse generale, limite non prefissato ma individuato dal giudice di volta in volta, e ricorrendo le condizioni previste dalla norma, con riferimento al principio di equità.’

²⁴⁷ Palmieri 2000, who observes that a system that requires a judge to always check the contractual arrangements made by the parties should not only allow for a reduction of excessive penalties but also for the augmentation of extremely low penalties.

²⁴⁸ In Part II, these various views on the duty of solidarity of contractual parties will be further examined, comparing how the courts in the selected countries have dealt with questions regarding the equilibrium between principles of autonomy and solidarity in contract law.

In relation to the *ex officio* powers of the courts in civil cases, several commentators²⁴⁹ have pointed out that the ‘new orientation’ of the *Corte di Cassazione* poses a danger to legal certainty. Giving the judge the authority to reduce a manifestly excessive penalty on his own motion means that parties can no longer be sure of the stability of their agreement regarding the consequences of non-performance of the contract. The judge can always modify the penalty if, in his or her opinion, the amount of the penalty is ‘manifestly excessive’. The reference to *aequitas* and ‘fairness’ for allowing the *ex officio* check of the excessive nature of the penalty, it is said, opens the door to ‘valuations of a considerably subjective nature’,²⁵⁰ which may reduce the predictability of the outcome of a case. This would be to the disadvantage of contracting parties that had established beforehand between themselves the possible liquidation of contractual damages. Judicially checking their agreement during procedures regarding the performance of the contract, without either of them having requested that the penalty be checked, in this view testifies to a profound distrust in the parties’ use of their autonomy.²⁵¹

Leaving aside the discussion regarding the punitive or compensatory function of contractual penalties,²⁵² which would require a more detailed analysis of the instrument itself, the argument of legal certainty is of central importance in the debate about the intensity of effects of fundamental rights in contract law. The renewed interpretation of instruments of contract law in the light of constitutional rights and values in Italian case law on penalty clauses does indeed create a new, more or less instable situation: the judicial control of the use of private autonomy potentially becomes greater, while it is not clear beforehand how this will affect the outcome of specific cases.

This seems to be a more general problem of the application of fundamental rights in contract cases, since the renewed interpretation of instruments of contract law in the light of these rights provide the judges with a possibility to deviate from the agreement made by the parties and in some cases even deviate from the rules laid down by the legislator. It is therefore important to determine the intensity which these effects should have.²⁵³ For the penalty clauses in Italian law it is therefore to be expected that there will be more case law and discussion in legal literature on this subject. The same is true, in general, for the judicial control of the contents of the contract on the basis of a joint reading of Article 2 *Cost.* and the principle of ‘good faith’.²⁵⁴

2.4.3 Preliminary conclusion

Considering the case law establishing that the general clause of ‘good faith’ should be interpreted in the light of constitutional principles, Italian law seems to have assumed an approach regarding the bond between private law and the constitutional order similar to the position of the German Constitutional Court expressed in the *Lith* decision. Both in tort law and contract law, Article 2 of

²⁴⁹ See, among others, Palmieri 2006, Bitetto 2006. See also Morelli 1994, p. 2173, commenting on *Corte di Cassazione* 20 April 1994, n. 3775. See also section 6.2.3 below.

²⁵⁰ Palmieri 2006.

²⁵¹ Palmieri 2006.

²⁵² Marini has argued in favour of an *ex officio* reduction of manifestly excessive penalties in Italian law, as a means of controlling the proper use of instruments of ‘private punishment’; see Marini 1984, p. 152-155. For a comparative study of the regulation of penalty clauses in various other European countries, including the question of punishment v. compensation, see Schelhaas 2004.

²⁵³ See Part II.

²⁵⁴ Compare Morelli 1994, p. 2173, who attenuates the doubts regarding judicial neutrality and objectivity, pointing out that the 1994 judgment did not go further than any other request made to the judge to recognise certain values, for instance in Articles 634, 1343, 1354 and 2035 *c.c.*

the Italian Constitution has played an important role, translating the values protected by fundamental rights to the private sphere through the concept of ‘solidarity’. In particular by means of the concretisation of rules of private law, such as Article 2059 *c.c.* on non-pecuniary damages (tort) and Article 1384 *c.c.* on the reduction of contractual penalties (good faith), the courts have given effect to Article 2 *Cost.* in private law relations. This approach resembles the part of the theory of *Wechselwirkung* applied by the German and Dutch courts that assumes general clauses of private law to be ‘inroads’ for fundamental rights to safeguard the compliance of the system of private law with the constitutional order of values.

As said before, however, the approach chosen in the aforementioned cases differs from the doctrine of *Wechselwirkung* in the sense that it emphasises the effect of fundamental rights on the interpretation of private law rules, while for the greater part leaving unattended the limits the latter may in their turn set on the former in relations between private parties. In the case of the penalty clause, for instance, the *Corte di Cassazione* considered the reduction of the contractual penalty in the light of the balance of fundamental values focussing on the interests of the debtor, without looking into the interests the creditor might have as to the payment of the full sum of the penalty. Indeed, though addressing the balance of interests which the courts in civil cases should make, the Italian Supreme Court in this case did not elaborate on the negative effect a reduction of the contractual penalty might have on the ‘solidarity’ of a stronger party towards its weaker contract partner: the reduction of the penalty could weigh heavier on the creditor (the private buyer of a house) than on the debtor (the building company).

The *Corte di Cassazione’s* judgment in the water bottling case does, nevertheless, seem to indicate that the application of the principle of good faith in the light of ‘solidarity’ should serve not only the formal equality of the contract parties, but also substantive justice.²⁵⁵ The principle of solidarity might then be interpreted as leaning towards the protection of the ‘weaker’ contract party, even though the court did not specify the notion of ‘substantive justice’ in contract law.

In tort law the Supreme Court in a similar way has used fundamental rights argumentation to widen the scope of application of the provisions governing compensation for non-pecuniary damage. On the basis of Article 2 *Cost.* it established that the applicability of Article 2059 *c.c.* no longer required the damage to be caused by a criminal act, but that the provision regarded all cases in which ‘values inherent to the person’ had been infringed. At this stage, the exact scope of the ‘new’ rules on non-pecuniary damages, however, remains unclear, since the *Corte di Cassazione* did not formulate more precise guidelines for the demarcation of the limits of liability.

Though in principle having opened the doors for fundamental rights to enter into various areas of private law, the approach of the Italian Supreme Court seems to differ from the theory of *Wechselwirkung* on the point of precision. While German courts have developed the interaction between specific fundamental rights and (general) provisions of private law, the Italian *Corte di Cassazione* often refers to Article 2 of the *Costituzione* to justify the effects of fundamental rights in private law relationships.²⁵⁶ Since Article 2 is a very broadly formulated provision, if not a general clause, the specific implications of its application in private law are not immediately clear. Accepting that provisions of the civil code should be read in conjunction with this provision thus

²⁵⁵ Compare section 1.2.1 above.

²⁵⁶ Morelli points out that Article 2 *Cost.* has thus obtained an imperative character similar to that of the laws that, according to Article 1322 *c.c.*, set limits to private autonomy; Morelli 1996, p. 543.

seems to give the possibility of introducing all values falling within the scope of the article into private law reasoning. Although in theory giving ample room for adapting the rules of private law to the changing needs of society, it has to be established what should be the intensity of such effects of fundamental rights, on the one hand by defining the scope of Article 2 *Cost.*,²⁵⁷ on the other by establishing the specific requirements of ‘solidarity’ in relations between private parties.

From an institutional point of view, the absence of groundbreaking decisions of the *Corte costituzionale* on the role of fundamental rights in contract law distinguishes Italy from Germany, where the *Bundesverfassungsgericht* has had an important impact on the developments in this field.²⁵⁸ A partial explanation for this difference could be that the Italian Constitutional Court, in contrast to its German counterpart, does not hear individual complaints and has no competence to adjudicate the constitutionality of decisions of the courts in civil cases.²⁵⁹ It is thus not possible for private parties to bring a complaint to the *Corte costituzionale* if they are of the opinion that the judgments in their cases infringe fundamental rights protected by the Italian Constitution, like for instance the German plaintiff did in the *Bürgschaft* case in 1993 (a ‘procedural effect’, in the classification made in section 2.1.4 above).²⁶⁰

The possibilities for the Italian Constitutional Court to affect the application of fundamental rights in contract law cases are consequently limited to the adjudication of the constitutionality of provisions of law that concern issues of contract law. Examples are rare. In a decision of 20 June 2002, the Court established the unconstitutionality of a provision of the Postal Code that excluded any liability of the (privatised) Italian postal service for the consequences of the late delivery of a telegram.²⁶¹ It held that this provision infringed the principle of equality, since it strongly diverged from the rules of general private law, which deemed any contract term excluding liability for gross negligence to be null and void (Article 1229 *c.c.*). In another judgment, regarding the succession of a cohabiting partner to the tenancy contract after the death of the principal tenant or after separation, the Court ruled that the law on tenancy (*legge* n. 392 of 1978) should be interpreted in the light of the principle of solidarity (Article 2 *Cost.*).²⁶² Accordingly, it should be prevented that the late tenant’s cohabitants remained deprived of housing. The law should thus be read as not only including ‘legitimate’ family members, but also couples who had lived together *more uxorio*.

The *Corte costituzionale* has so far refrained from giving any more general indications as to the interpretation of norms of contract law in the light of fundamental rights. As we have seen, in tort law its intervention has been more profound. In its judgment of 14 July 1986, n. 184, for instance, the Court considered Article 2043 *c.c.* a sort of ‘open norm’, that had to be interpreted in the light of the right to health guaranteed by Article 32 *Cost.*²⁶³ As a consequence of this ‘constitutional

²⁵⁷ Compare Busnelli 1991a, p. 253.

²⁵⁸ See for instance the *Betriebschlusser*, *Handelsvertreter* and *Bürgschaft* cases, described in section 2.2.2.

²⁵⁹ Compare sections 1.1.2 and 1.1.4 on the competence of the German and Italian Constitutional Courts.

²⁶⁰ See also section 3.1.5.

²⁶¹ *Corte cost.* 20 June 2002, n. 254, *Foro it.* 2002, I, 2209. The case concerned the late delivery of a telegram of the Italian Railways, containing a request for a job applicant to present himself for a medical check-up. Because of the late delivery, the applicant lost the job opportunity and claimed for lost opportunities.

²⁶² *Corte cost.* 24 March 1988, n. 404, *Giur. it.* 1988, I, 1627, with comment by A. Trabucchi.

²⁶³ *Corte cost.* 14 July 1986, n. 184, in particular no. 12: ‘Il riconoscimento del diritto alla salute come diritto pienamente operante anche nei rapporti di diritto privato, non è senza conseguenza in ordine ai collegamenti tra lo stesso art. 32, primo comma, *Cost.* e l’art. 2043 *c.c.* L’art. 2043 *c.c.* è una sorta di “norma in bianco”: mentre nello stesso articolo è espressamente e chiaramente indicata l’obbligazione risarcitoria, che consegue al fatto

reading' of the general tort provision of Article 2043 *c.c.*, the entire system of tort as laid down in the *Codice civile* would have to be reinterpreted in accordance with the *Costituzione*.²⁶⁴ In its decision of 11 July 2003, moreover, the Constitutional Court affirmed the interpretation of Article 2059 *c.c.*, dealing with non-pecuniary damages, in the light of constitutionally protected values. It did so making a more general observation on the tendency to guarantee a complete reparation of damage caused to personality rights (Article 2 *Cost.*) as the result of wrongful conduct.

Given these examples addressing the interpretation of open norms of tort law, it would be expected that the *Corte costituzionale* should have said something more about the interaction between general clauses of contract law and fundamental rights. An explanation for the fact that this has so far not occurred might be found in the different focuses taken on fundamental rights protection in tort and contract law respectively. In tort law, emphasis has been put on the protection of personality rights.²⁶⁵ The adjudication of such rights naturally brings into play the constitutional norms that safeguard values related to personality (in particular Articles 2 and 3 *Cost.*) and, consequently, questions of the constitutionality of the law in force. In contract law, considerations on fundamental values often seem to remain implicit, for instance in discourses on the protection of 'weaker' parties and the contractual equilibrium. Although the *Corte di Cassazione* has by now related these considerations to the constitutional values protecting party autonomy and requiring reciprocal solidarity, such considerations have not given rise to questions of the constitutionality of the scope or interpretation of (general) provisions of contract law. This could be a reason why the *Corte costituzionale* has not been called upon to address these types of questions and it has been left to the courts in civil cases to define the role of fundamental rights in contract cases.

2.5 England

In England, the possible effects of fundamental rights in private law in recent years have received a great deal of attention in the light of the drafting and entry into force of the Human Rights Act 1998, which has incorporated the European Convention on Human Rights in the UK. In the following, a brief overview of the main points of discussion will be given. Subsequently, a

doloso o colposo, non sono individuati i beni giuridici la cui lesione è vietata: l'illiceità oggettiva del fatto, che condiziona il sorgere dell'obbligazione risarcitoria, viene indicata unicamente attraverso l'"ingiustizia" del danno prodotto dall'illecito. È stato affermato, quasi all'inizio di questo secolo (l'osservazione era riferita all'art. 1151 dell'abrogato codice civile ma vale, ovviamente, anche per il vigente art. 2043 *c.c.*) che l'articolo in esame "contiene una norma giuridica secondaria, la cui applicazione suppone l'esistenza d'una norma giuridica primaria, perché non fa che statuire le conseguenze dell'iniuria, dell'atto contra ius, cioè della violazione della norma di diritto obiettivo". Il riconoscimento del diritto alla salute, come fondamentale diritto della persona umana, comporta il riconoscimento che l'art. 32 *Cost.* integra l'art. 2043 *c.c.*, completandone il precetto primario. È il collegamento tra gli artt. 32 *Cost.* e 2043 *c.c.* che ha permesso a questa Corte d'affermare che, dovendosi il diritto alla salute certamente ricomprendere tra le posizioni subiettive tutelate dalla Costituzione, "non sembra dubbia la sussistenza dell'illecito, con conseguente obbligo della riparazione, in caso di violazione del diritto stesso". L'ingiustizia del danno biologico e la conseguente sua risarcibilità discendono direttamente dal collegamento tra gli artt. 32, primo comma, *Cost.* e 2043 *c.c.*; più precisamente dall'integrazione di quest'ultima disposizione con la prima.

²⁶⁴ And in no. 16: 'Il combinato disposto degli artt. 32 *Cost.* e 2043 *c.c.* importa una rilettura costituzionale di tutto il sistema codicistico dell'illecito civile.'

²⁶⁵ Compare Lindenbergh 1999; Resta 2005.

comparison with the development of the theory of *Wechselwirkung* in German and Dutch case law will be made on the basis of several cases in which the (non-)existence of a contractual relationship between the parties was of importance.

2.5.1 *Direct or indirect effect*

The discussion concerning the HRA 1998 in English legal literature has mostly focused on ‘technical’ aspects of the role which ECHR rights should have in private law adjudication. The question has been raised whether the common-law judges are bound to develop private law in accordance with the Convention rights and, if so, whether direct effect should be given to the Act in cases between private parties.²⁶⁶

Section 6(1) of the HRA read in combination with section 6(3) stipulates that ‘it is unlawful for [a court] to act in a way which is incompatible with a Convention right’.²⁶⁷ From this formulation it is not immediately clear how the courts should handle fundamental rights arguments in private law cases. While some authors have interpreted it as allowing or even requiring the judges in civil cases to give full effect to the ECHR rights, others have opposed to such a reading of the Act, and still others, holding more moderate views, have advocated ‘in-between’ forms of integrating the HRA into private law adjudication.

Before the Act came into force, Wade already stated that it would apply between private parties as well as in relations between citizens and the State.²⁶⁸ He argued in favour of a full horizontal effect, which may be deemed ‘direct’:

‘It would be a poor sort of “incorporation” [of the ECHR; CM] which exempted private individuals and bodies from respecting the fundamental rights of their fellow-citizens and drove them back to Strasbourg with all its cost in time and money – the very evil which “incorporation” is supposed to remedy. It must surely be correct to read the Bill [now ‘the Act’; CM] as requiring courts and tribunals to recognise and enforce the convention rights, taking account of the ECHR materials catalogued in clause 2, and subject only to contrary primary legislation (...). This will be a statutory duty in all proceedings, whether the defendant is a public authority or a private person.’²⁶⁹

Wade gave a literal argument and an argument based on the nature of the Convention rights for his thesis that the HRA should have full horizontal effect.²⁷⁰ His literal argument, which came to the fore in the quotation, was based on sections 6(1) and 6(3) HRA. According to Wade, the formulation of these provisions indicated that a court should always decide in accordance with the relevant Convention rights, whether in a case against a public authority or in a case between

²⁶⁶ For instance: Hunt 1998; Wade 1998; Phillipson 1999; Cooper 2000; Buxton 2000; Wade 2000; Beatson & Grosz 2000; Raphael 2000; Beale & Pittam 2001; Bamforth 2001; Markesinis 2001a and Markesinis 2001b; Bamforth 2002; Beyleveld & Pattinson 2002; Taylor 2002. See also Clapham 1995 and Martens 1998.

²⁶⁷ Section 6(1) HRA 1998: ‘It is unlawful for a public authority to act in a way which is incompatible with a Convention right.’ Section 6(3) HRA 1998: ‘In this section, ‘public authority’ includes (a) a court or tribunal (...).’ Regarding the status of the ECHR in English law, see also section 1.1.5 above.

²⁶⁸ Wade 1998. Compare Clapham 1995, who even in the absence of a Bill of Rights had already argued in favour of a further-reaching application of international human rights in the private sphere.

²⁶⁹ Wade 1998, p. 63.

²⁷⁰ Wade 2000, p. 217-218.

private parties.²⁷¹ He saw no need to make a further distinction between direct and indirect effect nor a need to speak of new private causes of action, which seemed to him ‘a matter of words’, but stated that ‘the court must be the effective agent in all cases alike’.²⁷²

The opposing view, held by, for instance, Buxton and often referred to as ‘verticality’,²⁷³ was that the nature of the Convention rights prevented them from being applied between private parties. Since the ECtHR only dealt with claims against the States and not against private parties, it was argued that the HRA only incorporated Convention rights into British law in so far as their character in international law allowed for this.²⁷⁴ The transmission of ECHR rights to the HRA could not have changed the content of these rights.²⁷⁵ Thus, the effects would only be ‘vertical’, that is between individuals and the State or public authorities.

Other authors did not hold such strong opinions in favour of either a full, direct application of the ECHR rights between private parties or a strictly vertical effect of the HRA. Bamforth, commenting on the opposing views of Wade and Buxton, observed that both authors could be said to overstate their case.²⁷⁶ He noted that Wade’s ‘literal argument’ appeared to ‘make too much of the drafting solely of section 6 and to pay too little attention to what it actually means to say that a court is obliged, or has a lawful duty, to act in accordance with Convention rights’.²⁷⁷ Since the Act provided no clear sanction for courts failing to act in accordance with the ECHR in all cases that come before them, it could not be said that the British courts were under a positive obligation to do so and, hence, the ‘literal argument’ would be difficult to sustain.²⁷⁸ Buxton’s view that the Convention rights could only be invoked against public authorities and not against private bodies, on the other hand, would also be too narrow. Although the Strasbourg court solely deals with claims against national governments, the application of the ECHR rights by the domestic courts added a new dimension: ‘Convention rights will not operate in a vacuum under the Act. (...) At common law, courts have consistently held that they can pay attention to the requirements of the Convention in both “horizontal” and “vertical” cases when interpreting the law and when exercising a judicial discretion.’²⁷⁹ In Bamforth’s opinion, there seemed to have been ‘no Parliamentary intention that the Act should circumscribe this use of Convention rights at common law’.²⁸⁰

²⁷¹ Wade 2000, p. 218. See also Grosz c.s. 2000, p. 89; and Wadham, Mountfield & Edmundson 2003, p. 69-70, who however only discuss this literal argument and not the ‘nature of rights’ argument.

²⁷² Wade 2000, p. 221-222.

²⁷³ Wadham, Mountfield & Edmundson 2003, p. 69; Hunt 1998, p. 426-427.

²⁷⁴ Rights Brought Home: The Human Rights Bill, Government White Paper, October 1997, Cm 3782, in particular nos. 1.18, 2.2 ff.; Buxton 2000, p. 50. See also Wadham, Mountfield & Edmundson 2003, p. 69.

²⁷⁵ Buxton 2000, p. 51-52. This argumentation seems weak, in the sense that in theory it is possible to add a provision to the HRA that says it can have an effect between private parties.

²⁷⁶ Bamforth 2001, p. 34.

²⁷⁷ Bamforth 2001, p. 38.

²⁷⁸ Bamforth 2001, p. 38-39, referring to Buxton 2000.

²⁷⁹ Bamforth 2001, p. 35.

²⁸⁰ Bamforth 2001, p. 35. Bamforth is not convinced by Buxton’s statement that the continuing use of Convention rights in existing ‘horizontal’ common law cases would only be an effect of the ECHR’s ‘already existing status in domestic law’ rather than an effect of the Act itself. In the first place, the cases in this field in Bamforth’s opinion ‘do not necessarily envisage one fixed role for the Convention in relation to the common law’ (p. 36). Secondly, Buxton’s explanation ‘would entail the drawing of a sharp distinction between common law and statute: at common law, Convention rights would be capable of playing some role in “horizontal” cases, whereas under the Human Rights Act they would not’ (p. 35-36). Such a distinction, according to Bamforth, may be difficult to sustain in practice.

Both Wade and Buxton, furthermore, had focused on the interpretation of section 6 HRA, thus ignoring section 3(1), which stipulates that ‘so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights’. According to Bamforth, this provision, rather than section 6, provided the true statutory basis for any ‘horizontal effect’ of the Act.²⁸¹ He argued that section 3 is clearly not confined to ‘vertical’ cases, and hence suggests that ‘courts are required by the Act to apply Convention rights through statutory interpretation in cases of a “horizontal” nature as well’.²⁸² Furthermore, exactly for the reason that section 3 appears to apply ‘horizontally’ as well as ‘vertically’, it could be applied in any disputes between private parties involving the interpretation of statutes in the light of the Convention rights. As such, in Bamforth’s opinion, section 3 would give a ‘horizontal effect’ to the ECHR rights in a manner which is much clearer and more straightforward than section 6.²⁸³

Another in-between position was held by Hunt, who submitted that the Act would probably have a considerable horizontal effect, since it applied to *all law*, but certainly not a direct one; it would not confer new causes of action against private parties.²⁸⁴ Unlike Wade, he distinguished between types of direct and indirect effects, viz. (1) vertical effect, (2) direct horizontal effect, (3) indirect horizontal effect, and (4) a form between indirect and direct horizontal effect, i.e. ‘application to all law’. The first three categories have been described earlier,²⁸⁵ while the last one deserves some more attention.

Hunt borrowed this perspective from the South African judge Kriegler, who in his dissenting opinion in the case of *Du Plessis v. De Klerk* argued that fundamental rights not only governed the relationship between State and individual, but also relations between private individuals *wherever law was involved*.²⁸⁶ Kriegler’s argument was that South African constitutional law enforced the fundamental rights of persons in all legal relationships (no. 118). He held that it made no fundamental difference jurisprudentially or socially whether the horizontal application of the constitutional rights was direct or indirect, the rights irradiating private law relationships (no. 122). A reading of the relevant provisions of the South African Constitution indicated that the fundamental rights laid down in Chapter 3 governed *all law* in force during the currency of the Constitution (no. 130 ff.):

‘The Chapter has nothing to do with the ordinary relationships between private persons or associations. What it does govern, however, is all law, including that applicable to private relationships. Unless and until

²⁸¹ Bamforth 2001, p. 34.

²⁸² Bamforth 2001, p. 37. Compare Phillipson 1999, p. 825: ‘[W]hile the Act makes no mention of any form of horizontal effect under the Convention, it appears clear that section 3, requiring legislation to be interpreted in a way which is compatible with Convention rights, will apply to *all* legislation, whether public or private in nature. By contrast, the Act compounds its silence on horizontal effect by a complete absence of any reference to the common law.’ Phillipson thus seems to make a somewhat sharper distinction between statutory law and common law than Bamforth. Compare also Taylor 2002, p. 199.

²⁸³ Bamforth 2001, p. 40.

²⁸⁴ Hunt 1998, in particular p. 441-442. In the same sense: Wadham, Mountfield & Edmundson 2003, p. 70.

²⁸⁵ See section 2.1 above.

²⁸⁶ Kriegler’s dissenting opinion in *Du Plessis v. De Klerk*, [1996] 3 S Af 850, 915; Hunt 1998, p. 434. See also Taylor 2002, p. 211, who compares Kriegler’s view to the ‘state action’ doctrine developed by the United States Supreme Court.

there is a resort to law, private individuals are at liberty to conduct their private affairs exactly as they please as far as the fundamental rights and freedoms are concerned. As far as the Chapter is concerned a landlord is free to refuse to let a flat to someone because of race, gender or whatever; a white bigot may refuse to sell property to a person of colour; a social club may black-ball Jews, Catholics or Afrikaners if it so wishes. An employer is at liberty to discriminate on racial grounds in the engagement of staff; a hotelier may refuse to let a room to a homosexual; a church may close its doors to mourners of a particular colour or class. But none of them can invoke the law to enforce or protect their bigotry. The whole gamut of private relationships is left undisturbed. But the state, as the maker of laws, the administrator of laws and the interpreter and applier of the law, is bound to stay within the four corners of Chapter 3. Thus, if a man claims to have the right to beat his wife, sell his daughter into bondage or abuse his son, he will not be allowed to raise as a defence to a civil claim or a criminal charge that he is entitled to do so at common law, under customary law or in terms of any statute or contract.²⁸⁷

Wade rightly pointed out that this picture of the in-between category of horizontal effect concerned a situation where no law was in operation at all. He put forward that the effect would be the same as that of section 6 HRA, viz. a full horizontal effect.²⁸⁸

Although Wade and Kriegler both rejected a strict distinction between direct and indirect effects, opinions differ on the question whether the latter in fact advocated a full horizontal application between private parties. Hunt found that the HRA's position was in accordance with Kriegler's view, but deemed it an effect 'somewhere between indirect and direct horizontal effect'.²⁸⁹

In any case, Kriegler's vision should be seen against the background of South African history. The Constitution's preamble and postscript refer to the reconciliation of whites and blacks and the reconstruction of a skewed society (no. 127), inspired by a wish to overcome a past that was 'pervaded by inequality, authoritarianism and repression'. According to Kriegler, the South African Constitution therefore was 'unique in its origins, concepts and aspirations' (no. 127) and a comparative study had to be made with great caution. Translating Kriegler's view on the horizontality and direct/indirect effect debate to English law – and for that matter: to Dutch and German law – may thus not be simple, since the current Western European bills of rights relate to the history of this continent, dating back to the French Revolution and the atrocities of the two World Wars. Although freedom and equality hold prominent positions in South African as well as English fundamental rights law, the expression of these values may thus take different forms. Nevertheless, a cautious comparison might provide useful insights.²⁹⁰

In this context, other moderate versions of either the direct or indirect effect of the HRA in English private law deserve some attention. Grosz, Beatson and Duffy, for instance, have rejected the reading of the HRA in the sense that it would have a direct horizontal effect, with an exception for cases in which states and thus the courts had a positive duty to secure an individual's ECHR rights against infringements by other private parties.²⁹¹ They however acknowledged that the Act might have a substantial indirect effect in several situations, viz. a) interpretation of

²⁸⁷ Kriegler, no. 135.

²⁸⁸ Wade 2000, p. 222.

²⁸⁹ Hunt 1998, p. 438.

²⁹⁰ See, for instance, Taylor 2002, p. 210 ff., who discusses Kriegler's opinion in the light of the 'state action' doctrine.

primary and secondary legislation; b) court orders and the exercise of judicial discretion; c) positive duties on states to secure an individual's Convention rights against interference by others; d) the development of the common law, although e) there are limits to this use of Convention rights.²⁹²

Oliver concluded that the debate is still open and predicts that the courts will most likely develop the common law so as to make it compatible with the ECHR, but without explicitly and directly giving horizontal effect to the Convention rights.²⁹³ It is understood, however, that in any case the legislator and the courts are directly bound by the Act; unlike the Dutch and German Constitutions, the HRA makes this very clear. It is the application between private parties themselves that is at stake in this debate.

2.5.2 *The HRA in contract law adjudication*

The debate in legal literature appears to revolve around the question of why and to what extent, from a technical point of view, the British courts should give effect to ECHR rights in private law cases. In order to better evaluate the various lines of argumentation, especially for contract law disputes, a look at the first examples of cases engaging the HRA in this field may be helpful. In the first place, the development of the doctrine of breach of confidence in cases concerning the invasion of privacy will be looked into, paying special attention to the case of *Douglas v. Hello! Ltd* because of the contract law questions it addresses. Subsequently, the case of *Wilson v. First County Trust* will be analysed, since it is one of the first examples of a case completely situated in the contractual sphere and the courts in this case have discussed several important issues related to the coming into force of the HRA.

Privacy under the HRA: Douglas v. Hello! Ltd and other cases

A case that received a great deal of attention in English legal literature was the High Court of Justice's decision in *Douglas v. Hello! Ltd*,²⁹⁴ concerning the allegedly tortious publication of photographs taken at the wedding of film stars Michael Douglas and Catherine Zeta-Jones. Among many other questions related to the issue of fundamental rights and private law, the decision addressed the limits to the right of freedom of expression in relation to the privacy of the parties involved, for the protection of which they had chosen to conclude a contract based on exclusivity.

The case concerned the coverage in the media of the marriage of Michael Douglas and Catherine Zeta-Jones at the Plaza Hotel in New York on the 18th November 2000. The bride and groom had sold the exclusive photographic rights of the event to *OK!* magazine for an amount of £ 1m (ca. 1,460,000 euro). In accordance with the contract, they had taken extensive security measures in order to prevent other photographers than the ones selected by them from taking pictures of the wedding. Soon after the wedding day, however, it became clear that an intruder had eluded security and had taken photographs of the events. These relatively poor pictures were bought by *Hello!* magazine, a competitor of *OK!* The newly-weds and *OK!* then moved for an injunction and obtained one to restrain publication of the pictures in the UK. The injunction was however lifted by the Court of Appeal, leaving the Douglases and *OK!* to claim in damages. As a result, *Hello!* published its wedding pictures on the same day as *OK!*

²⁹¹ Grosz c.s. 2000, p. 89-90.

²⁹² Grosz c.s. 2000, p. 90-98.

²⁹³ Oliver 2003, p. 117.

published a part of the photographs for which it had paid, and which had been approved by the wedding couple.

In an earlier case it had been determined that in English law there was no subjective right of privacy.²⁹⁵ For this reason, the opinion given by Judge Sedley in the *Douglas* case was felt to be ‘bold’²⁹⁶ and ‘groundbreaking’²⁹⁷. Indeed, Sedley LJ, in the judgment of the Court of Appeal,²⁹⁸ considered that Douglas and Zeta-Jones had a legal right to respect for their privacy, which had been infringed in this case. On the general question whether a right of privacy existed in English law, he observed:

‘[W]e have reached a point at which it can be said with confidence that the law recognises and will appropriately protect a right of personal privacy. The reasons are twofold. First, equity and the common law are today in a position to respond to an increasingly invasive social environment by affirming that everybody has a right to some private space. Secondly, and in any event, the Human Rights Act 1998 requires the courts of this country to give appropriate effect to the right to respect for private and family life set out in article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.’

Subsequently, the relation of this right to privacy with freedom of expression was considered. Analysing section 12 HRA,²⁹⁹ which dealt with the ‘horizontal’ effect of the right to freedom of expression, Sedley emphasised the connection of this right, laid down in Article 10 ECHR,³⁰⁰ to

²⁹⁴ *Douglas v. Hello! Ltd* [2003] EMLR 31.

²⁹⁵ *Kaye v. Robertson* [1991] FSR 62. The case concerned the publication of an interview with and photographs of the actor Gordon Kaye, obtained by two journalists of the tabloid newspaper *Sunday Sport* who had managed to enter into the hospital room where Kaye was recovering from severe head injuries suffered as the consequence of an accident. Only a limited injunction was granted, which did not prevent the editor of the tabloid from printing the story, but only prohibited him from stating that Kaye had consented to the interview.

²⁹⁶ Barber 2003, p. 602.

²⁹⁷ Phillipson 2003a, p. 54.

²⁹⁸ *Douglas v. Hello! Ltd* [2001] QB 967; [2001] 2 WLR 992.

²⁹⁹ Section 12 HRA: ‘(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression. (2) If the person against whom the application for relief is made (“the respondent”) is neither present nor represented, no such relief is to be granted unless the court is satisfied (a) that the applicant has taken all practicable steps to notify the respondent; or (b) that there are compelling reasons why the respondent should not be notified. (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed. (4) The court must have particular regard to the importance of the Convention right to freedom of expression and, where the proceedings relate to material which the respondent claims, or which appears to the court, to be journalistic, literary or artistic material (or to conduct connected with such material), to (a) the extent to which (i) the material has, or is about to, become available to the public; or (ii) it is, or would be, in the public interest for the material to be published; (b) any relevant privacy code. (5) In this section “court” includes a tribunal; and “relief” includes any remedy or order (other than in criminal proceedings).’

³⁰⁰ Article 10 ECHR: ‘(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.’

the right to respect for one's privacy, laid down in Article 8 ECHR. His conclusions on the interaction of these provisions were:

'The case being one which affects the Convention right of freedom of expression, section 12 of the Human Rights Act 1998 requires the court to have regard to article 10 (as, in its absence, would section 6). This, however, cannot, consistently with section 3 and article 17, give the article 10(1) right of free expression a presumptive priority over other rights. What it does is require the court to consider article 10(2) [limitation clause to the right expressed in 10(1), CM] along with 10(1), and by doing so to bring into the frame the conflicting right to respect for privacy. This right, contained in article 8 and reflected in English law, is in turn qualified in both contexts by the right of others to free expression. The outcome, which self-evidently has to be the same under both articles, is determined principally by considerations of proportionality.'

The other two judges took a more cautious approach, observing that some aspects of confidence were, or might be, shaped by privacy.³⁰¹ Brooke LJ considered that the relevant provisions in this case were section 12 of the HRA 1998, which obliged the court to take into account any relevant privacy code, in conjunction with clause 3 of the Press Complaint Commission's Code of Practice, which could be considered a privacy code in the sense of section 12 HRA. According to Brooke, the Douglasses' privacy-based claim, however, did not seem to be particularly strong, since '[t]hey did not choose to have a private wedding, attended by a few members of their family and a few friends, in the normal sense of the words "private wedding"', but instead invited 250 people for the celebration.³⁰² Their claim for damages based on grounds of confidentiality would have a higher chance of success. Keene LJ came to a similar conclusion, considering that it was of considerable relevance 'that very widespread publicity was to be given in any event to the wedding very soon afterwards by way of photographs in *OK! Magazine*' and '[t]he occasion thereby lost much of its private nature'.³⁰³ In Keene's opinion, the security measures taken by the wedding couple had not so much been taken with a view to the protection of their privacy, but rather to control the form of publicity that ensued from the wedding. He, consequently, did not further comment on the existence of a right to privacy.

The judgment of the High Court did not follow Judge Sedley's considerations on privacy and freedom of expression. The Chancery Division of the High Court of Justice, in the person of judge Lindsay, held that 'there was no need in the present case for the court to attempt to construct a law of privacy and the court would decline to do so'.³⁰⁴ Lindsay J formulated five reasons for this decision: 1) the later case of *Wainwright v. Home Office*³⁰⁵ showed that a view

³⁰¹ Compare Barber 2003, p. 602.

³⁰² *Douglas v. Hello! Ltd* [2001] QB 967; [2001] 2 WLR 992, p. 994-995.

³⁰³ *Douglas v. Hello! Ltd* [2001] QB 967; [2001] 2 WLR 992, p. 1013. Compare Singh & Strachan 2002, p. 144, who emphasise that the contract between the Douglasses and *OK!* was as much of a commercial as a personal nature.

³⁰⁴ *Douglas v. Hello! Ltd* [2003] EMLR 31, n. H38, no. 229.

³⁰⁵ *Wainwright v. Home Office* [2002] 3 WLR 405 CA. This case concerned the mother and half-brother of a prisoner who respectively suffered emotional distress and a post-traumatic stress disorder as a consequence of a strip search they were subjected to when they entered the prison to visit their family member. The House of Lords held that there was no need to introduce a general tort of privacy in English law to conform to international obligations under the ECHR. Hoffmann LJ was of the opinion that existing torts in common law and statutory remedies provided sufficient means to safeguard privacy interests. In case of gaps, a solution could

different from Sedley's was tenable on the existence of a law of privacy; 2) protection and enforcement of individual rights to private and family life were already available in the *Douglas* case under the law of confidence; 3) the subject of privacy is so broad and the ramifications of any free-standing law in the area are such that the subject was better left to Parliament, which could consult interests far more widely than can be taken into account in the course of ordinary *inter partes* litigation; 4) in the case of *A v. B*³⁰⁶ Lord Woolf held that in the great majority of situations, if not all situations, where the protection of privacy was justified, an action for breach of confidence would provide the necessary protection; and 5) even if there were to be a law of privacy, it was doubtful whether the Douglases would be able to make any recovery greater than that which was open to them under the law of confidence.

Rather than developing a general right to privacy, Lindsay J thus chose to award damages on the basis of the breach of confidence doctrine. Referring to the cases of *A v. B*.³⁰⁷ and *Campbell v. MGN*³⁰⁸, he considered that:

'It will be necessary for the Courts to identify, on a case by case basis, the principles by which the law of confidentiality must accommodate Articles 8 and 10 [ECHR]. The weaker the claim for privacy, the more likely it will be outweighed by a claim based on freedom of expression. A balance between the conflicting interests has to be struck.'³⁰⁹

The judgment continued with an enumeration of the principles formulated in earlier cases and a balance of the parties' interests in the light of these principles. Lindsay J observed that 'it does not follow from the mere presence of all the elements of a successful case in breach of confidence that substantive relief will follow',³¹⁰ since the freedom of expression of the publishers of *Hello!* magazine might prevail over the Douglases' confidentiality interests (section 12 HRA). Since the way in which the unauthorised photographs had been obtained constituted a breach of the relevant Press Code, he concluded, however, that the Douglases' rights under the law of confidence in the end outranked the right to freedom of expression.³¹¹ On similar grounds, *OK!* magazine was entitled to damages for a breach of confidence in the nature of a trade secret.

On appeal,³¹² judge Lindsay's judgment as to the claim of the wedding couple was upheld, considering that the Douglases 'were entitled to complain about the unauthorised photographs as infringing their privacy on the ground that these detracted from the favourable picture presented

be found by an appropriate adaptation and development of already existing principles. Moreover, the declaration of a general principle of 'invasion of privacy' would be a task for the legislator, not the judiciary.

³⁰⁶ *A v. B* [2002] EWCA Civ 337; [2002] EMLR 21. The case was about a married Premiership footballer who had had brief affairs with two women, and they had subsequently sold their stories to a tabloid newspaper. While the footballer initially obtained an injunction restraining the newspaper from publishing these stories, the Court of Appeal, in the light of the circumstances of the case, did not hold the affairs worthy of protection. The Court formulated a comprehensive set of guidelines for future privacy issues involving the interpretation and application of the HRA. See also the case of *Theakston v. MGN* [2002] EMLR 22; [2002] EWHC 137.

³⁰⁷ *A v. B* [2002] EWCA Civ 337; [2002] EMLR 21.

³⁰⁸ *Campbell v. MGN* [2002] EWCA Civ 1373, later followed by *Campbell v. MGN* [2004] UKHL 22; [2004] 2 AC 457 (HL).

³⁰⁹ *Douglas v. Hello! Ltd* [2003] EMLR 31, no. 186(i).

³¹⁰ *Douglas v. Hello! Ltd* [2003] EMLR 31, no. 202 ff.

³¹¹ *Douglas v. Hello! Ltd* [2003] EMLR 31, no. 206 and 226-228.

³¹² *Douglas v. Hello! Ltd* [2006] QB 125.

by the authorised photographs and caused consequent distress'.³¹³ Moreover, *Hello!* was also liable to them for breach of confidence in deliberately obtaining and publishing unauthorised photographs to the detriment of their commercial interests.³¹⁴

With regard to the claim by *OK!* magazine, the Court of Appeal however overturned the High Court's decision. It held that the protection of the law of confidence did not extend to *OK!*:

'On analysis, *OK!*'s complaint is not that *Hello!* published images which they had been given the exclusive right to publish, but that *Hello!* published other images, which no one with knowledge of their confidentiality had any right to publish. The claimants themselves [the Douglasses], argued that "the unauthorised photographs were taken at different moments to the authorised ones, showed different and informal incidents at the reception, and were naturally much less posed". These photographs invaded the area of privacy which the Douglasses had chosen to retain. It was the Douglasses, not *OK!*, who had the right to protect this area of privacy or confidentiality.'³¹⁵

Consequently, according to the Court of Appeal, *OK!* could not enforce a right to commercial confidence against *Hello!*.

The House of Lords has recently reversed this decision, judging that, in the absence of reasons pointing in a different direction, *OK!* should have 'the benefit of the obligation of confidence imposed upon all those present at the wedding in respect of *any* photographs of the wedding'.³¹⁶ *OK!* was allowed to protect the right to that benefit against any third party who intentionally destroyed it.³¹⁷ The fact that authorised pictures had been published by *OK!* before *Hello!* published its pictures had not put all photographs of the wedding in the public domain. Thus, the duty of confidentiality had continued. Accordingly, the appeal was allowed and *OK!* regained its entitlement to damages.

Judgments in other cases have adopted a similar approach of stretching the doctrine of breach of confidence to include situations of the media invading the private sphere of public persons, rather than developing a general right to privacy. Although reference is usually made to the role of the HRA, the solutions to the cases mostly appear to remain within the framework of the balancing of private law interests, making reference to privacy, but hardly elaborating on the possibility of safeguarding it as a fundamental right also in relations between private parties.³¹⁸

Commenting on the case of *A v. B.*, concerning the publication of a story about a well-known footballer's adulterous affairs, Phillipson pointed out that the legal reasoning applied by the courts in their decisions in fact tended to avoid any analysis of the issues brought up by the coming into force of the Act.³¹⁹ The judgment did not pay any attention at all to the question

³¹³ No. 109.

³¹⁴ No. 119-120.

³¹⁵ No. 136.

³¹⁶ *Douglas v. Hello! Ltd* [2007] UKHL 21, no. 117 (Lord Hoffmann), no. 307 (Baroness Hale of Richmond), nos. 325-327 (Lord Brown of Eaton-under-Heywood); Lord Nicholls of Birkenhead and Lord Walker of Gestingthorpe dissenting.

³¹⁷ *Douglas v. Hello! Ltd* [2007] UKHL 21, no. 123.

³¹⁸ Compare Judge Brooke's judgment in *Douglas v. Hello! Ltd* [2001] QB 967; [2001] 2 WLR 992, p. 994, in which he remarks on the duties of the courts regarding the application of the HRA in cases between individuals: 'In this judgment, however, I have the luxury of identifying difficult issues: I am not obliged to solve them.'

³¹⁹ Phillipson 2003a, p. 58, p. 71-72. He refers to questions of horizontal effect, such as the ones that have been extensively dealt with in legal writings; see the previous subsection for a brief overview. Compare also Singh &

whether Article 8 ECHR placed national courts under a positive obligation to afford a remedy against press intrusions into private life. Nor did it address the question of ‘horizontal asymmetry’, i.e. the fact that Article 8 ECHR (privacy) may not always apply in cases concerning the application of Article 10 ECHR (freedom of expression) in the private sphere: while a court order restraining publication of an article constitutes a State interference with the newspaper’s freedom of expression (Article 10), the refusal to grant such an injunction does not imply that the court directly invades the person’s privacy (Article 8) – it is the newspaper that does so. The Court of Appeal in *A v. B* did not say anything on the question whether the court, in the latter situation, would in principle show a lack of respect for private life by failing to act. It simply asserted that both rights applied, without further analysing the matter.³²⁰ Thus, it left considerable uncertainty as to the duties of the courts under the HRA.

Similar observations may be made on the *Campbell v. Mirror Group Newspapers* case^{321,322} The case concerned the publication of an article in the tabloid newspaper the *Daily Mirror* about fashion model Naomi Campbell attending meetings of Narcotics Anonymous to help her beat her drug addiction. The article was accompanied by several pictures of Campbell in front of the places where the meetings were held. The court of first instance awarded her damages for breach of confidence and infringement of the Data Protection Act, but this decision was overturned on appeal. According to the Court of Appeal, the published information was not worthy of protection under the breach of confidence doctrine, considering that the publication was in the public interest, because it revealed that Campbell had lied about her use of drugs.³²³ The House of Lords, in its turn, overruled this judgment by a 3 to 2 majority. The House, though rejecting a general right to privacy, ruled that an action for breach of confidence in principle would hold up.³²⁴ The two dissenting judges found that the publishers’ right to freedom of expression outweighed Campbell’s privacy interests, especially because of her being a public figure and regarding the false claims she had made in the past concerning her use of drugs.³²⁵ According to the other three, however, the breach of confidence allowed damages to be granted.³²⁶

In his comment on the case, Morgan criticised the House of Lords’ recognition of an extended version of breach of confidence as formulated by the Court of Appeal in the *Douglas v. Hello!* case.³²⁷ He pointed out that this line of reasoning changed the rules established in the 1969 case of *Coco v. Clark (Engineers)*³²⁸, which named two criteria for a breach of confidence: in the first place, whether the information was of a confidential nature and, in the second place, whether the

Strachan 2002, p. 157, who observe that the sixth guideline formulated in *A v. B* ‘explicitly recommends avoidance (on injunction applications) of the difficult question as to whether or not a right to privacy has any independent existence in law’.

³²⁰ Phillipson 2003a, p. 58-59.

³²¹ *Campbell v. MGN* [2002] EWCA Civ 1373, n. 62-64 and [2004] UKHL 22, n. 24 (Lord Nicholls of Birkenhead), n. 58 (Lord Hoffmann), n. 82 (Lord Hope of Craighead), n. 151-152 (Baroness Hale of Richmond). See also [2005] UKHL 61, regarding the amount of damages to be paid.

³²² Morgan 2004, p. 564.

³²³ *Campbell v. MGN* [2002] EWCA Civ 1373.

³²⁴ *Campbell v. MGN* [2004] UKHL 22.

³²⁵ *Campbell v. MGN* [2004] UKHL 22, n. 28-32 (Lord Nicholls of Birkenhead) and n. 55-78 (Lord Hoffmann).

³²⁶ *Campbell v. MGN* [2004] UKHL 22, n. 112-125 (Lord Hope of Craighead), n. 147-160 (Baroness Hale of Richmond), n. 165-171 (Lord Carswell).

³²⁷ Morgan 2004, p. 563-564.

³²⁸ *Coco v. Clark (Engineers)* [1969] RPC 41.

parties were in a relationship giving rise to an obligation of confidence. The approach approved by the House of Lords led to the fading of the latter criterion into the former, in other words: 'there is an obligation of confidence whenever the information should have been recognised to be confidential'.³²⁹ Although 'post-HRA' case law shows a reluctance by the courts to resort to a separate right to privacy in order to protect private life, the doctrine of breach of confidence has thus been extended to cover more types of cases of invasion of privacy.

While giving effect to Articles 8 and 10 of the ECHR through the HRA appears to have influenced the development of this change in the approach to misuse of information,³³⁰ it is striking to see how little attention the courts pay to the questions related to the 'horizontal effect' of the Act. Lord Hoffmann, after giving a brief overview of the developments regarding privacy after the introduction of the HRA and recognising the possible implications for the future development of the law, considered that in the *Campbell* case it was 'unnecessary to consider these implications' because the cause of action fitted 'squarely into both the old and the new law'.³³¹ Lord Nicholls of Birkenhead asserted that the time had come 'to recognise that the values enshrined in Articles 8 and 10 are now part of the cause of action for breach of confidence' and affirmed their applicability in relations between individuals,³³² but he did not further specify the relationship between the fundamental rights and the private law action. Last but not least, in the most recent Court of Appeal decision in *Douglas v. Hello!*, the judges remarked that, although the Government had made it clear that it did not intend to introduce legislation on privacy protection but anticipated that the judges would appropriately develop this area of law, having regard to the requirements of the ECHR, 'the courts have not accepted this role with whole-hearted enthusiasm'.³³³

To sum up it may be said that in comparison with the German and Dutch judgments in cases regarding privacy and freedom of expression, the English courts so far have not developed rules on the interaction of fundamental rights with private law doctrines that appear as sophisticated as the German theory of *Wechselwirkung*. Although the idea of a general right to privacy has received considerable attention in the case law following the coming into force of the HRA as of October 2000, Article 8 ECHR has been 'absorbed' into the concept of breach of confidence to an extent that allows the judges to avoid its character as a fundamental human right in their reasoning.³³⁴ At the most one could say that Article 8 ECHR has induced the stretching of breach of confidence, but a true 'interaction' of fundamental rights and private law concepts cannot yet be made out.

³²⁹ Morgan 2004, p. 564.

³³⁰ Morgan 2004, p. 564. Compare also Lester 2004, p. 269, who refers to *Douglas* and *Campbell* as 'some promising green shoots in the recent case law' that indicated the courts' engagement in the development of both statute law and common law compatibly with the Convention right to respect for private life.

³³¹ *Campbell v. MGN* [2004] UKHL 22, no. 53.

³³² *Campbell v. MGN* [2004] UKHL 22, no. 17.

³³³ *Douglas v. Hello! Ltd* [2006] QB 125, no. 46.

³³⁴ Phillipson 2003b, p. 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.' Compare Morgan 2004, p. 565.

One final point of interest, before moving on to the effect of the HRA in consumer credit law, concerns the relevance of the contractual arrangements made by the wedding couple in the *Douglas v. Hello!* case.³³⁵ It has been submitted that what the bride and groom were seeking through the contract based on exclusivity with *OK!* Magazine was not privacy or confidentiality but control of the publicity given to their wedding in the media.³³⁶ In line with this consideration, Keene LJ in the Court of Appeal decision dismissed the arguments based on ‘interference with contractual relationships’ purely within the realm of contract law, not making any reference to the scope of protecting privacy values.³³⁷ Lindsay J, in the High Court judgment, also focused on the contract law dimension, arguing that the Douglases were not in breach of their contract with *OK!*, since they had taken all reasonable means to secure that unauthorised media had no access to the wedding. *OK!* had therefore, on this basis, not been injured by the publication of the photographs by *Hello!*.³³⁸

In the assessment of the claim based on breach of confidence, nevertheless, all three Court of Appeal judges considered that the contractual arrangements made to control the form of publicity given to the event were of some importance for the protection of privacy interests. Both Keene LJ and Brooke LJ observed that ‘the occasion lost much of its private nature’ by the fact that very widespread publicity was to be given to it in *OK!* magazine soon afterwards.³³⁹ Therefore, only a limited degree of privacy remained, which could not be weighed against the impact on the publishers of *Hello!* magazine of an injunction restraining publication. Sedley LJ was also of the opinion that the Douglases had sold most of their privacy interests in the wedding pictures to *OK!* magazine and submitted that in case *Hello!* would have got hold of *OK!*’s photographs, only the latter ‘would have proprietary rights and remedies in law’, while the wedding couple would probably not have ‘any claim for breach of the privacy with which they had already parted’.³⁴⁰ In the present case, however, *Hello!* published unauthorised photographs, which might not be in accordance with the image that was important to the couple from both a professional and a personal point of view. According to Sedley, ‘[t]his element of privacy remained theirs and *Hello!*’s photographs violated it’.³⁴¹ Still, this was not enough to grant an injunction.

Lindsay J, in his High Court judgment, found that *Hello!*’s conduct amounted to a breach of commercial confidence.³⁴² The contractual arrangements made with *OK!* magazine regarding the publicity that would be given to the wedding, in his view, had put the Douglases in a position akin to that of holders of a trade secret. By buying and publishing the photographs *Hello!* had been party to the breach of confidence with respect to the bride and groom and *OK!* magazine and, on this basis, could be held liable in damages.³⁴³

³³⁵ See also Whittaker 2004, no. 1-055 and 1-056.

³³⁶ *Douglas v. Hello! Ltd* [2001] QB 967; [2001] 2 WLR 992, p. 1013 and [2003] EMLR 31, n. 216. Compare Singh & Strachan 2002, p. 144.

³³⁷ *Douglas v. Hello! Ltd* [2001] QB 967; [2001] 2 WLR 992, p. 1010-1011.

³³⁸ *Douglas v. Hello! Ltd* [2003] EMLR 31, no. 241.

³³⁹ *Douglas v. Hello! Ltd* [2001] QB 967; [2001] 2 WLR 992, p. 995 and 1013 respectively.

³⁴⁰ *Douglas v. Hello! Ltd* [2001] QB 967; [2001] 2 WLR 992, p. 1006.

³⁴¹ *Douglas v. Hello! Ltd* [2001] QB 967; [2001] 2 WLR 992, p. 1006.

³⁴² *Douglas v. Hello! Ltd* [2003] EMLR 31, no. 227. See also Barber 2003, p. 602.

³⁴³ *Douglas v. Hello! Ltd* [2003] EMLR 31, no. 198: ‘As for the *Hello!* defendants, their consciences were, in my view, tainted; they were not acting in good faith nor by way of fair dealing. (...) They knew that *OK!* had an exclusive contract; as persons long engaged in the relevant trade, they knew what sort of provisions any such contract would include and that it would include provisions intended to preclude intrusion and unauthorised

Lord Phillips of Worth Matravers MR and Clarke and Neuberger LJ in the appeal decision specified that the calculation of damages might be affected by the fact that contractual arrangements had been made regarding the publication of pictures of a private occasion. They considered that:

[t]o the extent that an individual authorises photographs taken on a private occasion to be made public, the potential for distress at the publication of other, unauthorised, photographs, taken on the same occasion will be reduced. This will be very relevant when considering the amount of any damages. The agreement that authorised photographs can be published will not, however, provide a defence to a claim, brought under the law of confidence, for the publication of unauthorised photographs.³⁴⁴

The judges did thus not accept the submission made by the defendant's lawyers that the Douglases could no longer claim under the law of confidence because they had contracted with *OK!* magazine regarding the publication of their wedding pictures.

The case thus illustrates how private parties under English law may contractually waive certain elements of their privacy for commercial purposes. It makes clear that such a waiver reduces their possibilities of obtaining certain legal remedies in case of a violation of their rights: in the present case, the remaining privacy interests were not considered to carry sufficient weight to justify a limitation of *Hello!*'s journalistic freedom of expression by means of an injunction restraining publication of the unauthorised photographs. A breach of confidence was, nevertheless, established.

Like in the cases of *A v. B* and *Campbell v. MGN*, however, hardly any attention was paid to the protection of these remaining privacy interests by means of Article 8 ECHR. The courts did not elaborate on the status of privacy rights in the post-HRA era, but avoided this question by resorting to the breach of confidence doctrine. The balance of the parties' interests, consequently, remained for the most part within the sphere of private law and no guidelines were given regarding the role of the judiciary in safeguarding fundamental rights in cases between individuals and the interpretation of breach of confidence in the light of Article 8 ECHR. Other than the legal scholars participating in the academic debate on the 'horizontal effect' of the HRA, the English judges have thus not yet expressed themselves in favour of a direct or an indirect effect in the field of privacy-related cases.

Contract law: Wilson v. First County Trust and Ghaidan v. Godin-Mendoza

What about the role of the HRA in contract law adjudication? The first case in which the HRA was invoked in relation to an agreement between private parties was *Wilson v. First County Trust*.³⁴⁵ It dealt with the question whether a certain provision of the Consumer Credit Act 1974 (hereafter

photography. Particularly would that be so where, as they knew, a very considerable sum would have had to have been paid for the exclusive rights which had been obtained. (...) The surrounding facts were such that a duty of confidence should be inferred from them. (...) The unauthorised pictures themselves plainly indicated they were taken surreptitiously. Yet these defendants firmly kept their eyes shut lest they might see what they undeniably knew would have become apparent to them.'

³⁴⁴ *Douglas v. Hello! Ltd* [2006] QB 125, no. 107.

³⁴⁵ *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. See also Whittaker 2004, nos. 1-031 and 1-032, nos. 1-038 to 1-040.

also: CCA) was compatible with Article 6(1) ECHR (fair trial) and Article 1 of the First Protocol to the ECHR (protection of property).

The facts of the case were the following:³⁴⁶ In January of 1999, Mrs Wilson borrowed £ 5,000 (ca. 7,300 euro) from pawnbroker First County Trust (hereafter: FCT) for a period of six months. The pawned property was her car. In addition to the sum of £ 5,000, FCT charged a ‘document fee’ of £ 250 (ca. 365 euro). In the contract the amount of the loan was stated as £ 5,250 (ca. 7,700 euro) and parties agreed that this amount was to be repaid, with interest, on 21 July 1999. When Mrs Wilson did not repay the money on that date, FCT sought payment, failing which the car would be sold. Mrs Wilson then commenced proceedings in the county court, claiming that the credit agreement was unenforceable because it did not contain all of the terms prescribed by the Consumer Credit Act 1974. Alternatively, she sought to reopen the agreement on the ground that the rate of interest was grossly excessive. The judge refused her primary claim, but awarded the subsidiary one and reduced the amount of interest payable. The Court of Appeal, on the other hand, found that the agreement could indeed not be enforced. It however considered the provisions that stipulated this outcome incompatible with the HRA, which had in the meantime come into force, and made a declaration of incompatibility on the basis of section 4 of the Act. At the last instance, the House of Lords also looked into the fundamental rights aspects of the case.

At the root of the matter was the question whether the credit agreement contained all the prescribed terms (section 8 in conjunction with section 61(1)(a) of the Consumer Credit Act 1974). One of these was the ‘amount of the credit’. If the agreement did not contain the prescribed terms, the court was precluded from enforcing the contract (section 127(3)).³⁴⁷ In the case of *Wilson v. FCT*, the question was whether the fee of £ 250 was part of the amount of credit. If so, all prescribed terms would be correctly stated; if not, this would not be the case and the agreement would be unenforceable. As said, the district judge held the agreement to be enforceable, because he considered the amount of the fee to be part of the amount of credit. The Court of Appeal, however, found that the fee was not ‘credit’ for the purposes of the Consumer Credit Act. As a consequence, the credit agreement was unenforceable, which meant that Mrs Wilson was entitled to keep the amount of the loan, pay no interest and recover her car.

Sir Andrew Morritt V-C’s judgment, issued on behalf of the Court of Appeal, did not stop at this conclusion, but went on to consider the implications of the coming into force of the HRA.³⁴⁸ Judge Morritt held that from 2 October 2000 onwards – the date when the Act came into force – the court was required by the provisions of the HRA (section 6(1) in conjunction with section 6(3)(a)) to avoid acting in a way that was incompatible with the ECHR. If the relevant provisions of the Consumer Credit Act 1974 were incompatible with a Convention right, it would be unlawful for the Court of Appeal to give effect to them. Section 3 HRA obliged the court to try to read the provisions of the 1974 Act so as to render them compatible with the Convention, but if that reading was not possible, the court could make a declaration of the incompatibility of the Act with the Convention (section 4 HRA). According to Judge Morritt, the provisions of the 1974 Act infringed the right of access to a court (Article 6(1) ECHR) and the right to enjoy one’s

³⁴⁶ *Wilson v. First County Trust Ltd*, [2003] UKHL 40, nos. 1 ff. and 82 ff.

³⁴⁷ Section 127(3) Consumer Credit Act 1974: ‘The court shall not make an enforcement order under section 65(1) if section 61(1)(a) (signing of agreements) was not complied with unless a document (whether or not in the prescribed form and complying with the regulations under section 60(1)) itself containing all the prescribed terms of the agreement was signed by the debtor or hirer (whether or not in the prescribed manner).’

³⁴⁸ *Wilson v. First County Trust Ltd* (No 2) (CA) [2001] EWCA Civ 633; [2001] 3 WLR 42-61.

possessions (Article 1 of the First Protocol to the ECHR), since they excluded any judicial remedy and even any meaningful consideration by the court of the creditor's rights under the agreement. The court could not identify any reason why an inflexible prohibition was necessary in order to achieve a legitimate aim of social policy (here: protection of borrowers): 'there is no reason why that aim should not be achieved through judicial control by empowering the court to do what is just in the circumstances of the particular case' (no. 39).

The main issues in the judgment of the House of Lords were: 1) the retroactivity of the Human Rights Act; 2) the applicability of Article 6 ECHR and Article 1 of the First Protocol as well as the question whether these rights were breached; and 3) the use of *Hansard* (the official reports of proceedings in the Houses of Parliament) in compatibility cases. The second aspect has the most relevance to the 'horizontal' effect debate. Before going into this, it should however be mentioned that the Law Lords only considered the compatibility questions in a theoretical manner. They had found that the HRA did not apply in this case, in which all relevant events had taken place before the coming into force of the Act.³⁴⁹ Nevertheless, the Lords found it worthwhile to look into the effects of the Act had it been applicable, because the compatibility had been fully argued and considered in the Court of Appeal case and the issue was of importance for many other transactions (nos. 27, 103).

According to Lord Nicholls of Birkenhead, Article 6(1) ECHR was not applicable to the *Wilson* case. Section 127(3) of the Consumer Credit Act did not bar access to court to decide whether the case was caught by the restriction on the scope of the creditor's rights under the agreement (no. 36):

'The inability of the court to make an enforcement order in such a case, whatever the circumstances, is a limitation on the *substantive* scope of a creditor's rights. It no more offends the rule of law and the separation of powers than would be the case if Parliament had said that such an agreement is void.' (no. 37; emphasis added)

Article 1 of the First Protocol, on the other hand, did concern the content of substantive domestic law. In the *Wilson* case, the provision was of relevance in relation to FCT's proprietary interest as the pawnee of Mrs Wilson's car. Moreover, both parties had acquired contractual rights under the agreement. These also fell within the scope of Article 1, being 'possessions' in the sense of this provision. The Consumer Credit Act 1974, a law regulating the effect of a transaction between the parties in the public interest, could be tested against Article 1: if it created an 'imbalance' between the parties which would result in one party being arbitrarily or unjustly deprived of his possessions for the benefit of the other, the law might infringe the right to protection of one's property.³⁵⁰ According to Lord Nicholls, the relevant provisions of the Consumer Credit Act could be characterised as a statutory deprivation of the lender's rights of property – in this case: FCT's rights of property – in the broadest sense of the expression (no. 44). What had to be looked into was whether this statutory interference with FCT's peaceful enjoyment of its possessions was justified, that is the question of proportionality.

³⁴⁹ The most elaborate opinion on the retroactivity of the HRA is given by Lord Rodger of Earlsferry, no. 174 ff.

³⁵⁰ No. 43, with reference to ECommHR 12 October 1982, application no. 8588/79 and 8589/79, 5 EHRR 249, 256 (*Bramelid and Malmström v. Sweden*).

In Lord Nicholls's opinion, section 127(3) of the Consumer Credit Act was compatible with Article 1 of the First Protocol. He argues that it was generally accepted that the provision pursued a legitimate aim, referring to the public interests which section 127(3) served:

'The fairness of a system of law governing the contractual or property rights of private persons is a matter of public concern. Legislative provisions intended to bring about such fairness are capable of being in the public interest, even if they involve the compulsory transfer of property from one person to another (...) More specifically, persons wishing to borrow money are vulnerable. There is a public interest in protecting such persons from exploitation.' (no. 68)

The means chosen to achieve this aim was appropriate and not disproportionate in its adverse impact. Although the adverse consequences for the lender might be very harsh, since he would lose all his rights under the agreement in case the prescribed terms were missing, Lord Nicholls accepted that 'in suitable instances it is open to Parliament, when Parliament considers the public interest so requires, to decide that failure to comply with certain formalities is an essential prerequisite to enforcement of certain types of agreements'. Parliament could consider that a broad solution served the protection of borrowers best, even though it might have drastic effects on the lender's position in individual cases (nos. 74 and 75).

The only point that caused Lord Nicholls some difficulty was whether the Consumer Credit Act's requirement to state the amount of credit was sufficiently clear and certain: 'The more severe the sanction, the more important it is that the law should be unambiguous' (no. 76). In the *Wilson* case, however, the degree of uncertainty involved in identifying the amount of 'credit' was, in his opinion, not unacceptably high. Since the statutory provisions applied only to loans up to a limit of £ 25,000, the burden imposed on the creditor was in any case not excessive (no. 77). Lord Nicholls added, however, that his opinion might change, if this limit were removed and the Act were to apply to all loans regardless of their amount (no. 80).

According to Lord Hope of Craighead, neither Article 6 ECHR nor Article 1 of the First Protocol would have applied in the *Wilson* case. He considered that:

'What article 6(1) seeks to do (...) is to protect the individual against anything which restricts or impairs his access to the courts for the determination of a civil right whose existence is at least arguable. But the precise scope and content of the individual's civil rights is a matter for each state to determine (...)' (no. 105)

And on the nature of Article 1 of the First Protocol he stated:

'Article 1 of the First Protocol has a similar character. It does not confer a right of property as such nor does it guarantee the content of any rights in property. What it does instead is to guarantee the peaceful enjoyment of the possessions that a person already owns, of which a person cannot be deprived except in the public interest and subject to the conditions provided for by law (...). Here too it is a matter for domestic law to define the nature and extent of any rights which a party acquires from time to time as a result of the transactions which he or she enters into.' (no. 106)

In the case of *Wilson v. First County Trust*, the property rights involved were set in the credit agreement that was governed by the 1974 Consumer Credit Act. Since the agreement had been

improperly executed from the outset, it had been subject to the restrictions of section 127(3) of the 1974 Act from the start. Therefore, Lord Hope found that FCT's rights under Articles 6(1) ECHR and 1 of the Protocol were not engaged: FCT did not at any moment have more rights under the agreement than section 65(1) in conjunction with section 127(3) CCA allowed for.

'Article 6(1) of the Convention and article 1 of the First Protocol cannot be used to confer absolute and unqualified rights on FCT which, having regard to the terms of the statute by which agreements of this kind are regulated, it never had at any time under the improperly executed agreement which it entered into.' (no. 108)

Lord Hope, therefore, did not further consider the compatibility of section 127(3) with the Convention rights. He nevertheless added that he would have reached the same conclusion as Lord Nicholls, had he done so.

Lord Hobhouse of Woodborough, on the other hand, found that Article 1 would have applied, but he also came to the conclusion that the provisions of the Consumer Credit Act did not breach FCT's Convention rights. He assumed that 'there was a true pledge involving a transfer of the possession of the motor car from the borrower to the lenders', that is a contract of pledge (no. 137). On the basis of this contract, FCT sought to exercise its rights against the car, but was prevented from doing so by section 65 of the 1974 Act. Since this deprived it of its possession of the car, Article 1 was engaged. The answer would be different if Mrs Wilson had actually remained in possession of the car the whole time: FCT would have purported to enforce a contractual right to seize it after Mrs Wilson defaulted, but FCT had never validly acquired such a right.

Assuming that Article 1 of the First Protocol was engaged, Lord Hobhouse then investigated whether the Consumer Credit Act went beyond what was justifiable under this provision. He agreed with Lord Nicholls and Lord Hope that it did not, emphasising the legislator's freedom to decide on this kind of policy issue:

'The relevant provisions of the Act are a legitimate exercise in consumer protection. Borrowers are vulnerable and not on equal footing with lenders. The Act legitimately regulates the transparency and recording of the terms of the loan transaction and makes provisions for the clear obtaining of the borrower's informed consent to those terms. Any such Act would have to provide effective sanctions against the lender for any failure to comply with the requirements of the Act otherwise they will be liable to be flouted, as occurred in the instant case. (...) The Act, as a matter of policy, places a strong emphasis on the clarity and transparency of the actual transaction and, although in respect of other infringements a degree of latitude is allowed and the sanctions are discretionary, for the infringement involved in the instant case the sanction is automatic, as the statute makes plain. It is argued that the legislature could have made the sanction discretionary. Maybe. But it does not follow that the sanction should here be automatic was not a permissible view.' (no. 138)

Lord Scott of Foscote also found that, had the HRA been applicable to the transaction between FCT and Mrs Wilson, there would have been no infringement of FCT's Convention rights. He agreed with the other Law Lords that Article 6 ECHR provided a procedural guarantee of the right to have issues judicially determined, but was not concerned with the substantive law (no. 165). Since section 127(3) of the Consumer Credit Act was clearly a provision of substantive law Article 6, in his opinion, was not engaged in the *Wilson* case. As for Article 1 of the First Protocol,

this provision was also not engaged nor infringed, because 1) FCT had never had at any time the right to enforce against Mrs Wilson the repayment of the amount of £ 5,000, and therefore its peaceful enjoyment of existing possessions was not at stake, and 2) the policy underlying the Consumer Credit Act could not be deemed disproportionate.

Lord Rodger of Earlsferry, finally, did not go into the question of compatibility, but extensively examined the retroactivity of the HRA and the effect of the Convention rights in pending proceedings. He also reached the conclusion that, for the purposes of in particular Article 1 of the First Protocol,³⁵¹ the provisions of the HRA did not apply to the *Wilson* case.

Comments on this case have criticised the Court of Appeal's 'rather loose' use of the Convention rights.³⁵² Bamforth noted that the court seemed to have treated the two Convention rights, Article 6(1) ECHR and Article 1 of the First Protocol, together or synonymously for the greater part of its judgment. The case law of the Strasbourg court, however, deals with the issue of the proportionality of a restriction on a right in the context of the case. The answer to the proportionality question may thus differ from one right to another in the individual case, depending on the sensitivity of the right which is infringed, the nature of the Convention-approved goal used to justify the infringement, the severity of the infringement and its impact upon the complainant.³⁵³

Furthermore, Bamforth doubted whether Article 1 was engaged by the restriction imposed on the enforceability of FCT's security or by the restriction on its contractual rights. He pointed out that the ECtHR had not confirmed that restrictions on contractual rights fell within the scope of Article 1.³⁵⁴ Nevertheless, the House of Lords in its later judgment found that the term 'possessions' in Article 1 was 'apt to embrace contractual rights as much as personal rights' (no. 39).

On the horizontal effect of the HRA, Bamforth remarked that the Court of Appeal's decision in the *Wilson* case made clear that ECHR rights could be used in order to interpret legislation in cases between private parties.³⁵⁵ In the light of the court's earlier judgment in *Douglas v. Hello! Ltd*, the court in the *Wilson* case thus seemed to refute Sir Richard Buxton's argument that Convention rights could have no horizontal effect under the HRA.³⁵⁶ In Bamforth's opinion, the court's approach was consistent with the interpretation-based view of horizontal effect and did not go as far as to adopt Wade's view³⁵⁷ of a rather direct effect of Convention rights.

As has been observed by Whale, in this context, the problem of the Court of Appeal's approach seemed to be that it went back and forth between 'possessions' and the 'fair balance' test without clearly considering why or how Article 1 was engaged.³⁵⁸ For that reason, it remained unclear what the implications of the *Wilson* case would be for commercial disputes between private

³⁵¹ Lord Rodger agreed with Lord Nicholls that Article 6(1) ECHR was not engaged in this case; no. 215.

³⁵² Bamforth 2002, p. 206 ff.; Whale 2002, p. 78. In a different sense, Seager 2001 who considers the implications of the Court of Appeal's judgment for the CCA and other legislation.

³⁵³ Bamforth 2002, p. 206-207, with references to case law.

³⁵⁴ Bamforth 2002, p. 207.

³⁵⁵ Bamforth 2002, p. 208.

³⁵⁶ Buxton 2000.

³⁵⁷ Wade 1998 and 2000. See section 2.5.1 above.

³⁵⁸ Whale 2002, p. 78.

parties. According to Whale, the court's departure from Strasbourg jurisprudence left much room for questions on the development of the 'horizontal' application of the ECHR rights.³⁵⁹

Another contract case in which the HRA came into play was *Ghaidan v. Godin-Mendoza*.³⁶⁰ This case concerned the question whether, on the death of a tenant, the homosexual partner of the tenant could succeed to the tenancy of the apartment in which the couple lived.³⁶¹ Under English law, the surviving spouse of a protected tenant became a statutory tenant by succession (paragraph 2(1) of Schedule 1 to the Rent Act 1977). A person who was living with the original tenant as his or her wife or husband, moreover, should be treated as the spouse of the original tenant (paragraph 2(2) of the aforementioned Schedule). In earlier case law, the House of Lords had however established that this provision did not extend to same-sex couples.³⁶² In the case of *Ghaidan v. Godin-Mendoza* this interpretation was challenged in light of the HRA.

Godin-Mendoza was the surviving homosexual partner of the original tenant of the apartment in which the two of them had lived together for almost eighteen years. After the death of the tenant, landlord Ghaidan brought proceedings to take possession of the apartment. The judge handling the case established that Godin-Mendoza did not succeed to the tenancy as the surviving spouse, but was entitled to an assured tenancy by succession as a member of the 'family' of the deceased (paragraph 3(1) of Schedule 1 to the Rent Act 1977). This meant that he would be in a less favourable position than a surviving heterosexual partner of a tenant. Godin-Mendoza successfully appealed the decision. The judges hearing the appeal held that he was entitled to succeed to the tenancy under paragraph 2 of Schedule 1 to the Rent Act 1977. Ghaidan challenged the judgment.

The House of Lords held that the relevant provisions on tenancy infringed Godin-Mendoza's rights under Article 14 (non-discrimination) read in conjunction with Article 8 (protection of family life) of the ECHR.³⁶³ Lord Nicholls of Birkenhead considered the reasons underlying the protection given to the survivor of a cohabiting heterosexual couple to equally apply to the survivor of a homosexual couple. Therefore, no justification could be found for the difference in treatment of heterosexual and homosexual couples. In light of Article 3 of the HRA (interpretation of legislation), consequently, Article 2 of Schedule 1 to the Rent Act 1977 had to be read and given effect to as though the surviving homosexual partner of the original tenant were the surviving spouse of the tenant.³⁶⁴ In the end, therefore, Ghaidan's appeal was dismissed.

The *Ghaidan v. Mendoza* judgment is of importance for the ECHR-compliant interpretation of statutory provisions.³⁶⁵ It gives a first indication of what is required from judges in civil cases in light of Article 3 HRA. Even if statutory provisions do not contain ambiguities, judges may be held to change the interpretation of these provisions in light of the Convention rights.³⁶⁶

³⁵⁹ Whale 2002, p. 78-79.

³⁶⁰ *Ghaidan v. Godin-Mendoza* [2004] UKHL 31; [2004] 3 All ER 411.

³⁶¹ For an overview of the facts of the case, see *Ghaidan v. Godin-Mendoza* [2004] UKHL 31, nos. 1-7 (Lord Nicholls of Birkenhead).

³⁶² *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27.

³⁶³ *Ghaidan v. Godin-Mendoza* [2004] UKHL 31, nos. 17-20.

³⁶⁴ No. 35.

³⁶⁵ Van Zyl Smit 2007.

³⁶⁶ No. 28-29.

It may be noted that the *Wilson* case and *Ghaidan v. Mendoza* case considered the compatibility of a provision of law with human rights rather than the compatibility of the contractual provisions. In that sense, in particular the first case may be compared to the German *Handelsvertreter* judgment, where a non-competition clause that was in compliance with legislation was nevertheless set aside on the basis of the fundamental right to freely choose one's profession, which according to the *Bundesverfassungsgericht* had been infringed in a disproportionate manner.

There is however an important difference, due to the manner in which the effects of fundamental rights have been regulated in the two countries: while the German Constitutional Court overruled the decisions of the courts in civil cases because they validated a legal provision that did not comply with constitutionally protected rights, the English courts according to the HRA could only declare the incompatibility of a statutory provision with a Convention right (section 4(2) HRA).³⁶⁷ Even if the HRA had been applicable in the *Wilson* case and if the courts had found the relevant Consumer Credit Act 1974 provisions to violate Convention rights, the judges could do no more than declare this incompatibility, without this having any specific effect in the present case (section 4(6) HRA).³⁶⁸ The provisions of the Act would still have governed the present case and it would have been up to Parliament to decide whether to change them so as to comply with the relevant Convention rights.

In this sense the case of *Wilson v. First County Trust* also differs from the privacy cases that were discussed before. These cases engaged the common law doctrine of breach of confidence and as such left more discretion to the judges to develop the law in accordance with the ECHR rights that had been given further effect by the HRA. They could – or should(?)³⁶⁹ – interpret the rules on confidentiality in the light of Articles 8 and 10 ECHR and, if necessary, adapt them in order to comply with the rights protected by these provisions. Consequently, they could give effect to the Convention rights in the specific cases presented before them. Since the *Wilson* case regarded the compliance of statutory law with fundamental rights, and not common law as in the privacy cases, it was not possible to establish an effect of this type.

2.5.3 Preliminary conclusion

The examples from English case law demonstrate a so far rather modest effect of the HRA in private disputes. Until now, its influence has been most notable in the area of privacy protection, where the question has arisen in which manner Articles 8 and 10 ECHR (respect for privacy and freedom of expression, respectively) affect disputes concerning the publication of information regarding (famous) people's private lives in the media. Even in the cases in this field, however, the judges seem to shy away from analysing in an in-depth manner the changes brought about by the coming into force of the HRA in so far as they concern duties of the legislature and the judiciary to safeguard Convention rights in private law disputes. Most cases have been resolved on the basis of an extended interpretation of breach of confidence, thus remaining within the sphere of a balance of private law interests.

³⁶⁷ See also section 1.1.5.

³⁶⁸ Section 4 HRA stipulates: '(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility. (...) (6) A declaration under this section ("a declaration of incompatibility") (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and (b) is not binding on the parties to the proceedings in which it is made.'

³⁶⁹ See the discussion on the direct or indirect effect of the HRA in subsection 2.5.1 above.

In contract law adjudication, the HRA appears to have had even less of an impact. The case of *Wilson v. First County Trust* has given some indications of the way in which the compatibility of statutory provisions with the ECHR could be tested. Nevertheless, the considerations of the judges lacked precision as to the translation of specific elements of individual Convention rights in domestic cases and, moreover, deviated from the case law of the ECtHR.

English statutory and common law thus seem to remain true to their freedom-based tradition. As Brooke LJ considered in the Court of Appeal judgment in *Douglas v. Hello!*:

‘English law, as is well known, has been historically based on freedoms, not rights. The difference between freedom-based law and rights-based law was memorably expressed by Lord Goff of Chieveley in the course of his speech in *Attorney General v. Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109 when he said he could see no inconsistency between English law on freedom of speech and Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. He said, at p. 283:

“The only difference is that, whereas Article 10 of the Convention, in accordance with its avowed purpose, proceeds to state a fundamental right and then to qualify it, we in this country (where everybody is free to do anything, subject only to the provisions of the law) proceed rather upon an assumption of free speech, and turn to our law to discover the established exceptions to it.”

It is against this background of freedom-based law that the law of confidentiality has been developed.³⁷⁰

The HRA may be said to have affected the actual state of confidentiality law in so far as it has made way for a more rights-oriented discourse. While the judges in *Kaye v. Robertson*³⁷¹ explicitly rejected the concept of the right to privacy, post-HRA judgments have reopened the case for protection of privacy interests in private law disputes in the light of Articles 8 and 10 ECHR. Given the high hopes expressed before the coming into force of the Act as to its possible impact on the development of the law,³⁷² some disappointment will however be felt when examining the judicial reasoning regarding the Convention rights in the specific cases. Although a certain effect is undoubtedly given to these rights in relations between private parties, to which the extension of the breach of confidence doctrine testifies, the judges avoid taking a stance on the question of ‘horizontal effect’.³⁷³

For contract law the same holds true when considering the *Wilson* case. The examination of statutory provisions in the light of Article 6 ECHR and Article 1 of the First Protocol to the Convention led the Court of Appeal to consider the issues of social policy engaged by the Consumer Credit Act 1974.³⁷⁴ The application of fundamental rights could thus entail a review of legal provisions governing a dispute between private parties. The House of Lords, however, was quick to point out that the courts should keep in mind that ‘theirs is a reviewing role’ and, therefore, ‘[t]he courts will reach a different conclusion from the legislature only when it is

³⁷⁰ *Douglas v. Hello! Ltd* [2001] QB 967; [2001] 2 WLR 992, p. 985.

³⁷¹ *Kaye v. Robertson* [1991] FSR 62.

³⁷² See, for instance, Deakin, Johnston & Markesinis 2003, p. 68-69.

³⁷³ See, once again, Morgan 2004, p. 564: ‘[H]ere lies the fundamental problem with the privacy case law since October 2000: persistent judicial refusal to engage with the horizontal effect issue, even while simultaneously giving some sort of effect to Convention rights, in actions between private parties.’ For further references, see the subsection on the *Douglas* case above.

³⁷⁴ *Wilson v. First County Trust Ltd (No 2)* (CA), [2001] EWCA Civ 633; [2001] 3 WLR 42, p. 54-58. Compare Bamforth 2002, p. 205.

apparent that the legislature has attached insufficient importance to a person's Convention right'.³⁷⁵ Moreover, a declaration of incompatibility would not have had any effect in the specific case, since it left the challenged provisions unaltered, leaving it up to Parliament to eventually adapt them.

2.6 Conclusions on an overview of case law

From the overview of German and Dutch case law it can be concluded that in these systems the judges have developed a doctrine of 'interaction' or *Wechselwirkung* of fundamental, constitutional rights and civil code provisions. While the courts have considered that certain rules or principles of private law might set limits to specific fundamental rights (e.g. tort to freedom of expression, or a freely agreed upon non-competition clause to free choice of profession), they emphasise that the former should in their turn be interpreted in the light of the societal values protected by the latter (which expressions, according to common opinion, constitute a tort, and to what extent may parties contractually limit free choice of profession?). In specific cases, the courts thus have to balance the opposing interests of the parties involved, putting on the scales the constitutionally protected values and the interests regulated by private law.

Italian case law regarding private law relationships has equally given a prominent importance to constitutional values for the interpretation of private law institutions, most notably the open norms of the civil code. In contract law, the approach of the *Corte di Cassazione* appears more general than that of its German and Dutch counterparts, seeing the introduction of fundamental rights in the application of the principle of good faith by means of the generally formulated Article 2 *Cost.* An explicit appeal has been made to the judges in civil cases to guarantee the protection of these rights also in the private sphere. Still, the approach adopted by the courts differs from the German and Dutch approaches, insofar as emphasis lies on the interpretation of rules and institutions of private law in the light of fundamental rights, while relatively little attention is paid to the restrictions which norms of contract law might in their turn set on fundamental rights.

English common law, on the other hand, appears reluctant to allow the interference of fundamental rights argumentation with the solution of private law disputes. The effects of the Human Rights Act 1998 in these types of cases have so far remained few. Legal scholars speak of a 'quasi-effect' of the Act, referring to the 'persistent judicial refusal to deal with the horizontal effect issues, even while simultaneously giving some sort of effect to Convention rights'.³⁷⁶ Instead of addressing the fundamental rights question, the courts tend to resolve cases engaging interests

³⁷⁵ *Wilson v. First County Trust Ltd* [2003] UKHL 40, no. 70, in which Lord Nicholls of Birkenhead observed: 'The more the legislation concerns matters of broad social policy, the less ready will be a court to intervene.' Lord Hope of Craighead added: 'The boundaries between the respective powers and functions of the courts and of Parliament must, of course, be respected. It is no part of the court's function to determine whether sufficient reasons were given by Parliament for passing the enactment.' (no. 116) Lord Hobhouse of Woodborough agreed, but justly pointed out: 'The argument that the courts when they apply and give effect to the 1998 Act are frustrating the will of Parliament is a travesty of the true position: they are giving effect to the will of Parliament expressed in the 1998 Act.' (no. 141)

³⁷⁶ Morgan 2004, p. 564. See also Phillipson 2003a, p. 59-60 and p. 72; and the same author 2003b, p. 728 and p. 748.

protected by the ECHR on the basis of recognised doctrines of private law, if necessary stretching the scope and meaning of these doctrines.

When taking the German theory of *Wechselwirkung* of fundamental rights and private law provisions as a starting point, it might thus be said that the Dutch courts usually adopt a very similar approach to the interaction of constitutional and private interests. The Italian formula of '*combinato disposto*' seems to suppose a close connection between fundamental rights and contractual relationships, in which Article 2 *Cost.* plays a central part. English law, finally, stands on the opposite side, weaving ECHR rights into private law concepts in order to give further effect to these rights as requested by the HRA, but hesitating to formulate more precise rules regarding the duty of the courts in civil cases to protect fundamental rights.

On closer inspection, as will be further elaborated in the next Chapter, none of these general approaches seem to unambiguously favour a certain type of 'direct' or 'indirect' effect of fundamental rights in private law cases or, in particular, disputes between contract parties. Depending on the fundamental right involved and the type of relationship between the parties, the specific cases do show examples of the four categories distinguished before,³⁷⁷ but in none of the selected countries does this seem to indicate a principal choice of the courts in favour of either a direct or more indirect application of fundamental rights.³⁷⁸

In the light of these considerations, the question arises whether the direct/indirect effect distinction can clarify the role of fundamental rights in contract law. Does it explain the developments in case law and indicate how the courts in civil cases should deal with fundamental rights argument? And, if not, is there another theoretical model that might prove more useful? These questions will be the subject of the following Chapter.

³⁷⁷ See section 2.1.4, in which 'strong' and 'weak' versions of direct and indirect effect were distinguished on the basis of a theoretical analysis. In the next Chapter a more detailed analysis will be made of the presented case law in the light of these different forms of direct and indirect effect.

³⁷⁸ With an exception, maybe, for the early case law of the German *Bundesarbeitsgericht*, which under the influence of its then-president Nipperdey adopted the theory of direct effect. Later judgments of the court have, nevertheless, demonstrated a weakening of this line, though the court has never explicitly declared a conversion to the doctrine of indirect effect; Starck 2001, p. 97.

3 A new perspective on effects of fundamental rights in contract law

In section 2.1.4 a theoretical framework was presented based on the concepts of ‘direct’ and ‘indirect’ effects, distinguishing four hypothetical forms of effects of fundamental rights on contract law. In the subsequent sections of Chapter 2 a survey was given of relevant case law in the field, in which an exploration was made of approaches adopted by the courts. Only occasional reference was made to the conceptual framework of direct/indirect effect. In this Chapter, an attempt will now be made to relate the theory of direct and indirect effect to the various techniques of case solution applied by the courts, in particular the *Wechselwirkung* approach and the balance of parties’ interests. It will be investigated to what extent the conceptual distinction may indeed serve the understanding of and the explanation for the role of fundamental rights in contractual relationships and what other perspectives might be taken concerning the developments in case law.

For this purpose, the described cases will first be classified according to the categories of direct and indirect effect distinguished in section 2.1.4 (section 3.1). Subsequently, it will be discussed whether and to what extent such a classification helps to understand and explain the application of fundamental rights in contract cases (3.2). It will be argued that from the perspective offered by the direct/indirect effects analysis it does not seem possible to see exactly why and in what cases the courts should openly address fundamental rights questions – not in any of the countries selected for the research. Moreover, it will be defended that the analysis in terms of direct and indirect effects mostly emphasises the formal, dogmatic side of fundamental rights application in contract law, without relating to, for instance, new tendencies for protecting contracting parties. In order to determine more specific guidelines for the application of fundamental rights in contractual relationships, it may therefore be helpful to approach the issue from a different perspective, for instance the tension between party autonomy and duties of solidarity in contract law (3.3).

3.1 Cases of ‘direct’ and ‘indirect’ effect

3.1.1 Introduction

In section 2.1.4 a tentative distinction has been made between various theoretical forms of direct and indirect effect. A further differentiation has been made according to ‘weak’ and ‘strong’ versions, which may be briefly recalled here:

- (i) ‘strong’ direct effect: contract parties are directly bound by fundamental rights, which means that one party can base a claim or defence against the other party on a fundamental right, without having to seek recourse to rules of contract law;
- (ii) ‘strong’ indirect effect: contract parties are not directly bound by fundamental rights, but the courts guarantee the values protected by fundamental rights by interpreting the rules of contract law in the light of these rights; contract parties are indirectly affected through the judgments of the courts;
- (iii) ‘weak’ indirect effect: fundamental rights serve as an inspiration for the solution of contract law disputes, while no explicit reference is made to constitutional rights or human rights.

Besides these forms of effects of fundamental rights on the contractual relationship, it is also possible to distinguish a ‘procedural effect’ (iv) through the judgments of the courts in civil cases: if it is accepted that these courts are directly bound, this implies that a complaint can be made regarding the compliance of a court decision with fundamental rights. Contract parties may be either directly or indirectly affected.

This classification should not be seen as a ‘sliding scale’ or continuum.¹ Rather, each definition indicates a specific form of effect of fundamental rights in contractual relationships and, at least in theory, some overlap is possible between the categories. Moreover, these categories do not pretend to be more than a manner of systematising case law; the thoughts on which this systematisation is based, do not as such justify the specific effect given to a particular right in a certain contractual relationship.

Given these characteristics of the distinction between direct and indirect effects, it should therefore be investigated to what extent a systematisation according to these concepts indeed serves to clarify the relation between fundamental rights and contract law. On the basis of the case law that has been analysed in sections 2.2, 2.3, 2.4 and 2.5, a quick sketch will now be drawn of the various effects in the selected legal systems.² In particular, the comparative nature of the analysis might reveal whether the distinction between direct and indirect effects can provide adequate guidance for determining which fundamental rights might have an effect in what types of cases and under what circumstances.

3.1.2 Cases of ‘strong’ direct effect

Examples of parties being held directly bound by fundamental rights are few. The most significant cases that affirm such an effect are probably the early judgments of the German Federal Labour Court, the *Bundesarbeitsgericht*. As explained before,³ the Federal Labour Court in the 1950s, guided by its then-President Nipperdey, advocated the view that fundamental, constitutional rights were directly binding on private parties, in order to fully guarantee respect for these rights in all fields of law.⁴ In line with this conviction, it ruled, for instance, that a contractual clause prohibiting a student nurse from continuing her training if she became married infringed the basic right to marry (safeguarded by Article 6(1) GG), human dignity (Article 1 GG) and the right to freely develop one’s personality (Article 2 GG).⁵ The fact that the non-marriage clause had more or less freely been agreed upon could not justify such an infringement, given that the decision to marry

¹ Thus the classification does not follow the scheme of Boesjes, affirmed by the Dutch constitutional legislator; see Boesjes 1973, p. 911 and *TK* 1975-1976, 13 872, nr. 3. Compare section 1.1.3. The classification made for the present analysis regards the definition of certain types of effects of fundamental rights found in case law examples, without aspiring to design a coherent scale or continuum. In fact, as will also be argued in the following sections, I would agree with Smits 2003, p. 28-29, that the distinction between direct and indirect effects does not say anything about the intensity of the influence of fundamental rights in contractual relationships.

² Inevitably, some repetition of cases and argumentation will be made. However, it is aspired to present a more complete understanding of the direct/indirect effects discourse on the basis of the comparison. Where appropriate, reference will be made to earlier sections for more detailed information on the discussed cases.

³ See section 2.1.1. See also Spieß 1994, p. 1224.

⁴ Compare Nipperdey 1950 and 1961.

⁵ *BAG* 10 May 1957, *BAGE* 4, 274. See also section 2.1.3.b.

concerned a very personal matter, which should be free from any coercion. The protection of the institution of marriage was valued higher than that of freedom of contract (also constitutionally guaranteed, viz. by Article 2 GG), especially since contract parties should sometimes be protected against themselves.⁶

Although the *Bundesarbeitsgericht* followed this direct approach for a considerable time,⁷ and has never explicitly turned away from it, its current manner of addressing the constitutionality of labour contracts no longer fully corresponds to the definition of ‘strong’ direct effect. It has been observed that the Federal Labour Court nowadays prefers giving effect to fundamental rights through norms of private law and, thus, in an indirect manner: ‘The court first reviews the legal issues on the basis of private law and then, in a second step, considers whether the solution it has reached is consistent with the value system expressed by the basic rights.’⁸

The German courts in civil cases and the Constitutional Court have demonstrated even less inclination to accept the direct engagement of private individuals by fundamental rights. The *Lüth* decision of 1958 established the theory of *Wechselwirkung* or the interaction of fundamental rights with norms of private law⁹ and, consequently, the effect of fundamental rights should go through the ‘filter’ of these norms, in particular the general clauses. Later decisions seem to have always reverted to this starting point.¹⁰

In the other jurisdictions included in the analysis, ‘strong’ direct effects seem scarce as well. The Dutch courts in contract law cases appear to favour an adaptation of fundamental rights to the rules of contract law, thus excluding the possibility of a direct claim for a breach of a fundamental right. Once again, however, it should be emphasised that the distinction between direct and indirect effect for the greater part is a matter of perception; like a hologram, the picture changes depending on the angle from which we look at it. As we have seen before, the approach taken by the *Hoge Raad*, the Dutch Supreme Court, in the *hiv-test* cases has sometimes been recognised as a direct effect of fundamental rights in private law.¹¹ In this view, the cases involve a direct claim by a private party for breach of the fundamental rights to privacy (Article 10 *Grw*) and physical integrity (Article 11 *Grw*), in the assessment of which norms of private law play a role in the definition of the limitations (by law) of these rights. As I have argued in more detail before,¹² in my reading the cases do not demonstrate such a direct effect of fundamental rights, however; rather, a balance of the parties’ interests is made, in which the limitation of fundamental rights is considered in the light of rules of private law and, *vice versa*, the content of private law norms is determined in the light of fundamental, constitutionally protected values. This approach is similar to the German doctrine of *Wechselwirkung*, which presumes the indirect effect of fundamental rights in private law relations.¹³

⁶ Compare Starck 2001, p. 98-99.

⁷ Other examples include: *BAG* 3 December 1954, *BAGE* 1, 185; *BAG* 23 February 1959, *BAGE* 7, 256; *BAG* 29 June 1962, *BAGE* 13, 168; *BAG* 28 September 1972, *BAGE* 24, 438; *BAG* 23 September 1976, *BAGE* 28, 176; *BAG* 27 February 1985, *BAGE* 48, 122.

⁸ Starck 2001, p. 99.

⁹ *BVerfG* 15 January 1958, *BVerfGE* 7, 198. See section 2.2.1.

¹⁰ Compare section 2.2.2.

¹¹ See section 2.3.2, in particular Cherednychenko’s comment on the second one; Cherednychenko 2004b.

¹² See, again, section 2.3.2.

¹³ See also the following subsections.

A somewhat more direct application of fundamental rights in Dutch private law can be found in older case law in the field of tort liability. An example is the case of a woman whose social benefit payments had been reduced after a neighbour, who happened to work for the local social services, had passed on information about the woman's private life to the civil servants in charge of the woman's files.¹⁴ The *Hoge Raad*, the Dutch Supreme Court, observed that a citizen could infringe another citizen's right to respect for private life, safeguarded by Article 8 ECHR.¹⁵ Such an infringement would in principle constitute a tort.¹⁶ According to the Court, the neighbour in this case had infringed the woman's right to respect for her private life. Nevertheless, his conduct did not amount to tortious liability, since the gathering of information regarding the woman's actual rights to benefit payments could be considered 'necessary in a democratic society in the interests of (...) the economic well-being of the country' and 'the protection of (...) morals' (Article 8(2) ECHR). This application of Article 8 ECHR to a relationship governed by private law, including the limitation which its second section prescribes for *public authority*, comes very close to the definition of 'strong' direct effect.¹⁷

It is sometimes said that fundamental rights have been given a similar effect in the well-known *Goeree* cases, dealing with the publication and distribution of offensive statements regarding Jewish people and regarding homosexuals, both in the name of freedom of religion.¹⁸ At close reading, however, I would say that the judgments in these cases take inspiration from the *Wechselwirkung* approach, rather than allowing a direct claim for a breach of a fundamental right.¹⁹ Although the courts considered the tortious nature of the publications within the margins of the relevant constitutional rights (Articles 6(1) and 7(1) *Gw*), the assessment of the allegedly tortious nature of the statements was made in the light of other protected values, such as the principle of non-discrimination.²⁰ Given the balance of interests that was thus struck, involving fundamental rights on both sides, it is difficult to discern an unambiguous direct effect of these rights. They have been adapted to the private law context.²¹ The direct approach of the privacy case consequently has not found a more general application in the Netherlands, as also appears from recent case law in the field of contractual liability.²²

In Italy, it has been accepted that certain fundamental rights, such as the right to a fair salary (Article 36 *Cost.*) and the right to equal treatment of men and women in employment relations (Article 37 *Cost.*), may have a direct effect on labour contracts. On the basis of Article 36 *Cost.*, for instance, it has been recognised that a judge may determine the supplementation of an employee's

¹⁴ HR 9 January 1987, NJ 1987, 928 (*Edamse bijstandsvrouw*).

¹⁵ On the role of the European Convention on Human Rights in Dutch private law, see section 1.1.3.

¹⁶ HR 9 January 1987, NJ 1987, 928, in particular no. 4.4.

¹⁷ Compare Alkema's comment to the case, NJ 1987, 928. Note that the question whether there was such a justification for the infringement had to be answered on the basis of a balance of the woman's interests against the intensity of the infringement. Depending on the manner in which this balance is conducted, especially insofar as it regards the interpretation of 'proper social conduct' in tort law, the effect of the fundamental right could in the end be more indirect.

¹⁸ HR 5 June 1987, NJ 1988, 702, with a comment by Alkema; HR 2 February 1990, NJ 1991, 289, with a comment by Alkema. Compare Cherednychenko 2004b, p. 191. In a different sense Kortmann 2005, p. 394-395.

¹⁹ Compare Advocate-General Koopman's conclusions in HR 18 June 1993, NJ 1994, 347 (*biv-test I*), n. 13, commenting on HR 2 February 1990, NJ 1991, 289.

²⁰ See, for instance, HR 2 February 1990, NJ 1991, 289, n. 6.

²¹ Compare the preliminary conclusions in section 2.3.

²² See section 2.3.2.

salary according to the terms of a collective labour agreement, even if the employee and his employer are not parties to the collective agreement.²³ Furthermore, a right has been established to compensation for work done on overtime, even if the employee had freely agreed to work on his weekly rest day.²⁴ In general contract law, however, a direct claim for a breach of a fundamental right has not been commonly accepted.²⁵

The English courts, finally, have until now not recognised a ‘strong’ direct effect of any of the ECHR rights, incorporated in English law through the Human Rights Act 1998, in cases between private parties.²⁶ In general the role of the HRA in contract law may be said to have been marginal, mostly serving as a source for the interpretation of statutory rules or common law doctrines.²⁷

3.1.3 Cases of ‘strong’ indirect effect

Perhaps the most common influence of fundamental rights in European contract law can be felt when they are given a ‘strong’ indirect effect, in the sense that rules of contract law are interpreted and applied in accordance with these rights. As follows from the German theory of *Wechselwirkung* as well as from its Dutch counterpart and the Italian approach of the ‘*combinato disposto*’ of civil code provisions with constitutional norms, this effect regards in particular the general clauses of contract law, such as ‘good faith’ and ‘good morals’.²⁸ In English law, although the effect of the HRA in contract law until now cannot be said to have been more than modest, ECHR rights have in a similar way caused a re-evaluation of certain institutions of law, e.g. confidentiality.

Giving examples would mean for the greater part repeating the analysis of case law that has been made in Chapter 2. The *Lüth* judgment of the German Constitutional Court²⁹ may be considered a pioneer case, establishing the necessity for norms of private law to be read and applied in accordance with the values protected by the *Grundgesetz*. In German contract law, the *Lüth* approach has been reaffirmed in various decisions, among which are the *Handelsvertreter* and *Bürgerschaft* judgments.³⁰ Considerations similar to those of the German courts can be found in Dutch contract cases, though a general preference for ‘strong’ indirect effect has not been expressed in so many words.³¹ In Italy, furthermore, the interpretation of the principle of good faith in light of constitutional norms, in particular Article 2 *Cost.* (solidarity), has affected case law so as to acknowledge a judicial review of the contents of contracts.³² The cases thus do not assume that private parties are directly bound by fundamental rights, while they do require the norms governing their relationship to comply with these rights. Parties cannot thus claim damages for a breach of a fundamental right as such, but they can challenge the lawfulness of the other

²³ *Cass. civ.* 10 August 1953, n. 1696, *Giust. civ.* 1953, 2687.

²⁴ *Cass. civ.* 4 December 1997, n. 12334, *Foro it. Lavoro* (rapporto), [3890], n. 983. Compare *Cass. civ.* 26 May 2000, n. 6902, *Foro it. Lavoro* (rapporto), [3890], n. 1068.

²⁵ See section 2.4, with further references.

²⁶ See section 2.5.

²⁷ For instance in the case of *Wilson v. First County Trust Ltd* [2003] UKHL 40 and [2001] EWCA Civ 633, also discussed in section 2.5.2 above.

²⁸ Compare section 2.6.

²⁹ *BVerfGE* 15 January 1958, *BVerfGE* 7, 198.

³⁰ See section 2.2.2.

³¹ See section 2.3, with further references.

³² See section 2.4.2.

party's conduct through the interpretation of rules of private law (tort or, in contract law, general principles of 'good faith' or 'good morals').

From the private law perspective, in general it may be said that the doctrine of indirect effect, even in its 'strong' version, has been much less controversial than the theory of direct effect.³³ This is probably due to the fact that it weaves fundamental rights argumentation into the balance of interests that is usually made by the courts in civil cases in the various countries, and thus is less intrusive in the respective systems of private law.

As follows from the comments made in section 2.1.3 regarding the differentiation of cases, however, it should be kept in mind that the qualification '(strong) indirect effect' – perhaps even more than the other categories of direct and indirect effect – remains an 'umbrella concept'. Its potential scope of application covers all cases in which an interpretation, supplementation or correction of contractual arrangements has to be made on the basis of open norms and, accordingly, specific examples may vary considerably. Think of cases as diverse as the German and Dutch cases regarding non-competition, the Dutch cases regarding the duty to co-operate in an *hiv* test, and the Italian cases on the reduction of penalty clauses.³⁴

It might therefore be asked whether a further distinction of categories of cases should be made in order to establish a systematisation of case law that is useful for the analysis of effects of fundamental rights in contractual relationships. The *Fallgruppen* which are often distinguished when describing the role of good faith in private law come to mind.³⁵ It does not seem unfeasible to differentiate between cases of 'strong' indirect effect of fundamental rights on the basis of, for instance, the fundamental right involved or the problem of contract law addressed. There may, however, also be drawbacks, especially relating to the further subdivision of already scarce materials and to the highly dogmatic nature of such an exercise. In section 3.2 I will develop a more detailed argument on this point.

'Strong' indirect effects of fundamental rights on contractual relationships may overlap with procedural effects through duties of the courts.³⁶ If the courts in civil cases are considered bound by fundamental rights, then they will have to interpret and apply rules of contract law in accordance with these rights.

3.1.4 Cases of 'weak' indirect effect

A 'weak' indirect effect of fundamental rights might be the easiest form of fundamental rights argumentation for judges in civil cases to work with, since it does not presuppose positive obligations on either judges or contract parties. In fact, it does not presume more than a reference to values protected by fundamental rights for the interpretation of rules of contract law.

An example from Dutch case law concerned an Islamic woman, whose employer dismissed her with immediate effect because she had not come to work on the day that the end of Ramadan, the

³³ Compare sections 2.1.1 and 2.1.2.

³⁴ For descriptions, see Chapter 2.

³⁵ Compare Hesselink 1999, p. 47 and p. 54-58; and the same author, 2004c, p. 475-478.

³⁶ See also section 3.1.5.

Islamic fasting month, was celebrated.³⁷ She had requested a day off from work, but the employer had turned down the request. According to the Court of Appeal presented with the case, the employer's refusal to grant a day off was only allowed in special circumstances, similar to the circumstances in which employees might be required to work on Christian holidays. The *Hoge Raad*, the highest instance, observed that Dutch law does not allow discrimination between religions, which meant that an employer was not allowed to treat requests for a day off for the celebration of a religious holiday in different ways depending on the employee's religion.³⁸ This, however, does not imply that a day off may only be refused on the basis of circumstances that allow the employer to require his employees to come to work on a general Christian holiday. In the Court's opinion, Christian holidays, even though they originate from the Christian religion, have generally been accepted as days off from work, valid for all members of Dutch society, irrespective of their religion or nationality. For this reason, holidays determined by other religions cannot be put on the same level with Christian holidays when answering the question whether an employer can require employees practising these other religions to work on their religious holidays. Nevertheless, the Court held, an employee who had in a timely fashion presented her request for a day off on a religious holiday which is important to her, stating the specific reasons, in principle cannot reasonably be expected to come to work on that day.

While the *Hoge Raad* in this case did not make explicit reference to the constitutional norms of Article 1 *Gw* (equality and non-discrimination) and Article 6 *Gw* (freedom of religion), its judgment was clearly influenced by the values protected by these norms. It took inspiration from these values for the determination of the validity of the dismissal of the employee, especially the interpretation of the 'important reason' for dismissal given by the employer.³⁹ However, in accordance with the idea of the weak indirect effect of fundamental rights, no specific attention was given to the fundamental rights character of the protected values and the case was resolved on the basis of a balance of the parties' interests.

In Italy, a similar line of reasoning was followed in a case regarding the doorman of a hotel, who was member of the religious organisation the Seventh-Day Adventists, who had been dismissed because he had not respected his shifts when these were scheduled on Saturdays.⁴⁰ The dismissal was ruled unjustified by the Court of Rome, since it did not comply with applicable rules regarding Seventh-Day Adventists,⁴¹ which prescribed the employer's respect for the biblical Sabbath's day of rest. Moreover, dismissal on the basis of the employee's religion was considered discriminatory in the light of the laws governing the dismissal of employees.⁴² The Court made no explicit reference to fundamental rights, but its considerations on the discriminatory character of a dismissal related to the employee's religion echo principles of equal treatment (Article 3 *Cost.*) and freedom of religion (Articles 8 and 19 *Cost.*).

³⁷ HR 30 March 1984, NJ 1985, 350 (*Suikerfeest*), with a comment by Alkema.

³⁸ NJ 1985, 350, n. 3.3.

³⁹ According to Dutch law, an employee can only be dismissed with immediate effect on the basis of a 'compelling reason' (*dringende reden*). Compare the current Articles 7:677 and 7:678 *BW*.

⁴⁰ *Pretura Circondariale Roma* (local court of Rome) 6 November 1998, *Il Diritto Ecclesiastico* 2000, 2, 95-101, with comments by T. Rimoldi and C. Valsiglio.

⁴¹ *Legge* n. 516 of 22 November 1988.

⁴² In particular, Article 4 of the *legge* n. 604 of 15 July 1966 (regarding the dismissal of employees) and Article 15 of the *legge* n. 300 of 20 May 1970 (Employee's Statute).

Such ‘taking inspiration’ from fundamental rights without a doubt can be said to have an effect on contract law in the sense that it affirms the need for rules of contract law to be interpreted and applied in accordance with the protected values. Its status, nevertheless, remains ‘weak’, given that neither the parties nor the courts are called upon to actively assure this compliance. Fundamental rights, or rather the societal values they guarantee, are a factor in the balancing of interests that is made to establish the ‘reasonableness’ or ‘morality’ of contract parties’ conduct. As such, they do not seem to be considered as any more or any less important than interests that do not have constitutional standing.

3.1.5 Cases of ‘procedural effect’

The ‘strong’ direct effect of fundamental rights as understood in section 3.1.2 by definition overlaps with a procedural effect through the judgments of the courts. If it is accepted that private individuals are bound by fundamental rights, then the courts in civil cases should guarantee that these rights are respected.⁴³ A direct effect of fundamental rights may then be felt in the sense that the courts, as institutions of public authority, have to interpret and apply the rules of private law in compliance with constitutionally protected interests, and their judgments may be overruled by higher courts or be subjected to a review by a constitutional court.

An effect on the courts may, furthermore, also be felt in cases in which it has not been accepted that fundamental rights are directly binding on private parties. The courts then, for instance, apply the theory of *Wechselwirkung*, establishing limits to fundamental rights in the light of concepts of contract law and, simultaneously, reading these concepts in the light of the societal values protected by fundamental rights.⁴⁴ Again, their judgments may be subjected to constitutional review.⁴⁵

A case-book example of such a procedural effect is provided by the famous *Bürgerschaft* decision,⁴⁶ in which the German Federal Constitutional Court, the *Bundesverfassungsgericht*, reproached the Federal Supreme Court, the *Bundesgerichtshof*, for not having given adequate protection to the constitutionally protected principle of private autonomy (Article 2(1) GG). Reverting to the *Liith* decision of 1958,⁴⁷ the Constitutional Court considered that the courts in civil cases are obliged to follow the ‘guidelines’ expressed by the basic, constitutional rights when interpreting and applying the general clauses of private law.⁴⁸ In case they fail to do so and decide to the disadvantage of a party, they infringe the party’s fundamental rights.

This view affirmed the observations which the *Bundesverfassungsgericht* had made in the *Handelsvertreter* decision of 1990.⁴⁹ In that judgment, the Court considered that the courts in civil cases, as organs of the State, were bound by fundamental rights (Article 1(3) GG). They infringed these rights if their judgments contained failures of interpretation, which had their basis in a

⁴³ See also section 2.1.3.a.

⁴⁴ See Chapter 2, in particular sections 2.2 and 2.3.

⁴⁵ Compare Colombi Ciacchi 2006, p. 169-171.

⁴⁶ BVerfG 19 October 1993, BVerfGE 89, 214 (*Bürgerschaft*). See section 2.2.1.

⁴⁷ BVerfG 15 January 1958, BVerfGE 7, 198. See section 2.2.1.

⁴⁸ BVerfGE 89, 214, 229.

⁴⁹ BVerfG 7 February 1990, BVerfGE 81, 242 (*Handelsvertreter*). See section 2.2.1.

fundamentally incorrect conception of the meaning of a certain constitutional right, in particular regarding its scope of protection, and were also of importance for the specific case from a substantive point of view.⁵⁰

In legal systems in which there is no Constitutional Court⁵¹ or this court does not have the competence to review judgments of the courts in civil cases,⁵² similar lines of reasoning can sometimes be found in the judgments of the Supreme Courts in civil cases. Although the Dutch *Hoge Raad* has rarely pronounced on the role of the courts in the application of fundamental rights in contract law, its considerations on the limitation of fundamental rights by general clauses give some indications. In recognising the limits on fundamental rights that may follow from the contents of a contract or from a tortious act, the *Hoge Raad* appears to require the judges in civil cases to guarantee compliance with fundamental rights also in contract cases. In fact, the Supreme Court usually immediately checks the manner in which the lower courts have applied fundamental rights in private law cases, without considering in so many words the duties of the courts regarding the protection of these rights.⁵³

In Italy, the *Corte di Cassazione* has interpreted the principle of good faith as requiring the courts in civil cases to evaluate the contents of contracts, seeking to ensure the compliance of the contract parties' conduct with the duty of solidarity prescribed by Article 2 *Cost.*⁵⁴ Furthermore, a duty has been recognised for the courts to check *ex officio* the constitutionality of contractual arrangements in cases regarding contractual penalties.⁵⁵ This form of procedural effect thus seems to go further than the German constitutional review of judgments conducted by the *Bundesverfassungsgericht*.

The English Human Rights Act 1998 expressly provides that '[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right' (section 6(1) HRA). In this section, 'public authority' is understood as including courts and tribunals (section 6(3) HRA). It has, consequently, been argued that 'acting in a way which is incompatible with a Convention right' implies that the courts should always decide in accordance with the rights protected by the ECHR, whether adjudicating claims against public authorities or against private parties.⁵⁶ The HRA does, however, not foresee any sanction for a court that fails to comply with the Convention

⁵⁰ *BVerfGE* 81, 242, 253. Compare Canaris 1999, p. 24-25, who remarks that the courts being bound by fundamental rights should not be justified on the mere basis of them being state organs, but rather on the ground that these rights can only be given full effect if their expression in legislation is complemented by their interpretation and development in case law.

⁵¹ Such as the Netherlands and England.

⁵² Compare the Italian case, on which some remarks have been made in section 2.4.

⁵³ See, for instance, *HR* 18 June 1993, *NJ* 1994, 347 (*hiv-test I*); and *HR* 12 December 2003, *NJ* 2004, 117 (*hiv-test II; dentist*). Compare also Procurer-General Hartkamp's conclusions in the last case, in which he observes that the Court of Appeal had explicitly recognised that the patient had certain constitutionally protected interests that should be taken into account in the balance of interests (n. 13). See also Verhey 1992, p. 187, who remarks that the Dutch courts tend to take a case-by-case approach rather than giving general indications for the application of fundamental rights in private law.

⁵⁴ For instance, *Cass. civ.* 20 April 1994, n. 3775, *Giust. civ.* 1994, p. 2164-2165.

⁵⁵ *Cass. civ.* 24 September 1999, n. 10511, *Foro it.* 2000, I, 1929; *Cass. civ.*, joint divisions, 13 September 2005, n. 18128, *Foro it.* 2005, I, 2985. See section 2.4.3.

⁵⁶ Wade 2000, p. 218. See section 2.5.1.

rights. As we have seen before, such a direct effect does not appear to have found recognition in case law.⁵⁷

3.1.6 Conclusion

From the case law examples it appears that no general manner of giving effect to fundamental rights in contract law has been established in any of the countries included in the research. The theory of *Wechselwirkung* or ‘reciprocal effect’ that in the previous Chapter has been distinguished as the most common form of application of fundamental rights to inter-private relationships might be considered a ‘strong’ indirect effect.⁵⁸ But there are also examples of the other three forms of direct and indirect effect defined in section 2.1.4. In fact, there appear to be cases demonstrating various effects in the comparative overview of the four selected countries as well as within the single legal systems.

The variety of cases might be explained on the basis of several factors, such as: differences in the institutional structures of the legal systems (presence and competences of a constitutional court); differences in general convictions regarding the extent to which parties and courts are bound by fundamental rights (e.g. the direct line followed by the German *Bundesarbeitsgericht* as compared to the *Wechselwirkung* approach adopted by the *Bundesgerichtshof* and *Bundesverfassungsgericht*); and the differentiation according to legal actors, fundamental rights and legal relationships (see section 2.1.4).

A problematic aspect of the distinction between these types of direct and indirect effects seems to be that it mostly ignores these factors. It categorises the cases on the basis of the way in which the courts in these specific cases handle fundamental rights argumentation, without addressing the question why the courts might have chosen for a particular form of effect in a particular case. Therefore, apart from the fact that many cases sometimes be difficult to define as showing either one effect or another, the question arises what exactly may be learnt from the classification of case law according to the distinction between direct and indirect effects. This problem will be further elaborated in the next section.

3.2 A new perspective

3.2.1 Introduction

Although a systematisation of cases would be helpful for determining the factors that should be taken into account when fundamental rights are applied in contract law, it might be doubted whether the tendency to discuss these cases in terms of ‘direct’ and ‘indirect’ effects provides enough guidance. In fact, the theoretical distinction seems to give only a partial explanation of case law practices (section 3.2.2). In order to gain a better insight into the problems related to fundamental rights application to contractual relations, a different perspective might have to be taken. The analysis of case law suggests that the tension between principles of autonomy and solidarity in contract law relates to the manner in which the courts approach fundamental rights

⁵⁷ Section 2.5.1.

⁵⁸ Note, however, that the *Wechselwirkung* approach may also concur with a ‘weak’ direct effect or ‘weak’ indirect effect.

issues in contract cases (3.2.3). It might therefore be worthwhile to explore this line of analysis (3.2.4).

3.2.2 *What the distinction between direct and indirect effects does and does not explain*

Since its introduction in the academic discourse on fundamental rights and private law, the distinction between direct and indirect effect, or *unmittelbare* and *mittelbare Drittwirkung*,⁵⁹ has dominated the analysis of case law in this field. Indeed, the theoretical framework defined by these concepts is still the most commonly used conceptual model used in European legal writing on this topic.⁶⁰

At the same time, however, doubts continue to be raised about the usefulness of the analysis of case law in terms of direct and indirect effects.⁶¹ The distinction says something about the (theoretical) views that may be taken on the relation between constitutional values and private law and the responsibility of the various legal actors (legislator, judges, contract parties) for the protection of fundamental rights in contractual relationships.⁶² However, it leaves many questions undecided. In fact, the distinction between direct and indirect effects might to some extent help to understand judicial reasoning, but it fails to explain why judges in certain cases have chosen or should choose for a certain effect of fundamental rights.⁶³ Several reasons may be given for abstaining from making a choice between the theories of direct and indirect effect and, eventually, looking beyond this distinction when evaluating questions on the role of fundamental rights in contract law.

a) *To what extent do fundamental rights affect contract law?*

The theories of direct and indirect effect represent different views on the extent to which private parties are bound by fundamental rights. While advocates of the former theory hold that fundamental rights can only be fully and adequately protected if they apply as such to inter-private

⁵⁹ For Germany: Nipperdey 1950, p. 122 and 1961, p. 14-15; Dürig 1956, p. 165 and p. 176-182; Leisner 1960, p. 286. The Netherlands: Maris 1969, p. 23-27; Drion 1969, p. 585; Biesheuvel 1986, p. 44.

⁶⁰ Compare Barak 2001; Canaris 1999; Smits 2003; Comandé 2004, p. 26-28; Phillipson 1999.

⁶¹ See, for instance, Spieß 1994, p. 1226; and Smits 2003, p. 28-29, who is of the opinion that the theories of direct and indirect effect as such do not contribute much to the debate about *to what extent* fundamental rights should have an effect in private law, in other words: the intensity of the effect. He then, nevertheless, argues in favour of the theory of indirect effect, which would itself indicate the extent to which citizens are bound by fundamental rights; p. 49 ff. According to Smits' view of indirect effect, the intensity of the effect is determined by the balance of the interests involved in the specific case; p. 61 ff. He argues that the balance that is made in specific cases requires the judges to make choices regarding the values shared in society and the (political) views on the protection of these values. Since these choices are often left implicit in the judgments, there seem to be no general rules on a hierarchy of fundamental rights or the desirability of the effect of such rights in private law. In Smits' opinion, therefore, the legislator should intervene and legal academics should discuss the possible choices that could be made in legislation; p. 64.

I agree with Smits on the limited significance of the direct/indirect effect distinction and the importance of discussing the intensity which the effects of fundamental rights should have in private law. However, I find it difficult to follow the limitation of the discourse to cases of indirect effect. As follows from section 3.1, I think that – if we choose to talk in terms of direct and indirect effect – there are differentiated forms of effects of fundamental rights, which might overlap and which, moreover, might all involve a balance of private parties' interests. For this reason, in my opinion, it would not make sense to defend one general theory of effects of fundamental rights (compare section 3.1.6), nor to relate the discourse on intensity to this one theory.

⁶² Compare section 2.1.

⁶³ On the questions of *Understanding and Explaining Adjudication*, see Lucy 1999. See also section 4.1.1 and Chapter 7 below.

relations, proponents of the latter theory are of the opinion that private parties can never be considered addressees of these rights.⁶⁴

With regard to the general relation between constitutional law and contract law, consequently, it has been said that direct effect implies a submission of the whole of contract law to the values protected on the constitutional level.⁶⁵ This would mean that cases are resolved completely outside the framework of private law, possibly disregarding the more detailed rules the latter provides for balancing the parties' interests.⁶⁶

A preference for indirect effect, on the other hand, would concur with the view that contract law in itself already offers a satisfactory framework for the solution of cases involving interests engaging fundamental rights. The rules of private law, including those of contract law, to a great extent express the values protected by fundamental rights and, therefore, it would not be necessary to lift cases to the constitutional level.⁶⁷ Following a strict view on effects of fundamental rights, it would in principle be left to the legislator to rectify possible gaps in the protection of these rights. A possible lack of protection in specific cases would have to be taken for granted. It should be prevented that Constitutional Courts – in Germany and Italy – turn into new instances of appeal in civil cases, even overruling judgments of the highest courts in the hierarchy of private procedure and legislating in place of the legislator.⁶⁸ In a more moderate view, the courts in civil cases play a part in protecting fundamental rights, but still only through contract law rules.⁶⁹

The two concepts, especially in their strictest definitions, thus also represent two different views on the relation between constitutional law and contract law. The theory of direct effect emphasises the protection of fundamental rights, even if this would imply making changes to the rules – and institutions⁷⁰ – of contract law. The doctrine of indirect effect, on the other hand, stresses the autonomy of the contract laws of the various countries. While an effort is made to integrate fundamental values into these systems, this may never go as far as submitting rules of contract law to a higher constitutional order.

If seen in this way, the distinction between direct and indirect effect pushes towards a general choice between the theories. The views presented by the two theories seem difficult to reconcile, in the sense that they fundamentally disagree on the questions whether private parties should be considered addressees of fundamental rights and to what extent judges may modify contract law in the light of fundamental rights argumentation.

However, this picture seems to be too roughly sketched, as we have already seen in sections 2.1.3 and 2.1.4. The case law of the various countries shows examples of both forms of effects of fundamental rights and, moreover, various gradations of effects. Two – mutually exclusive – explanations might be thought of:

⁶⁴ Compare sections 2.1.1 and 2.1.2.

⁶⁵ Smits 2003, p. 57-60.

⁶⁶ De Vos 2005, p. 296; Cherednychenko 2004a (conclusion).

⁶⁷ Grosheide 2001; Smits 2003, p. 161; De Vos 2005, p. 302.

⁶⁸ Simon 1996; Diederichsen 1998.

⁶⁹ See, for instance, Canaris 1999, p. 34 ff.

- the courts in different countries, also within the systems themselves, have made choices on principle for different forms of giving effect to fundamental rights in contract cases;
- there have been no principle choices for either direct or indirect effect, but a more pragmatic approach has been adopted, deciding on a case-by-case basis how to give effect to a specific fundamental right.

The truth, as is often the case, appears to lie somewhere in the middle. I would say that the general tendency in German, Dutch and Italian law⁷¹ seems to be towards an indirect impact of fundamental rights on the rules of contract law, in the form of *Wechselwirkung*, or a combined reading of the relevant civil code provisions with constitutional norms. However, there are individual cases in which a different road has been taken, as follows from the classification made in the previous subsection. Sometimes, depending on the circumstances of the case, the courts attribute a more direct role to fundamental rights in contract law.⁷²

In my opinion, this apparent failure to make a choice on principle⁷³ covers up a more profound problem related to the distinction between direct and indirect effects. The distinction, and especially its interpretation in the sense that a choice between the two theories should be made, relates to the idea of contract law as a coherent system.⁷⁴ On the basis of the characteristics of the coherent system, a theory may be developed regarding the desirability and feasibility of fundamental rights entering into the resolution of contractual disputes. This comes to the fore, for instance, in the discussion on the interpretation of Article 1(3) *GG* in Germany, regarding the impact of fundamental rights on private law legislation.⁷⁵ It also emerges from the debate on the interpretation of Article 2 *Cost.* in Italy.⁷⁶

The problem with these types of general, coherency-based theories is that their level of abstraction leads them far away from the reality of case law. In fact, as has been demonstrated in the previous section, although the courts have occasionally given more general consideration to the relation between constitutional law and contract law,⁷⁷ they have hardly ever done so in terms of ‘direct’ and ‘indirect effects’.⁷⁸ It may also be difficult to classify specific cases according to

⁷⁰ Meaning the role of the courts in adjudicating, or legislating, the subject. Compare Unger 1996. I will come back to this issue in the Epilogue to Part II.

⁷¹ The English system of case law solution differs so fundamentally that I prefer not to include it explicitly in the line of reasoning followed in this section. An additional problem for making a statement on the approach taken by the English courts is the lack of sufficient case law materials explaining the view of the English courts on the subject, especially following the introduction of the HRA 1998. See section 2.5.

⁷² See section 3.1. Note, again, that there may be an overlap between the various categories.

⁷³ Note that legal authors have been much more convinced in their choice for one theory or the other. See the references made in section 2.1 and, especially for English law, the references made in section 2.5 to the debate surrounding the drafting and coming into force of the HRA 1998.

⁷⁴ On coherence, compare MacCormick 1984, p. 37 ff. and section 5.2.3 below.

⁷⁵ Canaris 1999, p. 11-15.

⁷⁶ Section 2.4.1, with further references.

⁷⁷ Most notably the German *Bundesverfassungsgericht*'s considerations on private law and constitutional law in the *Lüth* case. Compare also the Dutch *Mensendieck* cases and *biv-test* cases, as well as the Italian case law on contractual penalties.

⁷⁸ In fact, the German *Bundesverfassungsgericht* is among the few courts that have explicitly recognised a theory of indirect effect. The Dutch courts have not made a clear choice; Smits 2003, p. 30-32 and p. 36-37.

these concepts.⁷⁹ As profound as the theoretical distinction may be felt in the academic debate, its practical relevance in the solution of contractual disputes thus seems less so.

For the sake of clarity, let me stress that I do not contest that it is possible to characterise an individual case as showing a certain form of weak or strong direct or indirect effect. It appears that the distinction between conceptions of direct and indirect effect may help to understand judicial choices in specific cases, if these are seen as the expression of a certain opinion on the interaction between constitutional law and contract law. Doubts may, however, be raised as to the question whether it is possible to derive general rules from these case examples when thinking in terms of 'direct' and 'indirect effect'. Not only has this terminology been used to refer to different types of effects,⁸⁰ but it also does not offer an explanation for the choice for either a more intrusive (direct) or less intrusive (indirect) application of fundamental rights in contract cases.

In fact, the distinction between direct and indirect effect cannot further clarify the relationship between constitutional law and contract law, because it is defined by this relation itself: someone who considers constitutional law superior to contract law will favour a direct effect, whereas someone who seeks to preserve the autonomous nature of contract law will prefer an indirect method of giving effect to fundamental rights. Trying to distill more general rules on the application of fundamental rights in contract cases from the specific case examples showing these varying effects thus brings to mind Baron von Münchhausen pulling himself out of the swamp.

Seeing the impossibility of such a circle of definitions, it seems difficult to follow Smits, when he states that the intensity of the effects of fundamental rights follows from the theory of indirect effect itself.⁸¹ In my view, neither the theory of direct effect nor that of indirect effect as such say anything about *the extent to which* fundamental rights may and should affect contractual relationships. I would agree with Smits that other factors are of importance, such as the politics of contract law (can private law be used to realise public interests?), the question who decides on the specific effect (legislator or judge?), as well as views on society and existing contract law.⁸² It is, therefore, to be regretted that he does not elaborate on these aspects.⁸³ In my opinion, only when considering such additional factors, may it be possible to find an explanation for the way in which the courts have handled fundamental rights argumentation in contract cases and to formulate guidelines for the further development of the topic.

b) In which types of cases can fundamental rights be applied?

A further problem of the analytical distinction between direct and indirect effects is that it does not clarify in what kind of contractual disputes reference to fundamental rights might affect the solution of cases. Both theories presuppose that fundamental rights should have a role in contract law adjudication.⁸⁴ However, they do not explain in what cases fundamental rights might be

⁷⁹ Compare the fate of the 'Boesjes' scale', adopted by the Dutch constitutional legislator. See section 1.1.3.

⁸⁰ See section 2.1, as well as the next subsection.

⁸¹ Smits 2003, p. 49.

⁸² Smits 2003, p. 29. See also Hesselink 2002a, p. 189-190; and compare Maduro 1999, p. 455.

⁸³ In Smits' opinion, existing private law already forms an expression of the conflict between autonomy and solidarity and that redefining this conflict in terms of fundamental rights does not add much; Smits 2003, p. 162. See section 3.2.3 below.

⁸⁴ See Chapter 2.

invoked by the parties or should be explicitly considered by the courts in order to ensure this compliance.

Plurality of cases

To a great extent the lack of clarity regarding these questions may be due to the fact that the number of hypothetical cases in which a certain fundamental right is of importance is too great and most of all too diverse for the legislator to foresee all situations. In principle, all legislation in the field of contract law should be in accordance with the values protected by fundamental rights.⁸⁵ In some areas the relevance of certain rights is certainly more obvious than in other fields. Rules on equal treatment in employment relations,⁸⁶ for instance, directly refer to the principle of non-discrimination (Article 3 *GG*; Article 1 *Gnr*; Article 3 *Cost.*; Article 14 ECHR). And rules on contractual arrangements regarding surrogate motherhood entail personality rights (Article 2 *GG*; Articles 2 and 3 *Const.*) and the right to health (Article 32 *Cost.*).⁸⁷ In other areas, the relevance of specific rights is less obvious, although they should be taken account of on a deeper level. Think of the example of sureties by relatives, in which the rules governing the relationship between the bank and the surety should respect the requirements of human dignity.⁸⁸ The overall picture is thus that of a patchwork of smaller or bigger parts of contract law that to a lesser and greater extent have been affected by fundamental rights and values.

The rare general rules on the subject seem to be those concerning the interpretation of 'good faith' and 'good morals' in the light of values shared in society, as laid down in a civil code provision or developed in case law.⁸⁹ Then again, these general rules have to be made concrete in case law. As follows from the overview in Chapter 2, the most common influence of fundamental rights in contract cases has been rather indirect, through a form of *Wechselwirkung* (Germany), the interaction of fundamental rights and general clauses (the Netherlands), *combinato disposto* (Italy), or the interpretation of existing private law doctrines (England). In this process, the civil law systems do not seem to be very different from the English common law system: on a case-by-case basis it has been determined how a certain fundamental right affects the norms of conduct governing inter-private relations. The results of the cases mostly appear to depend on the circumstances of the cases and the balance of interests made by the judges.

General theories

Although the theories of direct and indirect effect present general ideas on the way in which the legislator and judges should balance interests involving fundamental rights,⁹⁰ *in abstracto* they do

⁸⁵ Section 2.1.3.a. On the various actors involved in the adjudication of 'fundamental rights and contract cases', see section 5.1 below.

⁸⁶ The German § 611a *BGB*; the Dutch Articles 7:646-7:649 and *Algemene wet gelijke behandeling* of 2 March 1994; the Italian Article 2060 ff. *c.c.*; the English Equal Pay Act 1970 and Sex Discrimination Act 1975.

⁸⁷ See the Italian law n. 40/2004 and also the English Surrogacy Arrangements Act 1985, which has been partly amended by the Human Fertilisation and Embryology Act 1990. For a further analysis of the example of surrogacy, see section 6.2.5.

⁸⁸ Governed by civil code provisions on sureties in Germany (§§ 765-778 *BGB*), the Netherlands (Articles 7:850-7:870 *BW*) and Italy (Articles 1936-1957), and by statutory law in England (s 137-139 of the Consumer Credit Act 1974). Compare the German *Bürgschaft* case, discussed in section 2.2.2. See also section 6.2.2 below.

⁸⁹ Compare Article 3:12 of the Dutch Civil Code; see section 1.2.2.b. See also the established German case law based on the *Lüth* decision of the *Bundesverfassungsgericht*; section 2.2.1.

⁹⁰ Sections 2.1.1 and 2.1.2.

not give much guidance for the application of specific rights to specific cases. Legal analysis of these effects, moreover, tends to focus on the public-law traits of fundamental rights rather than on the colouring of the private-law balance of interests in light of these rights.⁹¹

Canaris, for instance, has sought to clarify the theoretical implications of the approach of the German courts on the basis of the *Eingriffsverbotsfunktion* and *Schutzgebotsfunktion* of fundamental rights.⁹² The former function implies the prohibition for the State to interfere with the fundamental rights of its citizens, whereas the latter indicates a positive obligation on the State, including the courts as public authorities, to protect the values represented by these rights also in private relations.⁹³ An example of fundamental rights functioning as *Schutzgebote* would be the decision of the *Bundesverfassungsgericht* in the *Bürgerschaft* case.⁹⁴ No provision of law or a judgment of a court could be said to actively interfere with the surety's fundamental rights, since she had herself agreed to a restriction of her private autonomy (protected by Article 2(1) GG). What mattered was the *Bundesgerichtshof's* omission to relieve the surety from her contractual duties.⁹⁵ It should have interpreted the norms of good morals and good faith as prohibiting the surety from being bound by a contract that did not respect her right to self-determination.

This reasoning in terms of *Eingriffsverbote* and *Schutzgebote* concerns the State-citizen relationship rather than the interrelations between citizens. Accordingly, it fits the theory of indirect effect,⁹⁶ in the sense that it does not necessarily presume fundamental rights to be binding on contract parties. It does, however, place the discussion in an institutional setting, emphasising the role of the courts as state organs. As such it does not give much guidance as to the types of private law cases that might be affected by the fundamental rights argument.

On a more practical level, nevertheless, Canaris distinguishes several (hypothetical) cases in which the rights safeguarded by the *Grundgesetz* serve as *Eingriffsverbote* and cases in which they serve as *Schutzgebote*, thus differentiating between types of fundamental rights in combination with types of cases.⁹⁷ In fact, he has identified several criteria for establishing a *Schutzgebot*, such as:⁹⁸ (i) the applicability of a fundamental right; (ii) the need for protection and its indicators, i.e. the tortious nature of the infringement, the threat of infringing constitutionally protected interests, or

⁹¹ E.g. Verhey 1992; Canaris 1999.

⁹² Canaris 1984, p. 225-229, 1989, p. 163 and 1999, p. 37-38. See also Isensee 1992, p. 145-148; Oeter 1994, p. 535-536; Spieß 1994, p. 1225.

⁹³ Compare the procedural effect of fundamental rights in contract law; sections 2.1.4 and 3.1.5.

⁹⁴ Canaris 1999, p. 37. See section 2.2.2.

⁹⁵ Canaris 1999, p. 37. Compare *BVerfGE* 89, 214, 231: 'Die Frage, ob und inwieweit beide Vertragspartner über den Abschluß und den Inhalt des Vertrages tatsächlich frei entscheiden konnten, stellte sich der Bundesgerichtshof nicht. Darin liegt eine Verkennung der grundrechtlichen gewährleisteten Privatautonomie.' And 232: 'Handelt es sich jedoch um eine typisierbare Fallgestaltung, die eine strukturelle Unterlegenheit des einen Vertragsteils erkennen läßt, und sind die Folgen des Vertrages für den unterlegenen Vertragsteil ungewöhnlich belastend, so muß die Zivilrechtsordnung darauf reagieren und Korrekturen ermöglichen. Das folgt aus der grundrechtlichen Gewährleistung der Privatautonomie (Art. 2 Abs. 1 GG) und dem Sozialstaatsprinzip (Art. 20 Abs. 1, Art. 28 Abs. 1 GG).'

⁹⁶ Canaris 1999, p. 34-36. See also Spieß 1994, p. 1225, who justly observes that the *Schutzgebotsfunktion* also fits the theory of direct effect, insofar as it requires the courts to directly apply fundamental rights to interprivate relationships.

⁹⁷ An interesting case hypothesis concerns the 'turning around' of the *Lüth* case, which demonstrates how the GG rights may function either as *Eingriffsverbote* or *Schutzgebote*, depending on the procedural circumstances of the case. Canaris 1999, p. 39-43. Compare the differentiating factors mentioned in section 2.1.4.

⁹⁸ Canaris 1999, p. 72-80.

the fact that a person depends on another person for his fundamental right to be respected;⁹⁹ and (iii) the interaction between the criteria.

Even though these criteria emphasise the public-law side of the problem, they illustrate the manner in which the further analysis of the effects of fundamental rights in contract law could be conducted. In this context, it is interesting to note that Canaris recognises a certain hierarchy of protected values and interests.¹⁰⁰ A ranking of values, at least on an abstract level, could be a starting point for the formulation of guidelines for giving effect to fundamental rights in contractual relationships.¹⁰¹

Limited significance of the distinction between direct and indirect effects

Picking up the thread of this chapter once again, the question remains how the distinction between direct and indirect effect can be of help in the formulation of such criteria for the application of fundamental rights in contract law. My opinion would be that its use for this purpose is limited.

As Canaris' analysis confirms, the general choice for either direct or indirect effect shows which perspective is taken on the question whether fundamental rights bind private parties in the same way as the State. It does not, however, take into account the possibility to differentiate between fundamental rights on the basis of their nature, in the sense that one may be given an indirect effect, whereas another may be considered directly binding on contract parties.¹⁰² A general choice, covering all cases, thus presupposes a mutual exclusivity of the theories.

The definition of criteria for the application of fundamental rights in contract law only depends on this choice insofar as such criteria have to take into account the formal inroads through which this application takes place. According to the theory of indirect effect, fundamental rights have to be introduced in contract disputes by means of the rules of private law. Thus, an infringement of a fundamental right can only be sanctioned if it violates a contractual duty or a rule of statutory private law or constitutes a tort.¹⁰³ The theory of direct effect, on the other hand, permits the courts to establish the breach of a fundamental right as such.¹⁰⁴

In the end, however, the question whether an infringement amounts to liability in both cases seems to boil down to a balance of the parties' interests. In the case of indirect effect, this balance takes place within the framework of the rules of private law, whereas in the case of direct effect, a balance has to be struck between the parties' opposing (fundamental) rights.¹⁰⁵ Although a balancing act on the constitutional level in principle does not have to follow the detailed rules developed in the courts when balancing private law interests,¹⁰⁶ it seems only natural that the

⁹⁹ For instance, a tenant being dependent on his or her landlord for making use of his right to receive information when placing an antenna on the house which he or she rents.

¹⁰⁰ Canaris 1999, p. 79. In Canaris' view, for instance, life and health *in abstracto* rank higher than private autonomy and property.

¹⁰¹ In the same sense, Smits 2003, p. 64, who is of the opinion that the legislator should take the lead in the process of establishing such a hierarchy.

¹⁰² Compare section 2.1.3.b.

¹⁰³ Compare the Dutch dentist case (*hiv-test II*); section 2.3.2.

¹⁰⁴ As we have seen in section 3.1, there are only very few examples of a direct effect in its strongest form.

¹⁰⁵ Compare Spieß 1994, p. 1225.

¹⁰⁶ Smits 2003, p. 57-58.

courts in civil cases will use their experience also when weighing constitutional interests.¹⁰⁷ This is also confirmed by the aforementioned case examples (section 3.1.2), in which the courts usually indulged a certain balancing of the interests involved, coloured by the circumstances of the case, when interpreting the fundamental rights and their limitations. Given the fact that the cases concerned private parties, this balancing process included the parties' interests protected by private law. Whether fundamental rights were given more weight than other interests¹⁰⁸ cannot be confirmed in all cases, but, then again, this also rings true for cases of indirect effect. This confirms the conclusion that the distinction between direct and indirect effects does not give many starting points for the definition of criteria for the application of fundamental rights in contract law.

c) *What does the explicit consideration of fundamental rights add to contract law adjudication?*

Finally, assuming that fundamental rights find expression in the rules of contract law, the question remains whether and to what extent these rights are explicitly considered when applying the rules that translate their meaning to the level of the contractual relationship. In other words, do the courts consider fundamental rights even if they have not been invoked by one of the parties and, related to that, can fundamental rights require the courts to intervene *ex officio* in contractual arrangements, even if this would, in principle, restrict freedom of contract?

Explicit consideration of fundamental rights?

The distinction between direct and indirect effect gives some explanations for the way in which the first question has been dealt with in case law. Its meaning is limited, however, since it regards the parties rather than the courts. At most, the manner in which the parties are considered to be bound by fundamental rights could say something about the role of the courts in enforcing these rights.

The theory of *indirect effect* assumes that private parties cannot immediately be held liable for the breach of another party's rights. In its weaker version, thus, the theory of indirect effect does not require the courts to explicitly refer to constitutional or human rights norms when interpreting rules of contract law. The application of legislation on non-competition clauses, for instance, already implies the protection of the employee's free choice of profession.¹⁰⁹ In its stronger version, the theory of indirect effect requires the courts to take into account the role of fundamental rights for the determination of the meaning of contract law rules. Sticking to the example of non-competition clauses, this means that the courts should in so many words consider the protection of freedom of profession when deciding on the reasonableness of a specific clause.¹¹⁰

¹⁰⁷ Compare Leisner 1997, p. 636-637: 'Spät lernt es, doch es lernt – das öffentliche Recht vom Zivilrecht, der Mutter aller Jurisprudenz. Unter dem Druck der Grundrechte hat es die Verhältnismäßigkeit entdeckt, es erforscht sie systematisch, in Abwägungsbemühungen öffentlicher Belange untereinander, öffentlicher und privater Interessen.' Leisner, however, warns for the threats this expansion of the balancing process might pose to the State of law, undermining the legislator's check on judicial practices; p. 638-639.

¹⁰⁸ On this question, compare section 7.c below.

¹⁰⁹ Compare the German *Handelsvertreter* case, *BVerfGE* 81, 242, 254; and the Dutch *Kolkman/Cornelisse* case, *NJ* 1997, 685.

¹¹⁰ See, for instance, the Dutch decision *Ktr. Nijmegen* 17 May 2002, *JAR* 2002/178, in which the non-competition clause was considered to limit the employee's freedom of profession to too great an extent.

Under the theory of *direct effect*, on the other hand, parties are considered to be bound by fundamental rights. The strong version of direct effect implies that the fundamental right is applied in its constitutional formulation, determining to what extent it has been infringed by a certain conduct or contractual arrangement.¹¹¹ A breach of the employee's freedom of profession by the employer would then in principle immediately entail the nullity of the relevant contract term. When accepting such a direct binding nature of fundamental rights on private parties, it can be defended that the judges should play an active part in guaranteeing the protection of these rights, and explicitly deal with the question of a possible breach.

From this distinction, however, no general rules can be derived for the judicial participation in the protection of fundamental rights in contract law: the requirements change according to the view taken on the responsibilities of the parties towards each other.

The *procedural effect* of fundamental rights in theory might give some more guidance as to the activity expected from the judges, since it regards the courts rather than the parties. It relates to Canaris's *Schutzgebotsfunktion*, in the sense that it assumes that courts have to guarantee the protection of fundamental rights also in private relations. Still, whether this always requires the courts to make explicit reference to these rights, does not follow from the definition. It does not prescribe how the *Schutzgebotsfunktion* should be made concrete. Indeed, the courts may already be said to comply with their duties if they manage to secure the interpretation of contract law rules in conformity with fundamental values. There seems to be no real pressure on the judges to take a more active part in the protection of fundamental rights in contractual relationships, or to at least justify why contract law rules are considered to be in conformity with the values protected by these rights.

What, then, would be the problem if no specific reference were made to fundamental rights in contract cases somehow involving values protected by such rights? If it were guaranteed that the application of rules of contract law expressing the values guaranteed by fundamental rights always complied with these values, then there would be no problem. The difficulty, however, is to secure this compliance without occasionally reverting to the rationale of the relevant rules and, consequently, their justification.

The example of sureties by relatives might better clarify what is meant by this. If we compare the decisions of the *Bundesgerichtshof* and the *Bundesverfassungsgericht* in the *Bürgschaft* case,¹¹² we see that the *BGH* – in its first decision – remained within the framework of private law, whereas the Constitutional Court – naturally – evaluated the constitutional merits of the case. The outcome is known: while the *BGH* upheld the suretyship contract, the *BVerfG* considered it to limit the surety's private autonomy to too great an extent and reproached the *BGH* for not having redressed the contractual balance. Although the *BGH* had applied valid rules of contract law, its application of these rules came into conflict with principles of dignity and autonomy (Articles 1 and 2 *GG*). In this case, explicit reference to the *Grundgesetz* was needed in order to redress this omission, since the courts in civil cases had not by themselves reached the result that fundamental rights required.

¹¹¹ Compare *BAG* 10 May 1957, *BAGE* 4, 274 (*Zölibatsklausel*), which was discussed in section 3.1.2 above.

¹¹² Section 2.2.2.

Although questions may be raised as to the desirability of the outcome of the case,¹¹³ the different methods of reasoning make clear what role fundamental rights can play in making the decision. In principle, of course, it is possible that a decision similar to the 1994 judgment of the *Bundesgerichtshof*, which followed the guidelines set by the *Bundesverfassungsgericht*, is reached on the basis of purely private law reasoning. In Dutch law, for example, it has been accepted that in the case of a close family tie between a potential surety and the principal debtor, the bank has a duty to inform the would-be surety about the risks related to the suretyship, since emotional pressure might blur the potential surety's autonomous decision-making.¹¹⁴ Nevertheless, the German example shows that it cannot be said beforehand that a contract law balance of interests will always lead to an outcome that complies with fundamental rights.

Actually, I would contend that the fact that through contract law reasoning similar results may be reached as on the basis of constitutional argumentation is to a great extent a matter of coincidence. Without a doubt, rules of contract law in themselves express the constitutional values shared in a society and should therefore lead to results that comply with these values. But examples from case law show that these results are not always obtained, and that an explicit discourse on the fundamentals of the private law issue might be necessary.¹¹⁵

Strangely enough, the debate about direct and indirect effects seems to ignore this problem, since it mostly regards the classification of cases in which an explicit reference to fundamental rights is made anyhow (except for the category of weak indirect effect). It thus leaves aside the question of for what reason such a reference may be made in the first place and in what types of cases may it be of any relevance.

Ex officio intervention on the basis of fundamental rights?

The *ex officio* intervention by the courts in contractual arrangements is an even more delicate issue. This question mirrors the preceding one, in the sense that it does not ask whether fundamental rights only have to be considered in case they have been invoked by one of the parties, but it investigates to what extent fundamental rights may require the courts to apply on their own motion certain powers attributed to them in the field of contract law, on the basis of fundamental rights argumentation. The first question, on an explicit reference to fundamental rights, requires existing rules of contract law to comply with fundamental rights, while occasionally the consideration of these rights may induce a change to the rules. The second question, concerning *ex officio* application of judicial powers, however, by definition introduces an unstable factor in the adjudication of contract disputes: it is not clear beforehand to what extent the courts might interfere with contractual arrangements and, consequently, with freedom of contract.

An example is given by the Italian case law on the reduction of manifestly excessive contractual penalties.¹¹⁶ According to the traditional reading of the relevant civil code provisions, such a reduction could only be ordered by the courts if it had been requested by one of the parties. The new, fundamental rights-based interpretation of Article 1384 *c.c.*, on the contrary, requires the courts to adjudicate the penalty clauses agreed upon by contract parties and to reduce the sum of

¹¹³ Compare section 2.2.2, with references to the comments on the case.

¹¹⁴ *HR* 1 June 1990, *NJ* 1991, 759, with comment by C.J.H. Brunner. See section 6.2.2 below.

¹¹⁵ This line of argumentation will be further developed in Chapters 5 and 6 and section 7.c.

¹¹⁶ Section 2.4.2.

the penalty when it is ‘manifestly excessive’. This may be said to constitute an interference with freedom of contract for parties who had anticipated the possible damages for breach of contract.¹¹⁷

Although the concepts of direct and indirect effect mostly remain silent on the intensity of the impact of fundamental rights on contractual relationships, the analysis of contract law in light of these theories does say something about the role of the courts in these types of cases. Indeed, according to the comprehensive theory of procedural effect,¹¹⁸ the courts should guarantee respect for fundamental rights not only in the State-citizen relation but also in private law relations.¹¹⁹

Even if the courts may be considered directly bound by fundamental rights, however, this does not mean that contract parties by definition are also directly bound: the procedural effect may concur with a strong direct effect as well as with a strong indirect effect on the parties.¹²⁰ For this reason, an *ex officio* interference in contractual arrangements that are not contested by the parties in civil procedure seems problematic; it imposes a duty on them to comply with fundamental rights, which may go further than what would be expected from them if the court’s role were not taken into account.¹²¹

Again, however, the theories of direct and indirect effect do not elaborate on the desirability of such a further-reaching intervention of fundamental rights in contractual relationships. They categorise the cases in which a certain effect of fundamental rights has been felt, but do not give criteria for the determination of situations in which the courts may assume *ex officio* powers for the redressing of contractual imbalances.

Preliminary conclusion

Concluding, it seems that a theoretical distinction of direct and indirect effects of fundamental rights in contract law cannot fully explain why such effects should take place.¹²² It is therefore difficult to survey the possible views on the balance of freedom of contract and fundamental rights protection in terms of this distinction. In fact, even if it is acknowledged that the majority of cases concerning fundamental rights and contract law fall within the category of (strong) indirect effect (comprising forms of *Wechselwirkung*, *combinato disposto* and reinterpretation of doctrines of contract law), this does not explain why such an application of fundamental rights has been necessary in these cases. It does not give further criteria regarding the types of cases in which fundamental rights argumentation should be taken into consideration, nor does it specify the way in which fundamental rights should be integrated into the balancing of the parties’ interests.

3.2.3 Choosing a new perspective: freedom of contract and fundamental rights between autonomy and solidarity

If it is accepted that the discussion in terms of direct and indirect effects only explains the procedural side of the application of fundamental rights to contractual relations, the question

¹¹⁷ Palmieri 2006; section 2.4.2 above.

¹¹⁸ Sections 2.1.4 and 3.1.5.

¹¹⁹ Compare the *Schutzgebotsfunktion* of fundamental rights as defined by Canaris 1984, p. 225-229 and 1999, p. 37-38; see the previous subsection.

¹²⁰ See section 2.1.4.

¹²¹ The discussion resembles the one that followed the German *Handelsvertreter* and *Bürgerschaft* decisions, in which the *Bundesverfassungsgericht* also addressed the role of the courts in the evaluation of the content of contracts. Compare Emmerich 1994; Oeter 1994; Spieß 1994; Wiedemann 1990 and 1994; Hillgruber 1991 and 1995.

¹²² Compare Gerstenberg 2004, p. 775-776.

arises what other perspective might be taken on the subject in order to obtain a clearer view of its substantive side. In this section it will be submitted that fundamental rights, because of their open nature, leave more room for considerations of policy than is usually the case with the rules of contract law. Therefore, the explicit consideration of fundamental rights in contract cases could make judges more aware of the rationale behind different case solutions and of the implications of their judgments for the role contract law plays in resolving issues of societal importance. From that point of view, it might be possible to formulate guidelines for the application of fundamental rights in contractual relationships.

The line of argument in this section will run along the lines of the tension between the two principles underlying European continental contract law: autonomy and solidarity (subsection a). It will be argued that fundamental rights, even if at least rhetorically they are ‘rights’, might engage questions of policy insofar as they leave judges a certain discretion to pursue aims of either autonomy-based or solidarity-based orientation through contract cases (b). Although there are several problematic aspects to this perspective (c), it could form a framework for raising awareness of the judiciary as to the policy issues at stake (d). Therefore, it will be argued that the legal-political perspective might yield fruitful results for understanding and explaining existing case law on fundamental rights in contract law and for anticipating future developments (e). This hypothesis will then be further elaborated in Part II of this book.

a) *Fundamental rights or policies?*

Fundamental rights, at least in name, are rights, which means that they are supposed to give their beneficiaries (traditionally: the citizens) an enforceable claim against the other party (traditionally: the State). Because of their rhetorical strength, in fact, it has been said that these rights could provide private parties, also in the parties’ interrelations, with a powerful tool to protect their interests.¹²³

If we look at the wording of certain fundamental rights, however, they seem to promote the safeguarding of certain rights and interests rather than guaranteeing a specific right. Article 1 of the Dutch *Grondwet* as well as Article 3 of the German *Grundgesetz* and Article 3 of the Italian *Costituzione*, for instance, do not formulate specific claims for equal treatment, but provide a general basis for preventing discrimination. And while human dignity is guaranteed by Article 1 GG, this provision does not specify in what situations it might be successfully invoked. Given the editing of these articles, they thus seem to be principles rather than rights, in the sense that they provide a justification for the protection of certain individual or group rights.¹²⁴ The same might even be said of articles that use the term ‘right’, but on a closer examination they do not specify a right that can be invoked as such; think of the right to free development of personality of Article 2 GG.¹²⁵

In interprivate relations, moreover, fundamental rights often do not seem to hold a position which is as strong as in the relation between State and citizens. As we have seen, their effects are

¹²³ Compare Hesselink 2002a, p. 187.

¹²⁴ Compare Dworkin 1977, p. 82, on which, see below, section 5.2.1. Note that the Italian *Costituzione* indeed makes a distinction between *principi fondamentali* (fundamental principles) and *diritti e doveri dei cittadini* (rights and duties of citizens).

¹²⁵ Note that the Italian constitutional legislator has included the development of one’s personality in the general principles, Article 2 *Cost.*

often established in a balance of the parties' interests. Other than in the relationship between State and citizens, the infringement of the interest safeguarded by a fundamental right does not therefore in principle immediately entail legal consequences. It depends on the balancing of all the interests involved what the outcome of a specific case will be.

For contractual relationships it could thus be said that it is the principle that is protected by the fundamental right that affects the judgment, rather than the right as such.¹²⁶ Notwithstanding the rhetorical power of 'rights talk'¹²⁷ it seems difficult to maintain that they function as rights on the private level as they do in the relationship between State and citizens.

Whereas contract law is mostly built on rules, the application of fundamental rights may be said to emphasise the principles underlying these rules. Consequently, they appear to be more open to interpretation: they do not impose a certain case solution, but form the starting point for balancing the interests involved.¹²⁸

As will be argued in more detail later on,¹²⁹ the line that divides arguments of principle from arguments of policy is a thin one. In case law, judges refer increasingly often to the general interest when establishing limits to freedom of contract¹³⁰ and, thus, arguments of policy compete with the principle-based arguments regarding the rights of the parties. This brings into play the political stakes in European contract law, embodied in the tension between the opposing principles of autonomy and solidarity.¹³¹

b) The politics of European contract law

A central point in the discussion on today's contract law concerns the balance that has to be struck between, on the one hand, freedom of contract and, on the other, the protection of parties holding a structurally weaker bargaining position than their (potential) contract partner.¹³²

It may be assumed that fundamental rights engage issues of social distribution through contract law insofar as they embody values shared in society, which govern not only the relation between citizens and the State, but also the relations between citizens. An exemplary illustration of this thesis was given by the efforts that in recent years have been made on the EU level to find a lasting constitutional settlement in the form of a Treaty establishing a Constitution for Europe.¹³³ Although the draft for this Treaty has had to make way for a less ambitious Reform Treaty, the development of the EU still shows a growing emphasis on constitutional values.¹³⁴ The gradual progress from an Economic Community to a broader political Union asks for choices to be made

¹²⁶ Verhey 1992, p. 24-25.

¹²⁷ Compare Kennedy 1997, p. 308-311; Hesselink 2002a, p. 188-189.

¹²⁸ Verhey 1992, p. 25.

¹²⁹ Section 5.2.1. Compare Kennedy 1997, p. 125.

¹³⁰ See further section 6.3.2.c.

¹³¹ See sections 5.2 and 5.3 below.

¹³² Lurger 1998, p. 137; Lurger 2005; Hondius 1999; Schelhaas 2004, p. 431-433; Hesselink 2001, p. 48-52, and 2004a, Chapter 4, and 2006a, p. 5; Loos 2006a, p. 9. On the tension between the legal principles of personality (expression of freedom) and of community (expression of love), see already Scholten 1935. On the importance of this distinction for the role of fundamental rights in private law, see Mak 2003a, in particular p. 171-173.

¹³³ Treaty establishing a Constitution for Europe, 18 July 2003, http://europa.eu/constitution/index_en.htm (last consulted on 14 December 2006).

¹³⁴ The agreement reached at the European Council in Brussels on 23 June 2007 foresees in giving a legally binding status to the Nice Charter of Fundamental Rights.

regarding the principles that govern the market order, of which the rules of contract law are part.¹³⁵ In this process, the fundamental rights documents to which the EU Member States are parties will be of great importance, as will their national constitutional rights and principles and the rights enumerated by the EU Charter on Fundamental Rights agreed upon in Nice in 2000. They set a framework for the choices that have to be made regarding the principles that should govern the internal market in Europe.¹³⁶

As such, fundamental rights and constitutional principles also provide a framework for policy choices regarding the further evolution of the market and the distribution of wealth.¹³⁷ If we understand policy as the justification of a political decision that advances or protects a certain goal of the community as a whole,¹³⁸ then efficiency and redistribution in contract law may be considered as two policies emphasising different goals to be achieved through the rules of contract law. Efficiency, from this point of view, refers to a market ideology, in which contract law should contribute to the proper functioning of the market by ensuring efficient exchange.¹³⁹ Redistribution, on the other hand, is linked to an ideology of social justice, regarding the protection of groups of parties that in general may be presumed to hold a weaker bargaining position than their contract partner and that, in general, may not always make the economically most ‘rational’ decisions.¹⁴⁰

These policies may be said to engage two opposing principles in contract law: autonomy and solidarity, respectively.¹⁴¹ In general, it is presumed that the basic principle of nineteenth century contract law was that of freedom of contract, which supported a neutral, a-political and non-instrumentalist system of rules.¹⁴² Gradually, during the twentieth Century, more limitations were set on freedom of contract in order to protect parties against stronger contract partners as well as against themselves.¹⁴³ As a result, it has been said, the social, distributive character of contract law in Europe has been reinforced, requiring parties to comply with certain standards of ‘regard and fairness’ and thus steering the reallocation of wealth.¹⁴⁴ Translating these achievements

¹³⁵ Social Justice Group 2004, p. 667; Hesselink 2004b, p. 676-677; Rodotà 2005, p. 25; Maduro 2006, p. 135. See further Chapter 4 below.

¹³⁶ Social Justice Group 2004, p. 667: ‘In that Charter, a solemn agreement made by all the Member States in 2000, the European Union declares itself founded on the indivisible, universal values of human dignity, freedom, equality, and solidarity, and commits itself to the principles of democracy and the rule of law. These principles have an important bearing on the evolution of European contract law, for they set a framework for consideration of the principles to govern the market order. Although freedom is a fundamental value and supports private autonomy in contract law, it must be balanced against other values proclaimed in the Charter such as respect for equality, diversity, social inclusion, access to services of general economic interest, a high level of environmental protection and consumer protection, and fair and just working conditions.’

¹³⁷ Compare Maduro 1999, p. 464 ff.

¹³⁸ Dworkin 1977, p. 82. See, below, section 5.2.1. Compare also Kennedy 1997, p. 99.

¹³⁹ Hesselink 2002b, section 3b, on the market ideology of the European Commission, regarding the proper functioning of the common market in Europe. See also Lurger 2005, p. 452-453.

¹⁴⁰ Hesselink 2002b, section 3b; Lurger 2005, p. 447-452.

¹⁴¹ On terminology, see section 4.2.

¹⁴² Lurger 2005, p. 447; Schmid 2005, p. 213-214; Hesselink 2002b, section 3b. See also Jansen 2003, p. 148-149 for a nuanced view of the limits to freedom of contract in the law of the 19th Century.

¹⁴³ Lurger 2005, p. 447 ff.; Hesselink 2002b, section 3b; Hondius 1999, p. 387; Spieß 1994, p. 1223.

¹⁴⁴ See the authors mentioned in the previous footnote. See also Lurger 2004, p. 275-279 and p. 287-291.

to the current developments in European contract law, this implies that also on the EU level a balance has to be struck between the opposing principles of autonomy and solidarity.¹⁴⁵

This brings us to the question of how and by whom the line between autonomy and solidarity will be drawn in a harmonised European contract law.¹⁴⁶ Moreover, keeping in mind the adaptation of contract law to social changes, it has to be asked how and by whom the possible pursuit of policies of efficiency and distribution through contract law will be supervised.

From the legal-political perspective, I would say that the application of fundamental rights in contract cases directly relates to this subject. If fundamental rights are considered as part of the framework in which the principles of contract law are decided upon, then they should also play a role in the application and evolution of the rules of contract law. In my opinion, this is exactly what is pursued in the theories on *Wechselwirkung* or the interaction of fundamental rights and contract law: reverting to the fundamentals of a legal society, the civil courts seek to guarantee the lasting compliance of the specific rules of contract law with their founding principles.¹⁴⁷ At the same time, in my view, the constitutional approach allows the courts to evaluate the policies underlying contract law, thus giving them a say in the demarcation of the line between autonomy and solidarity.¹⁴⁸

c) Problematic aspects of the new perspective

This perspective on fundamental rights and contract law is not unproblematic. In the first place, it assumes a connection between private law and the pursuit of public interests that might be troublesome for many a contract lawyer. Or, more correctly, it enhances the risk of ‘talking politics’ instead of ‘talking law’, using rules of contract law as a means to achieve political ends.¹⁴⁹ Consequently, according to some, this type of discourse might endanger the autonomous nature of contract law as a field within which private parties are usually considered free to arrange their interrelations in the way in which they wish.¹⁵⁰ It might require private parties to take account of public interests in their interrelations.

Although one might disagree about the usefulness of a legal-political analysis of the present topic,¹⁵¹ the fear of a too far-reaching ‘politicisation’ of contract law seems unfounded and the

¹⁴⁵ On the distinction between autonomy and solidarity, compare Lurger 2005, p. 453-454, addressing these principles in terms of the Kennedian distinction between individualism and altruism; see Kennedy 1976, p. 1713-1719 and section 4.2.1 below. Regarding terminology, see Lurger 2004, p. 285-287 and section 4.2.2.

¹⁴⁶ Compare, on the question of legitimacy, the Manifesto of the Social Justice Group 2004, p. 658, and section 4.1.2 below.

¹⁴⁷ This by no means implies that (codified) fundamental rights should always precede the civil code provisions that engage them. Compare Rodotà 2005 on the changing roles of codifications of contract law and Constitutions in Europe’s modern constitutional history.

¹⁴⁸ This thesis will be further analysed in Part II.

¹⁴⁹ The classic concept of European-style civil codes considers commutative justice – as opposed to distributive justice – as governing contractual relations, implying that ‘private law relations shall be governed only by criteria originating in the relationship between the parties themselves – and not by reference to external political, social or economic goals’; Schmid 2005, p. 214.

¹⁵⁰ For instance, Zöllner 1988, p. 329, sees the political role of private law reflected in its independence: ‘Die politische Rolle, die dem Privatrecht nach (...) seiner Grundidee zufällt, ist evident: Privatrecht stellt eine ganz wesentliche Vorgabe für das Verhältnis von Staat und Gesellschaft dar, indem es der Gesellschaft gestattet, ihre rechtlichen Innenbeziehungen – freilich nur innerhalb eines vorgegebenen Rahmens – staatsfrei anzuknüpfen und auszuformen.’

¹⁵¹ Smits 2003, p. 162.

traditional autonomy-based conception of contract law somewhat outdated. When speaking about the ‘politics of contract law’ we identify solutions to disputes that may either emphasise the principles of autonomy and freedom of contract, or the principles of solidarity and the protection of weaker parties against exploitation. Even though it is not difficult to link these choices to the ideological ‘right’ or ‘left’ respectively, I think it would be a bridge too far to assume that political parties *as such and for that reason* will be interested in the issues handled by contract law. As has been correctly pointed out by various authors, the politics of contract law are not the same as party politics.¹⁵² For that reason, it also seems unlikely that the view of contract law as a field in which parties in principle are free from State intervention will be completely pushed aside. At the same time, the autonomy-oriented view of contract law, however, can no longer claim supremacy: through the introduction of special protection for presumed weaker contract parties (such as tenants, employees and consumers), also by the EU,¹⁵³ elements of distributive justice have gradually entered into contract law. Therefore, rather than asking whether public interests might – indirectly – affect contractual relationships, the question should be how and to what extent they can and should do so. A legal-political analysis might help define the criteria that should be taken into account when dealing with this question.

Nevertheless, other problems require attention. A second objection against the politics-of-law perspective on the effects of fundamental rights in contract cases is that, from this point of view, the attribution of legislative powers might be compromised.¹⁵⁴ If it is accepted that the application of fundamental rights in contractual disputes might affect the distribution of wealth in society, then the civil courts will be presented with questions that, according to some, should rather be left to the legislator to decide.¹⁵⁵ Even if it is recognised that there may be political stakes in contract law, then – in this view – the legislator should handle these, while the process of the application of the given rules should be as ideologically neutral as possible.¹⁵⁶

This objection seems, to some extent, to confuse the theoretical view of the most desirable attribution of competences with the reality of case law practices. To put it simply: if it is assumed that contract law should comply with fundamental rights, then there should be some mechanism for ensuring that this compliance is achieved in practice. If compliance is considered to engage questions of a political nature, then it might be said that the legislator should provide for such a mechanism, since the questions fall within its competence. Given the variety of cases in which fundamental rights might affect contractual relationships, the difficulty is that a general provision can hardly be imagined to say more than that judges in civil cases should take into account those values protected by fundamental rights when interpreting and applying rules of contract law.¹⁵⁷ More specific legislation would have to be developed for specific problems, as has been done, for

¹⁵² Hesselink 2004a, Chapter 4, and 2004b, p. 677; Kennedy 2002a, p. 7-8.

¹⁵³ Think of the harmonisation measures in consumer law. As Schmid remarks: ‘Fortunately enough, the ethical-societal concept of private law and the logic of market integration are to a large extent compatible, and in many cases even mutually dependent and reinforcing’; Schmid 2005, p. 216.

¹⁵⁴ Note that this problem seems to be less pressing in England than in civil law systems, since English law in principle to a greater extent depends on the rules developed in case law.

¹⁵⁵ Smits 2003, p. 64. Compare Kennedy 1997, Chapter 2 and section 5.1 below.

¹⁵⁶ Kennedy 1997, p. 23: ‘[M]any liberals and conservatives [in Europe that would be: progressives and liberals; CM] believe, some of the time, to some extent, usually in bad faith, that although there are ideological stakes in rule definition, the discursive process that disposes the stakes by choosing the rule (appellate decision) is not or ought not to be ideological.’

¹⁵⁷ Compare Article 3:12 of the Dutch *BW*; section 1.2.2.

example, for non-competition clauses in Dutch and German employment law and reduction of penalty clauses in Italian civil procedural law. But gaps would remain in the legislative protection of fundamental rights of contract parties and, consequently, the judges would at some point be presented with ‘politically charged’ questions – as is confirmed by the reality of the case law on, for instance, suretyships by relatives and surrogate motherhood.¹⁵⁸

A legitimate question, that is difficult to answer *in abstracto*, is then whether the judges should abstain from deciding on these types of questions and wait for the legislator to take action. *In concreto*, this problem becomes even more complex, given that the political stakes in contract cases are seldom explicitly considered.

In fact, and this would be a third objection against the legal-political perspective, it appears that many judges in civil cases are actually in denial of the political stakes in the cases they deal with.¹⁵⁹ The idea of a strict division between politics and law, and between legislation and adjudication, seems to prevail not only in academic literature on the subject of fundamental rights and contract law – which tend to discuss the topic in the light of the direct/indirect effect distinction – but also in the courts’ judgment of cases in this field. This leaves us with the following question: if the judges do not seem to be aware of the policy issues addressed in these cases, then how could a legal-political analysis serve the definition of criteria for fundamental rights application?

d) *Fundamental rights and the political stakes in contract law*

Here, my response would be to approach the problem from the other side, reversing the question as follows: what is or can be the role of fundamental rights in raising awareness of the political stakes in contract law cases? The logic behind this is: if fundamental rights have helped to define the policy issues involved in a contractual dispute, then we could start out from there a) to explore the relation between constitutional law and contract law, b) to define the types of cases in which fundamental rights argumentation might be applied, and c) to decide whether reference to fundamental rights should be made in an explicit manner.¹⁶⁰

A brief comparison of solutions for contract cases might clarify this idea. The problem of inexperienced relatives or spouses entering into suretyships on behalf of a loved one, for example, has not only arisen in Germany,¹⁶¹ but also in the Netherlands.¹⁶² Dutch law, however, considers suretyship contracts mainly within the framework of private law. Fundamental rights are usually not explicitly taken into account in cases regarding a person acting as surety for a spouse or next of kin.

In the case of *Van Lanschot/Bink*,¹⁶³ for instance, the *Hoge Raad* applied the doctrine of mistake in order to protect a mother providing surety for her son’s loan. The court ruled that in

¹⁵⁸ The example of surrogacy will be analysed in section 6.2.5.

¹⁵⁹ For a more detailed description of the problem of denial, see Chapter 5.

¹⁶⁰ See section 3.2.2 above and section 7.c below.

¹⁶¹ I refer to *BVerfG* 19 October 1993, *BVerfGE* 89, 214 (*Bürgschaft*), discussed in section 2.2.2.

¹⁶² Comparative analyses have been made by Cherednychenko 2004a, also including English law, and Colombi Ciacchi 2005, comparing a number of EU Member States.

¹⁶³ *HR* 1 June 1990, *NJ* 1991, 759 with comment by C.J.H. Brunner. Note that the judgment precedes the decision of the *Bundesverfassungsgericht* in the *Bürgschaft* case and that the outcome has thus not been influenced by the latter judgment.

the case of a close family relationship between the surety and the principal debtor, there is a risk that the would-be surety takes decisions without extensively thinking them through and that he will have a misplaced confidence that all will end well. These risks are so high that a professional credit supplier, such as a bank, is only allowed to argue that the mistake be borne by the surety if it succeeds in proving that it has sufficiently informed the latter about the risks attached to the suretyship. In fact, the bank in most cases will be better able to assess the risks than the private party who is willing to act as a surety because of his personal relation to the debtor.

Nevertheless, it should be pointed out that the results obtained in the Netherlands are similar to the German solution of the *Bürgschaft* case, protecting the insufficiently informed surety. Like the German *Bundesverfassungsgericht*, and the *Bundesgerichtshof* in its ‘rebound decision’, the Dutch *Hoge Raad* has chosen to protect the relative who acts as surety. Its line of reasoning actually shows similarity to the grounds provided by the *Bundesgerichtshof*: in the case of a close family tie between a potential surety and the principal debtor, the bank has to make sure that the would-be surety is aware of the risks related to the suretyship, since emotional pressure may blur the latter’s autonomous decision-making.

Unlike the German courts, however, the *Hoge Raad* did not revert to fundamental rights to come to this conclusion, but distilled it from the existing rules of private law.¹⁶⁴ Although similar fundamental values may have played a part in the court’s considerations regarding the bank’s duty of care towards the surety, the judgment contains no explicit references to these values. Consequently, underlying policy issues have not been openly discussed.

Is this problematic? If we look at the *Bundesverfassungsgericht*’s decision in the *Bürgschaft* case,¹⁶⁵ the answer would be yes. Indeed, the *Bundesgerichtshof* denied any protection to the unfortunate daughter, observing that she had been of sound mind and had reached the age of majority when signing the agreement and should have been aware of the risks attached to the suretyship. Whether one is in favour of weaker-party protection or not, the point is that this line of reasoning failed even to address the choice between a policy of autonomy and a policy of protection. In this sense, the judgment of the German Federal Supreme Court differed from the aforementioned decision of its Dutch counterpart, which had considered the special factor of a person emotionally bound to the principal debtor standing surety.

The *Bundesverfassungsgericht* reproached this omission, considering the case in the light of the fundamental rights governing the contractual relationship.¹⁶⁶ The Constitutional Court composed its judgment in the key of private autonomy (safeguarded by Article 2 GG), concentrating on the assurance of free determination of the content of the contract by both parties. Protecting the autonomous decision-making of both the bank and the potential surety implied making sure that the surety had been in a position to freely contribute to and agree on the terms of the contract. In other words: the bank should be urged to take into account certain standards of care, or a duty of ‘regard and fairness’, in respect to the potential surety who the bank knows to be closely related to

¹⁶⁴ It should be observed that the *Bundesgerichtshof*, at first instance, also did not address the constitutional dimension of the surety case. The *Bundesverfassungsgericht*’s judgment urged the *BGH* to reconsider its decision in the light of fundamental rights argumentation. This poses the question to what extent the use of fundamental rights in contract law depends on institutional factors (the existence of a constitutional court) and legal culture in general (the importance of fundamental rights in the legal system). In other words, what triggers the fundamental rights approach? I will come back to this in section 6.1.

¹⁶⁵ *BVerfG* 19 October 1993, *BVerfGE* 89, 214.

the principal debtor. And the civil courts should ensure that autonomous decision-making had indeed been possible.

My point is not that this outcome could only have been reached through fundamental rights reasoning – in fact, the Dutch case has proved the contrary. The thesis I would like to submit is that fundamental rights might induce the courts to reflect on the rationale of the solutions for contractual problems presented to them, thus reconsidering the role of contract law in the realisation of levels of freedom and protection that, at a given moment, are supported by societal values. This also means that they, to a greater or lesser extent, will have to deal with questions of policy, deciding whether the emphasis should be on party autonomy or solidarity, and considering the consequences of their choices for the pursuit of goals of efficiency and redistribution. At the same time, the consideration of fundamental rights arguments in case law might give other legal actors (parties, scholars) a better insight in the reasoning of the judges, thus making the outcome of cases and shifts in judicial opinions more predictable.

Once the ‘awareness thesis’ may be said to have found support in the reality of case law, we can re-reverse the question regarding the politics of fundamental rights in contract law. It seems to be overplaying one’s hand to require the courts to apply this fundamental rights-based approach if a solution can also be reached through existing contract law.¹⁶⁷ Therefore, it would be desirable to define guidelines for the determination of situations in which contract law reasoning might not suffice and, most of all, situations in which the protection of fundamental rights is endangered if they are not explicitly addressed.

A comparative legal-political analysis, in my opinion, might serve these purposes. Comparing case solutions in various legal systems on the point of reference to fundamental rights, it might be seen how similar questions are dealt with in different ways. Thus, an assessment may be made of the necessity for an explicit consideration of the protection of certain societal values and the pursuit of certain policies. And, finally, more specific answers may be found on the questions that were formulated in the Introduction, which the analysis in terms of direct and indirect effects has not been able to answer in a satisfactory manner.

3.2.4 Conclusion

Analysing the case law collected in Chapter 2, it seems that the distinction between direct and indirect effects cannot fully explain why fundamental rights have been applied in these specific cases. It only partly explains the views taken on the relationship between constitutional law and contract law, while not giving many indications for the identification of cases in which fundamental rights may or should be applied, nor considering procedural questions on the *ex officio* interference of the courts with contractual arrangements on the basis of fundamental rights.

Given the nature of fundamental rights as protecting societal values and the idea of contract law forming the expression of certain ideas of distributive justice, a comparative legal-political perspective seems to be an interesting addition or alternative to the traditional distinction. While the analysis of direct and indirect effects tends to focus on the formal integration of fundamental

¹⁶⁶ See section 2.2.2 for a more detailed description.

¹⁶⁷ See Chapter 7 below for a more in-depth investigation of the necessity of fundamental rights reasoning in contract cases.

rights reasoning in contract law, the investigation of the political stakes in contract cases may put flesh on the bones of the argument, providing new insights into the substantive impact of fundamental rights in this field.

Epilogue to Part I

In this first Part, a general overview has been presented of the major developments regarding the effects of fundamental rights in Dutch, German, English and Italian contract law. A comparative analysis has concluded that the contract laws of these countries have been affected by fundamental rights in a variety of cases, ranging from non-marriage clauses and non-competition clauses in employment and commercial agency contracts, to the validity of sureties given by relatives, the reduction of penalty clauses and duties of care in doctor/patient relations. While case comments and legal literature on the subject have sought to systemise case law and draw more general conclusions from the specific examples, no detailed guidelines are available for determining which fundamental rights could have which types of effects on which types of contract cases. In the previous Chapters, it has been argued that this is not due to the fact that it would be impossible to formulate more precise criteria. Rather, the focus up until now has been so much on the systematisation of cases according to the distinction between direct and indirect effects that other perspectives have hardly received attention. Although the theories of direct and indirect effect express two views on the relation between constitutional law and contract law, and the extent to which the former might invade the latter, they fail to reveal the motivation for either of these views to prevail. Moreover, in light of the opposing reasons underlying these theories, they seem to exclude the possibility of applying one form of effect in one case and another form of effect in another. It has been submitted that an analysis from a new perspective might give better insights into the dynamics of applying fundamental rights in contractual relationships, especially as regards the role of the judges in assuring compliance with fundamental rights by contract parties. This alternative is the comparative legal-political perspective, from which point of view the subject will be explored in the following Chapters.

Before moving on to the second Part of the book, however, some loose ends should be tied up. These concern: the use of examples from tort law for the explanation of the effects of fundamental rights in contract law (A); the formal and substantive effects of fundamental rights in contractual relationships (B); and the consequences for legal certainty of these effects in contract cases (C).

A. Tort law examples in a contract law discourse

First of all, it should be admitted that many examples in the analysis have dealt with tort liability rather than contractual claims. The reason for this is that in many legal systems examples and theories on the effects of fundamental rights in interprivate relationships have occurred and developed in tort law, e.g. in relation to the limits on freedom of expression in relation to private parties (the German *Liith* case, the Dutch *Boycot Outspan Aksie* case, the English ‘post-HRA’ cases on privacy). Moreover, the borders between contract and tort slightly differ from country to country and a comparative analysis could therefore more easily be conducted when adopting a broad definition of ‘effects of fundamental rights in contractual relationships’. Cases were included in which there was some relation based on a contract between the parties, though the actual claims might have had its basis in tort law.

Taking into account the developments in tort law when describing the role of fundamental rights in contractual relationships has thus provided a more detailed impression of the ways in

which the relations between private parties might be affected by considerations of constitutional law. Arguably, however, they might at the same time have made it more difficult to define the particular features of such effects in contractual relationships. It seems very well possible that different considerations might underlie decisions based on claims in tort law or in contract law, given the different aims pursued in these two fields of law: tort law regards the responsibility a person has to take with respect to an (usually unknown) other person for damage caused by his acts (or omissions to act), while in contract law emphasis lies on the regulation of the responsibilities the parties have – in principle – freely taken upon themselves with respect to their chosen contract partner. Differentiations might thus have to be made with regard to the extent to which parties are bound to take into account fundamental rights; with regard to a chosen contract partner duties may be further-going, or at least easier to establish in legal procedure, than in relation to a third party. The choice for a claim based on tort or contract might even have implications for the outcome of a case against a (former) contract partner, as emerged from the Dutch *hiv-test* case of 2003.¹

In the analysis based on the distinction between direct and indirect effects this aspect of the discussion was of minor importance, given the fact that these theories address the manner in which private parties in general are bound by fundamental rights – directly or not. From that perspective, there is no significant difference between tort and contract claims, since in both cases the question is how norms of private law might restrict fundamental rights and *vice versa*. Policy questions are hardly touched upon when these theories are applied.

If we look at the different scopes of tort and contract law, however, it seems likely that the criteria for the application of fundamental rights in the latter field might deviate from those which govern the former field of law. This relates to the extent to which a specific fundamental right might protect party autonomy as well as promote solidarity among parties, and to the policies pursued in rules of tort and contract law respectively, in other words: the politics of tort and contract law seen in the light of fundamental values.² An analysis regarding these aspects goes further than the systematisation of cases according to direct and indirect effects. It requires a contemplation of what is at stake in the (contractual) dispute and, thus, an evaluation of the consequences of fundamental rights argumentation for the policy questions underlying the case.

From the legal-political perspective, therefore, it seems desirable to distinguish between cases of tort liability and cases of contract liability. Criteria for the application of fundamental rights might change according to the nature of the claim. In the following Chapters the focus will thus be narrower than in the first Part of the book. Examples will almost exclusively be taken from contract law, in order to establish the criteria for the adjudication of contractual disputes in the light of fundamental rights. Occasional reference may be made to cases involving tortious liability in order to illustrate the differences in approach.

B. *Form and substance*

The rhetorical strength of fundamental rights has briefly been referred to before.³ At this point, an additional remark should be made on the question whether the application of these rights in

¹ See section 2.3.2.

² Compare section 3.2.3.b.

³ Section 3.2.3.a.

contractual disputes is mostly limited to this formal aspect or whether, as has been assumed in the previous analysis, it has a substantive effect on contract law.

Some have argued, because of the fact that private law often gives similar results without referring to fundamental rights, that the application of fundamental rights usually does not constitute a real ‘effect’ at all.⁴ That is, there would only be an ‘effect’ of fundamental rights in relations between contract parties if the decision could not be reached without reference to fundamental rights. Furthermore, in this view there are no fundamental rights that cannot be waived in a contract; private parties may always limit these rights by their mutual consent. If fundamental rights, or the values they express, are taken into account in case law on contracts, they appear only as an interest that is weighed against other interests. If they play a part in the interpretation of the general clauses of contract law, it is never more than as a source of inspiration for the judge. From this perspective, in sum, fundamental rights do not have any added value in respect to the normal mechanisms of contract law adjudication and are mostly used in a rhetorical way.⁵

In my opinion, two points are overlooked when thinking in this way. First, this perspective does not accept the distinction as is often made between direct or indirect effects of fundamental rights,⁶ or rather, it only acknowledges the former as a ‘real’ effect.⁷ As said earlier, ‘direct effect’ implies the application of the rights as recognised and formulated in a constitution or treaty, while ‘indirect effect’ refers to the interpretation of general clauses of contract law in light of fundamental rights.⁸ The supporters of a strict understanding of ‘effects of fundamental rights’ mostly limit the concept to cases of direct effect, that is cases in which a fundamental right is applied as straightforward as possible, almost as in the relationship between citizen and state.⁹ Any application of fundamental rights that others might understand as an indirect effect is thus considered as a mere ‘taking inspiration from fundamental rights’ in order to apply the traditional concepts of contract law. Seen in this light, the differing views on ‘horizontal effect’ could be thought of as mere ‘wordplay’: while both schools of thought recognise cases of direct effect as such, one also includes indirect effect cases whereas the other excludes these.

To put it in this way, would, however, seem to be an oversimplification. Second, namely the views on the ‘effects’ of fundamental rights entail a more substantive discussion on the role of contract law in general and the role of the courts regarding the evolution of this field of law in particular.¹⁰ In a strict view of fundamental rights and contract law, the *Bürgerschaft* case, for instance, could be seen as giving no particular ‘effect’ to the rights involved, since the *Bundesgerichtshof* in the end decided the case on the basis of the general clause of ‘good morals’. In other countries, furthermore, similar solutions were reached in similar cases on the basis of pure

⁴ De Graaf & De Haas 1984, p. 1353-1358. Compare Cherednychenko 2004a and De Vos 2005. See also Canaris 1999, p. 35, on the terminological distinction between the direct effect of fundamental rights (*unmittelbare Drittwirkung*, referring to private parties being addressed by fundamental rights) and direct applicability (*unmittelbare Geltung*, referring to the applicability of fundamental rights on private legal relationships); Lurger 2002, p. 234-238.

⁵ In this sense: Smits 2003, p. 161-163.

⁶ For an overview of the debate on direct and indirect effect, see section 2.1 above, with further references. See also sections 3.1 and 3.2.2 for a critique of the usefulness of this distinction for the analysis of case law.

⁷ De Graaf & De Haas 1984, p. 1354.

⁸ See above, section 2.1.

⁹ De Graaf & De Haas 1984, p. 1354.

¹⁰ See section 3.2.2.a.

contract law reasoning. From the strict doctrine it would thus follow that the contract law of the discussed countries by itself provided a sufficient framework for deciding the case.¹¹

Yet, from another point of view,¹² the *Bundesverfassungsgericht's* judgment revealed a deeper layer of contract law adjudication. Referring to the fundamental values that do not only find expression in the Constitution but also in the rules of contract law, it openly contemplated the rationale of the rules regarding suretyships. Reverting to this rationale, in my view, makes it possible to reconsider it and perhaps adapt the contract law rules to new societal standards, such as the protection of weaker parties. The 'effect' of fundamental rights application may then not necessarily consist of a direct change in contract law rules, but rather of creating an opening for a renewed discourse on certain rules.

Recapitulating, it may be submitted that, while not denying the rhetorical strength of the fundamental rights argument, there does indeed appear to be a substantive effect of these rights on contract law adjudication as well. This conclusion, nevertheless, does not answer the question to what extent such developments should be either welcomed or discouraged, nor what criteria they should comply with.¹³

In fact, it seems that part of the disagreement on the question whether the role of fundamental rights in contract law should be understood as merely a formal one can be traced back to a Babylonian misunderstanding of the term 'horizontal effect'.¹⁴ Those who recognise fundamental rights as having mostly a formal role in contract law tend to understand 'horizontal effect' in a much stricter sense than those who in the definition of this term include not only a direct application of a fundamental right but also the impact of the values protected by these rights. When focusing on these terminological differences, therefore, there is a risk of losing sight of the real issues.

The true point of discussion does not seem to be the question of 'form or substance' as such, but the question of the *desirability* of the application that has been given to fundamental rights in contract law adjudication. Generally, it seems that legal scholars who emphasise the rhetorical strength of the fundamental rights argument in contract law cases tend to lean towards a limited use or even the elimination of this type of argument in contract law adjudication. They fear an inflation of fundamental rights and warn against the risks of introducing public law concepts in private law discourses.¹⁵ Moreover, they emphasise that many values protected by fundamental rights have already been recognised and expressed in private law, for which reason it is not necessary to reintroduce them by means of public law rights. They prefer to conduct the debate on the values underlying contract law as much as possible within the framework of this field of law.

Those who are more open to the possible effects of fundamental rights on substantive contract law, on the other hand, usually see more possibilities for this form of legal reasoning to enter into contract law adjudication. They value the interaction between constitutional law and

¹¹ Compare Cherednychenko 2004a, p. 16-17.

¹² See also, below, section 6.2.2.

¹³ Section 3.2.2.

¹⁴ See also the Introduction to this book. It is partly for this reason that the choice has been made to avoid the terminology 'horizontal effect' in this analysis.

¹⁵ Compare Besselink 2003, p. 15; De Vos 2005, p. 301; and Cherednychenko 2006a, p. 33-34. See also Dürig 1956, p. 183-184.

private law as a means of reasoning that might add to the development of contract law, especially insofar as it regards the protection of contract parties.

In the end, therefore, differences in opinion on the substantive role of fundamental rights in contract law depend on the legal-political view that is taken on the subject. This aspect of the discourse will be further elaborated in Part II.¹⁶

C. *Legal certainty*

Finally, the introduction of fundamental rights argumentation has been said to entail the risk of case solutions becoming less predictable.¹⁷ The application of these rights in contractual disputes could induce the courts to change existing rules of contract law or even develop new rules. Legal certainty would thus be at risk.

Though fundamental rights may indeed lead judges to rethink the rules provided for a certain case,¹⁸ their impact on legal (un)certainly should in my opinion not be overstated. First, the rules of contract law in principle should already express the values guaranteed by fundamental rights. Their ‘constitutional reading’ should thus affirm the usual application of these rules. Second, where this is not the case, i.e. where fundamental rights argumentation does change the interpretation of a rule or introduce a new rule, the court’s reasoning should address the rationale of the rule, precisely because that is what the fundamental right relates to.¹⁹ Thus, even though a change of the case solution may be decided upon, the outcome of subsequent similar cases will to a great extent be predictable on the basis of this reasoning.

So far, so good. If it is assumed, however, that the rationale of contract law rules reflects policy choices that have been made in contract law,²⁰ the discourse becomes somewhat more complicated. In the first place, this assumption implies that a definition should be given of the political stakes in contract law and the policy issues that play a part in particular cases. Only then can a level of predictability be guaranteed, since legal certainty requires clear definitions. In the second place, the role of fundamental rights should be determined in revealing these political stakes. If the application of these rights can open up the discourse to the policy issues underlying a case, then it has to be established in which types of cases such an effect should occur. Third, the question should be answered whether this implies that judges should always explicitly consider the fundamental rights engaged in contractual disputes or whether an implicit consideration of the values protected by these rights may suffice. An explicit adjudication of the role of fundamental rights would of course enhance legal certainty, as it gives a better insight into the legal reasoning supporting the outcome of a case.

The question of legal certainty thus appears, on a deeper level, to relate to the three questions that have been posed in the Introduction to this book: a) to what extent do fundamental rights affect contract law; b) in which types of cases can fundamental rights be applied; and c) what does the explicit consideration of fundamental rights add to contract law adjudication? If it

¹⁶ In particular section 7.a.

¹⁷ See, for instance, section 2.4.2 above on the questions of legal certainty which Italian commentators have raised in reaction to the decision of the *Cass. civ.*, joint divisions, 13 September 2005, n. 18128, *Foro it.* 2005, I, 2985.

¹⁸ This thesis will be further elaborated in Chapters 5 and 6.

¹⁹ See section 3.2.3.a and section 5.2.

²⁰ See Chapter 4 below.

can be proven that fundamental rights mediate between rules of contract law and policies, then answers to these questions might be found in criteria for the judicial elaboration of this interaction. Risks to legal certainty would then be limited.

A final objection might be that this line of argument could encourage judges to use fundamental rights in order to pursue certain policies through contract law. This objection, however, does not hold up if it follows from the comparative legal-political analysis in Part II that fundamental rights bring into the open the policy questions underlying contract cases. Indeed, it may be held that courts already make policy decisions, even if they may be unaware or in denial of this.²¹ The added value of the fundamental rights approach would be to make explicit these processes in (some) contract cases. Although this might give courts an incentive to choose certain policies, at the same time it requires them to provide adequate reasoning for their choices. And on the basis of these grounds it might be possible to better define the relationship between fundamental rights and contract law.

²¹ See Chapter 5.

Part II

The intermediary role of fundamental rights in European contract law adjudication

Introduction to Part II

Why should fundamental rights be taken into account in European contract law adjudication? The increasing amount of cases in which fundamental rights are applied to contractual relationships as well as the growing attention to this subject in legal doctrine accentuate the importance of this question. As we have seen in Part I, an attempt to find an answer may start from a classical internal analysis of *how* fundamental rights can affect contract cases, thus charting the developments in the field and aspiring to understand them. To fully appreciate *why* the actors in these types of cases – i.e. the parties and the judges – would be interested in applying fundamental rights, the internal view alone may however not suffice. Classical legal analysis considers judicial decision making from the inside, presuming that the process of adjudication in principle is as politically and morally neutral as possible. An external perspective, on the other hand, emphasises the context in which adjudication takes places. This includes looking into the politics of law in order to explain what the political stakes of the actors in adjudication exactly are. Analysing case law on fundamental rights and contract law ‘from the outside’ may provide insights into the motives of parties and judges and clarify how they (subconsciously) pursue ideological aims by means of arguments based on fundamental rights.

At the core, the subsequent part of this thesis submits that there are indeed political stakes in European contract law, based on the opposing principles of autonomy and solidarity (Chapter 4). They are of particular relevance for the protection of the weaker contract party by rules of contract law. The autonomy and solidarity stakes, however, often seem to be denied by contracting parties as well as by the judges who consider their cases, as a result of which the political choices made in contract law adjudication usually remain under the surface (Chapter 5). The consideration of fundamental rights in contract cases, though, may help bring to light the underlying values that affect these choices (Chapter 6). On this basis, parties and judges will possibly become more aware of the scope of their discretionary powers, in other words: of the extent to which they can use the margin of choice granted to them by the legislator. A more conscious application of fundamental rights in contract cases could then indicate limits to the use of discretionary powers as well as provide a basis for a wider discretion. Moreover, the ideological choices in European contract law would have to be more explicitly and profoundly motivated, thus making it possible to increase social justice in contract law by creating possibilities for a better protection of ‘weaker’ parties, while at the same time seeking to preserve legal certainty by clarifying the decision-making process (Chapter 7).

At this point, the reader should note that the approach in this Part differs from the analysis made in Part I not only in its focus on the politics of contract law, but also in its precise topic of comparison. The case law overview carried out in Chapter 2 contained only examples of cases in which fundamental rights were applied, in order to see how this technique of case solution had developed. In this Part, in particular in Chapter 6, a different approach will be adopted: specific problems of contract law will be analysed, comparing the solutions given to these problems in the various selected countries. In principle, examples will be chosen of cases that have been resolved on the basis of fundamental rights argumentation in at least one of the chosen legal systems and it will be seen what other types of solutions have been found on the basis of contract law rules in

the other systems. In this way, an attempt is made to define what fundamental rights application might add to dispute resolution in contractual relationships and, subsequently, to formulate criteria that might be taken into account when following this method of reasoning.¹

¹ Compare the remarks made on the use of examples from tort law in this analysis; Epilogue to Part I. Note that the approach chosen corresponds to the methodology of the RTN project that was mentioned in the Introduction to this book; see also Brüggemeier, Colombi Ciacchi & Comandé 2008b.

4 Changing perspectives: starting points for a comparative legal-political analysis

What is ‘just’ and who decides what is ‘justice’? In the previous part of this book, the focus was on the techniques used for finding ‘just’ case law solutions rather than on the specification of the notion of ‘justice’. As we have seen, fundamental rights and values sometimes form sources of inspiration for resolving contract law disputes. The courts then revert to the principles that underpin the rules of contract law governing the case. On the one hand, they seem to look for guidance regarding what would be a ‘just answer’,¹ while on the other hand the appeal to underlying values may enhance the legitimacy of the solution chosen.

In Part I, an attempt has been made to clarify these developments from the perspective of a coherent system of contract law,² trying to understand how fundamental rights might ‘fit’ into the classical balance of parties’ interests. In this Chapter, the perspective will be changed, in order to try to explain the undercurrents of judicial law-making in Europe. It will be argued that political stakes are present in contract law adjudication, which underlie each decision in case law. In light of the distinctions between rights and policies, and rules and principles, it will then be submitted in the next Chapter that attempts have been made to ‘depoliticise’ the process of adjudication. These attempts, however, seem to have covered up the political stakes rather than having ‘neutralised’ them. This means that political choices still form part of adjudication, even if the courts themselves might be in denial of this. In the subsequent Chapters the consequences of this view for the application of fundamental rights in contract law will be analysed.

Setting the stage on which the argument will be developed, this Chapter will briefly introduce the distinction between ‘internal’ and ‘external’ analyses of adjudication and explain the relevance of North-American legal theory for European contract law (section 4.1). It will then move on to the distinction that may be made between political stakes of ‘autonomy’ and ‘solidarity’ in contract law rules (section 4.2). A further elaboration of the relation between the principles of autonomy and solidarity provides a model for the subsequent comparative legal-political analysis of effects of fundamental rights in contract law (section 4.3).

4.1 An external perspective on fundamental rights in contract law

4.1.1 *A Lion and a Fox...*

One may take either an ‘internal’ or an ‘external’ perspective on adjudication.³ This idea to a certain extent corresponds with the distinction that is sometimes made between ‘lions’ and ‘foxes’ in legal science.⁴ Lions would be those legal scholars who build their theories around the internal analysis of decision making, starting from the presumption that cases in principle are decided in a deductive mode. Judges are assumed to seek a justifiable answer for the disputes before them, an answer that ‘fits’ with legal materials and values and serves the consistency and coherence of the

¹ I intentionally avoid using the terminology ‘right answer’, since it might be confused with Dworkin’s theory of ‘one right answer’ for each case. I will come back to this in section 5.2.2.

² Compare section 3.2.2.a.

³ Soeteman 1991, p. 29; Lucy 1999, p. 1; Hesselink 2004a, p. 189-200.

⁴ Kwak 2003, p. 55, commenting on Lucy 1999, who makes a distinction between ‘orthodox’ and ‘heretical’ accounts of adjudication.

legal system in question.⁵ From the Lions' perspective, the law thus has some degree of predictability and certainty. A Lion seeks to construct his kingdom of theories on this basis. A renowned representative of this group of legal scholars is Ronald Dworkin, who has built an impressive theory of adjudication, a central concept of which is the 'right answer' that can be found in all disputes, including 'hard cases'.⁶

Dworkin's work, as well as that of other 'builders', has been criticised by the Foxes in legal theory. The metaphor of the Fox refers to the fact that scholars belonging to this group tend to deconstruct rather than build, like a Fox coming out of its hole to do damage to the Lion's kingdom, then returning. These scholars, other than the Lions, tend to take an external perspective to law, attempting to deconstruct classical legal theories.⁷ The Foxes accept that adjudication, to a certain degree, takes place within the law and that judges try to make their choices on the basis of arguments of 'fit' and coherence. However, they submit that these choices are not in principle capable of justification.⁸ There are thus no 'right answers', but rather the judge has a choice among many possible answers in each case. An important argument for this is that judicial law making cannot be considered politically and morally neutral, but rather has been and is used for the realisation of ideological projects. Since the 1970s, this argument has been elaborated by the American Critical Legal Studies movement (hereafter: cls movement), which sought to 'trash' conservative legal theory in order to reveal that adjudication was used as an instrument for the realisation of conservative, right-wing ideals.⁹ Thus, the Foxes sought to make room for the pursuit of more left-wing ideals of justice. One of the most influential members of this movement is Duncan Kennedy, whose *Critique of Adjudication*¹⁰ uses both internal and external analysis of law in order to demonstrate the role of ideology in judicial law making.¹¹

4.1.2 ...and the politics of European contract law

How does this controversy in American legal theory relate to European contract law and, in particular, to the growing attention to fundamental rights in this field? Although there are many differences between the legal system of the United States and the European systems discussed here, the current discourses on the politics of a European Civil Code and the constitutionalisation of European private law address issues that are closely related to the core topics of debate between the Lions and the Foxes in American legal science.

⁵ Lucy 1999, p. 1-6.

⁶ See, for instance, Dworkin 1977, in particular p. 81 ff. See also section 4.3 below.

⁷ Lucy 1999, p. 7-15.

⁸ Lucy 1999, p. 10-11.

⁹ On this movement, Unger 1986.

¹⁰ Kennedy 1997.

¹¹ The fact that Kennedy now also uses more conventional methods of legal analysis does not seem to imply that the contradiction between Lions and Foxes is losing its sharpness. Although the methods (external or internal analysis) of both groups may sometimes converge, their ideological engagement still signifies a profound difference of opinion. Kennedy's propensity to resort to leftist, deconstructive theory places him with the Foxes, even though he may sometimes apply the internal analysis that characterises the Lions' work. Compare Kwak 2003, p. 62.

An example is the Manifesto on ‘Social justice in European contract law’¹², published in November 2004, which criticises the approach which the European Commission has adopted in regard to the harmonisation of contract law in the European Union. The authors submit that ‘[i]f governments seek to reduce the role of the State, to encourage market solutions to problems of securing social welfare, and to use the discipline of market competition to improve the efficiency of the supply of public goods, contracts become both an instrument of trade and an instrument of politics. The rules governing these transactions, which are based in private law, therefore become a key regulatory instrument of modern governments’.¹³ Ignoring the political issues in the harmonisation of European contract law could lead to an overemphasis of market integration and an inadequate assurance of social justice.¹⁴

The Social Justice Group submits that the European Commission in its Action Plan on European contract law¹⁵ appears to overlook this political side of the work on a European Civil Code. A technocratic approach has been adopted, emphasising the completion of the Internal Market by removing impediments to cross-border trade. According to the Social Justice Group, the Commission thus avoids the ‘real issues’ engaged by proposals for the harmonisation of contract law in Europe. These real issues are summarised in two starting points, stressing respectively: a) the ‘political goal of the construction of a union of shared fundamental values concerning the social and economic relations between citizens’; and b) the new methods that are needed for the construction of this union of shared fundamental values as represented in contract law and the remainder of private law.¹⁶ The Manifesto thus forms an expression of the growing attention in European legal doctrine for the political issues involved in the harmonisation of contract law.¹⁷ Whereas private law, and in particular contract law, is often considered an autonomous field, in which freedom of contract is a main principle, an awareness is now arising that the rules of private law may also have effects on the distribution of welfare in society.

In this respect, the Manifesto on Social Justice shows similarities to the critiques of adjudication developed in the cls movement. It looks beyond the technocratic approach to harmonisation, in order to demonstrate how such an approach may favour the views of strong actors who pursue certain political goals. This may be illustrated on the basis of an example from the Manifesto regarding the Commission’s approach to democratic participation by citizens in the development of European contract law: it is submitted that the Commission’s agenda appears to exclude the democratic participation of European citizens in the determination of a ‘common frame of reference’. This ‘common frame of reference’ should help achieve a higher degree of convergence between the contract laws of the member states and could even prelude a European contract code. Notwithstanding the clear relevance of this process for the citizens of Europe, the

¹² Social Justice Group 2004. The study group, chaired by Martijn Hesselink (University of Amsterdam), consists of legal scholars from various European universities. See also the contributions to a workshop organised by the Study Group in Paris in September 2005, which have been published in the *European Review of Contract Law* 2006, no. 2.

¹³ Social Justice Group 2004, p. 655.

¹⁴ Social Justice Group 2004, p. 664.

¹⁵ European Commission, A More Coherent European Contract Law: An Action Plan, Brussels, 12 February 2003, COM (2003) 68 final.

¹⁶ Social Justice Group 2004, p. 657.

¹⁷ For instance, Hesselink 2004b; Gerstenberg 2004. On 7 January 2005, a conference was organised at the University of Amsterdam on ‘The Politics of a European Civil Code’; see Hesselink 2006a.

Commission's Action Plan does not foresee any kind of democratic consultation of the people in the process of establishing this framework; the work will be done by 'a legal élite', conducting scholarly research, in combination with 'powerful business interests and other effective pressure groups'.¹⁸ Consequently, there is a danger that large organisations will mould the framework in their favour, without taking into consideration principles of fairness or social justice. The European Commission's technocratic agenda, according to the Social Justice Group, by not addressing this problem suppresses fundamental political questions. Thus criticising the Commission's approach, the Manifesto recalls the deconstruction projects of the *cls* movement, which sought to reveal the conservative ideology behind laws and adjudication. In a *cls*-like manner the drafters of the Manifesto seek to open up the debate to the 'real issues', at the same time promoting the assurance of social justice in contract law.

From a broader perspective, the politics of European contract law relate to the so-called 'constitutionalisation' of European private law.¹⁹ As we have seen in Part I, a tendency is emerging in contract law adjudication in various European countries to also consider disputes between private parties in the light of fundamental rights. This development starts from the assumption that the rules of private law should comply with the values of the constitutional order.²⁰ The judges verify whether the contract respects fundamental values and, indirectly, assess the constitutionality of the relevant rules.

In the following, I will further analyse the relationship between the process of constitutionalisation of contract law and the consideration of the political role of contract law in adjudication. The analysis diverges from the Social Justice Manifesto, in the sense that it will not concentrate on the role of the EU institutions in this relationship, but rather focus on the national courts. 'European Contract Law' in this analysis thus implies the comparison of the law of various Member States with an eye on harmonisation: How do the courts in respectively Germany and the Netherlands, Italy and England deal with the constitutional side of contract law cases? Are there similar tendencies and solutions that could form a basis for harmonisation? An investigation of this limited field could clarify the problems attached to the realisation and maintenance of national systems of contract law that aim at guaranteeing both market values and social justice. Thus, it is aspired to define points of attention for the evolution of the debate on the EU level.

4.2 Autonomy and solidarity in European contract law

Which tools can be used in order to reveal the real issues in contract law in Europe? Legal literature on 'social justice in contract law' tends to depict changes in legal development by describing them in the light of sets of opposing concepts, or dichotomies.²¹ One of these dichotomies is 'autonomy v. solidarity', or – in Duncan Kennedy's terminology – 'individualism v.

¹⁸ Social Justice Group 2004, p. 662. See also Hesselink 2005.

¹⁹ Compare Social Justice Group 2004, p. 667-668.

²⁰ Smits 2003, p. 9, as well as p. 119-120 of the report of the meeting in which the preliminary report was discussed, Smits 2003 (report); and Gerstenberg 2004, p. 766.

²¹ Wilhelmsson 2004, p. 712. See also Auer 2002, p. 279-301.

altruism'.²² Autonomy in general may be said to emphasise the liberty and personal responsibility of the individual, while solidarity stresses the need to make sacrifices on behalf of others. This dichotomy can be used to picture and explain developments such as socialisation and constitutionalisation of contract law.

A more precise definitions of autonomy and especially solidarity are however required in order to adequately use these concepts for the analysis of fundamental rights application in contract law adjudication. It greatly depends on the eye of the beholder whether a certain rule or solution to a case emphasises either autonomy or solidarity: what in the view of one person or legal system is a social rule may in another's opinion seem more traditional.²³ In the following sections, an attempt will be made to find out how fundamental rights may help clarify the understanding and inspire the development of social justice in European contract law. Before embarking on that analysis, a brief overview of the conceptions of autonomy and solidarity will be given in this section.

4.2.1 *Individualism and altruism...*

In his 1976 publication on form and substance in private law adjudication, Duncan Kennedy defined the essence of the ideal of individualism (a more egalitarian term for autonomy) as 'the making of a sharp distinction between one's interests and those of others, combined with the belief that a preference in conduct for one's own interests is legitimate, but that one should be willing to respect the rules that make it possible to coexist with others similarly self-interested'.²⁴ Individualism thus refers to self-reliance and the pursuit of one's own interests. However, it is different from pure egotism, in the sense that one should always respect the rights of others.²⁵

Altruism (a more egalitarian term for solidarity), in Kennedy's opinion, implies that 'one ought *not* to indulge a sharp preference for one's own interest over those of others. Altruism enjoins us to make sacrifices, to share, and to be merciful'.²⁶ Still, it does not go as far as complete selflessness or saintliness, since it acknowledges a certain 'sphere of autonomy or liberty or freedom or privacy within which one is free to ignore both the plights of others and the consequences of one's own acts for their welfare'.²⁷

Kennedy prefers the terminology 'individualism and altruism' to 'autonomy and solidarity'. The latter might suggest a distinction between stronger and weaker parties, whereas Kennedy's conception of altruism includes the sacrifices made on behalf of stronger as well as weaker parties. It does not take into account the status of the parties and does not as such express a preference for liberal, conservative rules or social rules of contract law.²⁸

²² As will be specified in this section, the concept of autonomy does not equal individualism, even though they overlap. The same holds true for solidarity and altruism.

²³ Compare Wilhelmsson 2004, p. 713.

²⁴ Kennedy 1976, p. 1713.

²⁵ Kennedy 1976, p. 1715.

²⁶ Kennedy 1976, p. 1717.

²⁷ Kennedy 1976, p. 1718.

²⁸ See Kennedy 2002a, p. 13-15.

4.2.2 ...or autonomy and solidarity

In scholarly writings,²⁹ the legal concept of ‘private autonomy’ is usually defined in a sense that comes close to Kennedy’s understanding of ‘individualism’. It emphasises the freedom of the individual in the private sphere, as opposed to the public sphere within which the citizens have to respect the decisions of the democratically legitimised State.³⁰ Freedom of contract forms an expression of this autonomy,³¹ since it gives individuals the space to arrange their relationships in the private sphere as they see fit, in principle concluding contracts on the terms they wish.³² Moreover, fundamental rights may be seen as protecting the autonomy of the individual in so far as they protect the sphere within which he or she is free to develop his or her personality and pursue personal interests free from state intervention.

Nevertheless, autonomy, by definition, does not imply unlimited freedom. The autonomy of one party ends where it meets the autonomy of another, equally self-interested, party. Accordingly, freedom of contract has usually been limited by means of rules of mandatory law that aim to guarantee that both parties to a contract can fully realise their autonomy.³³ This encompasses both the formation of the contract and the review of the contents of the agreement.³⁴ The question arises to what extent such limits on freedom of contract can be classified as inherent to autonomy, or whether they should rather be put in the key of protection or ‘solidarity’.³⁵

‘Solidarity’ is a concept which is more difficult to define than ‘autonomy’. In the debate on social justice in European contract law several conceptions of ‘solidarity’ have emerged. With respect to Kennedy’s definition, a less egalitarian use of the conception of solidarity regularly appears.³⁶ It has been put forward, for example, that solidarity is emerging as a new paradigm of contract law alongside autonomy, protecting parties that usually have a weak bargaining position (consumers, employees, tenants).³⁷ In these analyses, the status of the parties is thus of relevance: solidarity implies that the imbalances in contractual relations should be redressed in order to protect parties that in general are ‘weaker’.

Others have opted for a more Kennedian interpretation.³⁸ Lurger, for instance, prefers not to use the term ‘solidarity’, because it might mislead the reader to ‘expect that such kind of

²⁹ References in this chapter will be made to materials concerning Dutch, German, English and Italian law, as well as general publications on European private law.

³⁰ Compare Smits 2003, p. 50-51.

³¹ Vranken 2000, p. 146-147. Autonomy may also be said to legitimise tortious liability: freedom implies responsibility and, accordingly, a person may in principle be held liable for the consequences of his or her chosen conduct; compare Nieuwenhuis 1979, p. 8.

³² See section 1.2.1, with further references.

³³ Hartlief 2004, p. 107. In Italian law, this principle has been codified in Article 1322 *c.c.* Compare also Spieß 1994, p. 1223, who stresses the ‘eternal dilemma of private autonomy’, which says that actors in the market should be free to pursue their own interests, but recognises that those who have a weaker social and economic position in a market-oriented society will not be able to fully realise their autonomy.

³⁴ On German law, see the considerations of the *Bundesverfassungsgericht* in the *Bürgerschaft* decision, discussed in section 2.2.2 of Part I. See also Spieß 1994; Wiedemann 1990 and 1994; Hillgruber 1991 and 1995. For Italian law, Schlesinger 1999, p. 231.

³⁵ Compare Hartlief 2004, p. 107-108. See also Huls 2004, p. 103, who submits that general clauses in private law have created openings for social elements to enter into private law, thus reducing the role of autonomy. On the role of the legislator in the process of ‘socialisation’ of Dutch private law, see already Koopmans 1970.

³⁶ Kennedy 2002a, p. 14-15.

³⁷ Hondius 1999, p. 387-393.

³⁸ Hesselink 2001, p. 49; Lurger 2004, p. 281 ff.

contract law would deal with transfers of assets from richer to poorer parties, with sacrifices of groups of society made in support of other groups, or it could evoke the false impression that “contractual solidarity” is the same as a communitarian view of private law.³⁹ A ‘principle of regard and fairness’ in her view ranks on the same level as the principle of freedom of contract.⁴⁰

The first mentioned, less egalitarian conception of solidarity has several problematic points attached to it. First, what is a ‘weak’ bargaining position that merits protection? In principle, social contract law mostly concerns the protection of individual parties, not acting in a commercial capacity. This thought is for instance present in the rules on consumer protection in European contract law.⁴¹ In particular by imposing duties on the seller to sufficiently inform the buyer it is sought to improve the position of the consumer.⁴² Similar rationales figured in the German *Bürgschaft* case, in which the Constitutional Court emphasised the duty of the civil courts to make sure banks did not take advantage of impecunious potential sureties being unaware of the risks attached to the suretyship which the latter wanted to assume on behalf of a close relative. In this way it was sought to redress the imbalance of power between the negotiating parties and to level the playing field for the ‘weaker’ party.

However, the question arises, what happens if it is not an individual, non-commercial actor who is concluding a sales or credit contract? A retailer will often have a strong position in relation to the individual buyer, but in its relation to the producer from which he obtains his products it may be the retailer who is the ‘weaker’ party.⁴³ A similar line of reasoning could be valid with regard to franchising agreements: Usually the franchisee has a weak position in relation to the franchiser, who can impose all kinds of company standards and rules regarding the decoration of the retail outlet and the services offered. Although with respect to the individual consumers the franchisee may have a strong bargaining position, this may thus not be the case in the franchisee/franchiser relationship.⁴⁴ Voices have consequently been raised to extend the protection of ‘weaker’ parties to small and medium-sized enterprises.⁴⁵ This example demonstrates the relativity of solidarity as a social conception: a party that is ‘strong’ in one relation may be ‘weak’ in another.

A second problem of a social definition of ‘solidarity’ in contract law is that, while protective regulations cannot help but generalise, the usual weaker parties may in practice turn out to be not so weak at all. What I mean by this is that parties receiving special protection because of their status, such as patients, consumers or employees, in a specific case may not be in need of such protection. It has been argued, for example, that the commercial agent in the earlier

³⁹ Lurger 2004, p. 285.

⁴⁰ Lurger 2004, p. 281 ff., with further references.

⁴¹ National laws or statutes may contain specific rules on consumer contracts, such as Book 7, Title 1 of the Dutch *BW*; §§ 433 to 487 of the German *BGB*; Book 4, Title III, section I.II.1bis of the Italian *Codice civile*; the British Sale of Goods Act 1979. These have been influenced by EC law, such as the Directive on Consumer Sales, no. 99/44/EC and the Directive on Unfair Terms in Consumer Contracts, no. 93/13/EC.

⁴² For example: Article 7:17 *BW*; § 434(1) *BGB*; Article 1519ter *c.c.*

⁴³ For this reason, Dutch sales law protects the retailer up to a certain point; Article 7:25 *BW*.

⁴⁴ Bueno Diaz 2003.

⁴⁵ On this topic see, for example, the report by Professors Herre, Hondius and Alpa for the Study Group on a European Civil Code, regarding the ‘Notions of the consumer and the professional’, in particular section B.4, with further references; www.sgecc.net (last consulted on 29 November 2006).

mentioned *Handelsvertreter* case⁴⁶ did not have a weaker position than his principal. He had been able to convince the latter to change the contract in his favour in order to retain him as an agent. Thus, it could be defended that there had not been an imbalance of power between the parties and there had consequently been no duty of the State to protect the commercial agent's freedom of profession against infringement by the principal.⁴⁷ Although this line of argument for this specific case may be challenged,⁴⁸ the example raises the question whether and how to provide for a method to take the substantive equality of the contracting parties into account. If parties had substantively equal bargaining positions, this might be an argument for upholding the contract. If both had full information, in theory the circumstances were provided for reaching a valid contract. Even in that case, however, the question remains to what extent the judge may also evaluate the contents of the contract; full information might still not have resulted in a contract that respects both parties' interests, and thus in substantive equality of the parties. It might be required to define 'solidarity' in more detail to further analyse the criteria for a contract that complies with liberal as well as social values.⁴⁹

Apart from 'weaker' parties not being so weak in practice, it is also possible that the usually strong party is not the stronger one in the specific situation. In the dentist case, for instance, it could be defended that it was the dentist rather than the patient who had the weaker position in the post-treatment phase, when the problem of the blood test arose. The dental surgeon depended on the patient's co-operation in the blood test for obtaining certainty about the risk of an hiv infection and probably experienced distress because of the insecurity. The patient, on the other hand, was in a somewhat stronger position, seeing that he could invoke fundamental rights of privacy and physical integrity and had no explicit contractual duty to co-operate.

The patient's contractual position is frequently protected by legislation regarding medical treatment contracts.⁵⁰ Patients often have no expert knowledge and cannot fully assess the diagnosis and treatment offered. Legislation regarding medical treatment therefore favours the rights of the patient, who is usually in a position that makes it difficult for him to freely negotiate the terms of the contract. It seeks to secure that he can realise his right of self-determination as good as possible, for instance requiring informed consent on the part of the patient before surgery is carried out. Thus, it aims to achieve an equilibrium of the bargaining positions of the parties at the time of the formation of the contract.

In the dentist case, nevertheless, these aspects of legislative protection were of less importance, since the case concerned the post-treatment situation. While legislation seeks to protect the patient's interests from the perspective of him usually being the one in need of protection, only to a limited extent does it foresee changes of circumstances that reverse the positions of the parties. In the dentist case, it was no longer the health interest of the patient that was at stake in the post-treatment phase, but that of the medical practitioner. Seen from this point

⁴⁶ *BVerfG* 7 February 1990, *BVerfGE* 81, 242.

⁴⁷ Hillgruber 1991, p. 80 ff.

⁴⁸ The adjustments to the contract did not concern the non-competition clause. Therefore the question remains to what extent the commercial agent had been able to determine the terms of this clause, that is to what extent there had been a balanced negotiation relationship between the parties regarding this point. Since it was the non-competition clause that engaged the freedom of profession, the balance of power between the parties *with respect to this clause* is what actually matters.

⁴⁹ See the reference to Wilhelmsson's work hereafter.

⁵⁰ Compare Article 7:446 ff. *BW*.

of view, it is not strange that the balance of interests tipped in favour of the dentist. Actually, the court applied considerations of social justice in order to reach this result, formulating a duty of care on the part of the patient towards the doctor. Even though legislation protecting the patient may be based on solidarity, the judge can reverse the argument if there is a shift in the balance of power between the parties. Solidarity thus remains a tool of social politics, protecting the factually weaker party.

Finally, however, an important observation should be made regarding the reference to ‘social’ aspects of contract law when speaking about solidarity. As Lurger has pointed out, the term ‘social’ here differs from the traditional understanding of social policy.⁵¹ While social contract law mostly concentrates on consumer protection and protection of the weaker party, it does not exclusively focus on the protection of the really poor and needy: ‘The low social position of a party can play a certain role, but is not the central justification for protective measures in contract law, whereas traditional social policy measures see neediness as the main basis for transfer payments or similar distributive measures. Additionally, the whole of contract law is not “social”, it is still also individualistic and allows for the operation of the principle of private autonomy.’⁵²

In this context, the observations made by the Social Justice Group on the development of contract law within the EU may be recalled. One of the main points of interest addressed by the study group’s Manifesto is the need to define the notion of ‘social justice’ in Europe.⁵³ As Somma ironically remarks, ‘the model of social justice to which the Manifesto refers, is certainly different from the one held in mind by whom, according to an old adagio, considers “just” the results of a freely concluded contract as such’.⁵⁴ In the latter view, there would be no duties of solidarity in private interrelations, since these would hamper the functioning of the market. Somma points out that many European legal systems deviate from such a market-oriented approach, referring to limits set to freedom of enterprise by ‘duties of solidarity’ (Article 2 of the Italian *Costituzione*) or ‘the general interest’ (Article 61 of the Portuguese *Constituição*), and limits set to the use of property by ‘the general interest’ (Article 17 of the Greek Constitution) and ‘the social function’ (Article 33 of the Spanish *Constitución*). A further consideration of how the balance of market values and solidarity has affected contractual relationships on the national level might therefore, in my opinion, give indications for the further development of European contract law. For this purpose, however, it has to be kept in mind that definitions of ‘solidarity’ may slightly differ from one legal system to another and that a common definition might therefore have to be formulated.

4.2.3 Choice of terminology

In the following analysis I will use the terms ‘autonomy and solidarity’ rather than ‘individualism and altruism’, since they seem more accurately to express the ideological aspects of contract law adjudication that I would like to analyse. In principle, individualism and altruism overlap with my understanding of autonomy and solidarity insofar as there are no significant differences in status

⁵¹ Lurger 2004, p. 286.

⁵² Lurger 2004, p. 286. She suggests calling the new principle arising in contract law a ‘principle of regard and fairness’, in order to ‘avoid unwanted associations with broad general solidarity or social policy and name two key elements of the new obligations of the parties’ (p. 287).

⁵³ Social Justice Group 2004, p. 657-658.

⁵⁴ Somma 2005, p. 79.

and power between the parties. The meaning of individualism and altruism, however, is broader and more egalitarian than autonomy and solidarity. This becomes clear if importance is attributed to the differences between parties. Individualism and altruism then still do not make distinctions on the basis of the status of the parties: altruism refers to protection of the ‘weaker’ party as well as the legislative or contractual sacrifices of the latter on behalf of its ‘stronger’ counterpart. Autonomy and in particular solidarity, on the other hand, emphasise the social side of contract law, consisting of the improvement of the position of the structurally weaker party. Since I will focus on the use of fundamental rights as a means of protecting the weak, a more ideologically coloured terminology, such as ‘autonomy and solidarity’, seems defensible.

4.3 An impression of the autonomy/solidarity continuum

In contemplating some of the elements generally recognised as defining autonomy and solidarity, an interdependence of the two parts of the dichotomy has come to the fore. While autonomy, being different from egotism, recognises a need to respect the rights of others, solidarity in its turn distinguishes itself from complete selflessness by the acknowledgement of a certain sphere of autonomy. This openness of the conceptions of autonomy and solidarity towards each other has implications for the theoretical framework in which they should be seen as well as for the application of this theory to specific case law examples.

4.3.1 Gradations of autonomy and solidarity

Autonomy and solidarity occur in various degrees. A rule may be based on autonomy, but maybe less so than another rule. Duncan Kennedy illustrates this on the basis of the example of liability of a mistaken party.⁵⁵ The hypothetical case concerns a party to an otherwise formally perfect contract being mistaken in one of the typical ways, such as a slip of the tongue or a mistake as to the ‘identity’ of the objects to be exchanged. He then asks the other party for an amendment to the contract, since he will be worse off if the contract is enforced ‘as made’ than if it is enforced as he, mistakenly, thought it was. The example is one of ‘unilateral mistake’, in the sense that the other party did not make a mistake. There are no significant differences in wealth, bargaining power, status, etc. between the parties.

Kennedy distinguishes four alternative solutions to the case, all inspired by common law solutions to the problem of mistake:⁵⁶

- *No relief for unilateral mistake.* This means that if the other party was ignorant of the mistake, he can recover expectation damages, i.e. the benefit of the mistaken bargain. No attention is paid to the question whether or not the other party relied on the mistaken promise or whether the mistaken party was negligent or not. In practice, this means that a buyer who is ignorant of the seller’s mistake regarding the price of the goods can take them for the amount stated by the seller, for example half of the price the latter thought he was charging.

⁵⁵ Kennedy 2002a, p. 9-11.

⁵⁶ Kennedy 2002a, p. 9-10. The problem of unilateral mistake will not be analysed in depth here, but serves as a brief example to explain the concept of the autonomy/solidarity continuum.

- *Strict liability for unilateral mistake.* The other party can recover if he relied on the mistaken promise, still irrespective of the mistaken party having been negligent or not. In this case, for instance, a buyer can only claim compensation if he relied on the seller's mistake.
- *No liability without other party reliance and mistaken party negligence.* The other party can only recover if he has relied on the mistaken promise and if the mistaken party was negligent. For example, a buyer can only ask for damages if he has relied on the mistaken information given by the seller and if the seller can be held responsible for the mistake.
- *'Tailored liability'.* Liability is determined on the basis of 'all relevant circumstances'. Depending on the specific case, expectancy or reliance or restitution will be chosen, with or without fault on either side, in order to prevent 'unjust enrichment'.

These solutions each portray a relatively greater or lesser emphasis on autonomy or solidarity of the parties.⁵⁷ To put it differently: in general, the different rule-solutions for mistake can be categorised along a spectrum. Their place on this spectrum is determined according to whether the rule-solutions impose more or less intense duties of sacrifice and sharing *vis-à-vis* vulnerable or misfortunate parties, and according to how much they make these duties a function of the fault of the mistaken party.⁵⁸ A continuum thus takes shape between two (non-existing) extremes of egotism and selflessness; each rule-solution on this spectrum relates to the other possible solutions as more or less 'altruist' (based on 'solidarity') or 'individualist' (based on 'autonomy').⁵⁹

Figure 1: The autonomy/solidarity continuum



In the example of the liability of the mistaken party (seller), thus, the solution of 'no relief for unilateral mistake' seems mostly to favour the other party (buyer). The other rule-solutions, to varying extents, take into account the fault of the seller and the reliance of the buyer. It may therefore be said that the first three of the abovementioned solutions, in the order given, relatively range from autonomy of the buyer to duties of solidarity of this party towards the mistaken party, the seller. 'No relief' implies that the buyer never has to share in the seller's losses, while strict liability limits the situations in which he does not have such a duty towards those in which he relied on the mistaken promise. The third alternative further limits the extent to which the buyer is

⁵⁷ Note that in this case my understanding of 'autonomy and solidarity' corresponds to Kennedy's 'individualism and altruism'. There are no significant differences between the parties, which means that the 'social' argument of protection of the weaker party does not play a role.

⁵⁸ Kennedy 2002a, p. 13.

⁵⁹ Compare Kennedy 1976, p. 1720.

free to pursue his own interests, in the sense that negligence of the seller is added as a criterion for the latter's liability. Each solution thus seems to emphasise a different point of the continuum.

The solution of 'tailored liability' is of a more chameleonic nature. It depends on the specific case whether expectancy or reliance, and the fault of either of the parties are of relevance. Instead of giving a framework for adjudicating the case, this solution only dictates the aspired result: prevention of 'unjust enrichment' of either party. Whether it thus relates to the other three solutions as more 'autonomous' or more 'solidarity-based' depends on its concrete application.

In sum, the relation between autonomy and solidarity can be depicted as a continuum categorising rule-solutions. It is a theoretical model that may be used to classify rule-solutions in relation to each other, one being either more 'autonomous' or tending more towards solidarity in respect of the other. As Kennedy emphasises: '[T]he solutions do not follow either from a conception of individualism [autonomy; CM] or from one of altruism [solidarity], but represent points on a continuum between non-existent extreme points [egotism and selflessness]. (...) To characterise a rule as individualist is always and only to contrast it with some other, more altruist rule, which rule is in turn individualist rather than altruist with regard to the next point along the spectrum.'⁶⁰

4.3.2 *The 'double relativity' of the continuum*

In the light of this last observation, it should be noted that in practice a statement regarding the nature of a rule-solution (based on 'autonomy' or 'solidarity') can only be understood if we know how the person making the statement considers other rule-solutions (more or less 'autonomous' or 'solidarity-based'). In order to assess an opinion regarding a certain rule or legal development, the personal understanding of the continuum is therefore of relevance. In other words, the relation between autonomy and solidarity is vulnerable to the personal interpretation of anyone – judge or scholar – who applies it for the analysis of a specific problem of contract law. Where one person sees autonomy, another may distinguish elements of solidarity. Where some scholars are speaking of the socialisation of contract law when reflecting on, for instance, duties of care,⁶¹ others prefer to regard these in the light of the 'respect for the rights of others' included in the conception of autonomy.⁶²

The German *Bürgschaft* case, once again, forms a concrete example. The *Bundesverfassungsgericht* put its reasoning in the realm of autonomy, ruling that the courts in civil cases had a responsibility to secure that the parties to a surety agreement in equal measure had been able to realise their autonomy. The consequences of the domination of the formation and contents of the contract by one of the parties should be mitigated in order to redress the contractual balance.⁶³ Autonomy, in this context, referred to the '*Selbstbestimmung des Einzelnen im Rechtsleben*' (self-determination of the individual in legal life). Unilateral domination of the contract to the extent that one party, the bank, could factually set the terms of the contract as it pleased, constituted *Fremdbestimmung* (determination by another) for the surety. The court held that it was

⁶⁰ Kennedy 2002a, p. 14.

⁶¹ Hesselink 2004a, in particular Chapter 4: *Zorgplichten – Een politiek perspectief*, p. 83-112.

⁶² For instance Du Perron 2003.

⁶³ *BVerfGE* 89, 214, 231-232. See section 2.1 above.

the duty of the judges in civil cases to make sure that the surety, who had no experience in business and was a relative of the principal debtor, had been able to realise *Selbstbestimmung*.

While the German Constitutional Court solely and explicitly speaks of self-determination and autonomy, some legal scholars have interpreted the judgment rather as – to some extent – saying farewell to private autonomy.⁶⁴ According to Spieß, the substantive check of the contents of the contract asserted by the court entails a limitation of freedom of contract of the parties.⁶⁵ He points out that each contractual obligation in itself implies a limitation of personal freedom and that a person in principle is free to agree to a (partial) waiver of a fundamental right. For that reason, private autonomy, which guarantees a freedom surpassing the one guaranteed by fundamental rights, should not be cut back on the basis of these fundamental rights.⁶⁶ In the view of Spieß, therefore, the *Bürgschaft* judgment of the *Bundesverfassungsgericht* has not followed the most adequate road to resolve the problem of disturbance of the contractual balance.⁶⁷

Others have characterised certain duties of care in bank transactions as justifiably ‘paternalistic’. Du Perron is of the opinion that there may be cases in which a bank should not allow a client to make a certain transaction, even if the client is willing to take the risk of the transaction and all other rules have been fulfilled.⁶⁸ An example is the case of a client of very limited means and a very modest salary who wants to take stock options. According to Du Perron, the bank should prohibit this if it is to be foreseen that a negative development on the stock exchange will almost immediately oblige the client to liquidate the options because he cannot meet the higher margin requirements.⁶⁹ An employee who has been made redundant, similarly, should not be allowed to invest his redundancy payment in stock entailing high risks. These, in Du Perron’s view, are cases in which the law should set limits to the ‘freedom of choice’ of contract parties.⁷⁰ He considers this a form of ‘paternalism’, distinguishing on the one hand aspects of ‘solidarity’ (eventually, the costs of protecting the individual will be borne by the collective stakeholders and clients of the bank) and on the other hand a ‘mingling in the affairs of others’ (the law prohibits the client from taking risks which he, being fully aware, is willing to take and thus limits the client’s autonomy).⁷¹

Still, in this view ‘paternalism’ or ‘solidarity’ is a conception reserved for prohibiting individual investors from making certain transactions. Du Perron emphasises that these cases of paternalism are exceptions: in relation to duties of care, the autonomy of the client is of primary

⁶⁴ Spieß 1994; Emmerich 1994; Oeter 1994; Wiedemann 1994.

⁶⁵ Spieß 1994, p. 1222: ‘Besondere Bedeutung hat diese Entscheidung vor allem deshalb, weil durch eine über die Grundrechte hergeleitete Inhaltskontrolle von Verträgen nach klassischem Vertragsverständnis die letzte Bastion von Selbstbestimmung und Selbstverantwortung – die Vertragsfreiheit – unter die Kuratel des Staates, namentlich der Gerichte, gestellt wird.’

⁶⁶ Spieß 1994, p. 1226, who observes that fundamental rights should guarantee a certain minimum standard of individual freedom and should not, on the other hand, reduce further-reaching freedom to that standard.

⁶⁷ Spieß 1994, p. 1227-1229, who stresses the danger of an inflation of private autonomy. See also section 7.a below.

⁶⁸ Du Perron 2003, p. 196. Compare Marella 2006, p. 264 on Teubner’s understanding of the German case law regarding suretyships by relatives.

⁶⁹ This margin refers to the minimum amount of credit the client should maintain in his account in order to cover the obligations attached to the option.

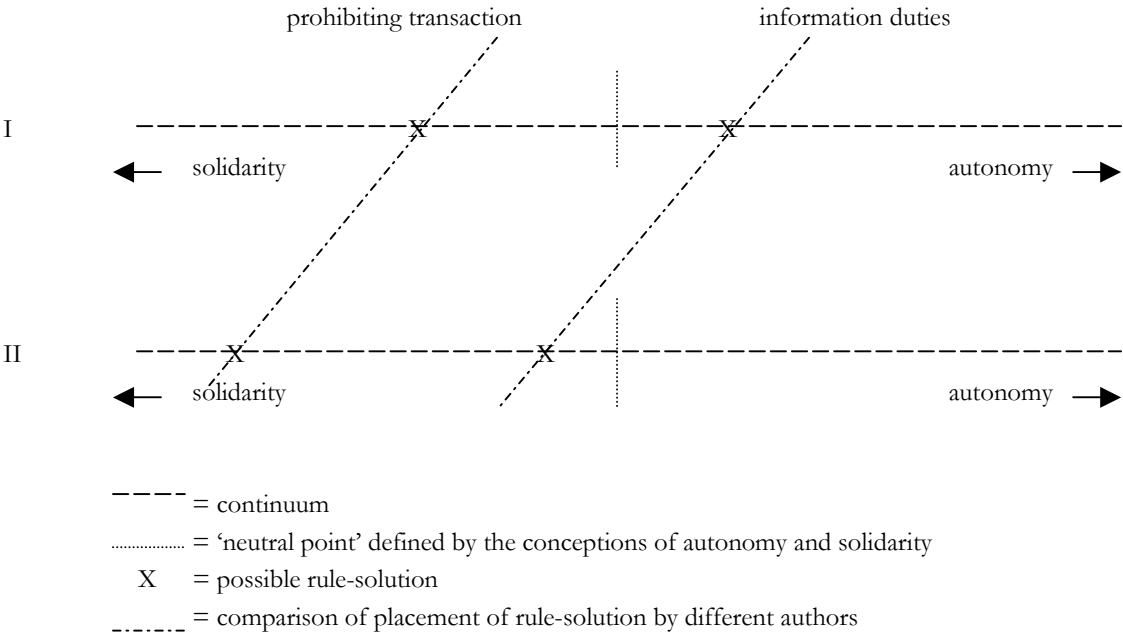
⁷⁰ Du Perron 2003, p. 196.

⁷¹ Du Perron 2003, p. 186. Compare also Loos 2003, p. 261, who is of the opinion that the buyer of a house needs to be protected against himself if he wants to waive his right of withdrawal. Loos observes that there is a

importance. The fully informed client in principle should be allowed to make the transactions he wishes.⁷² Thus, Du Perron considers duties to inform in the light of safeguarding the client’s autonomy rather than as examples of solidarity.

Going back to the continuum, it may in general be said that the rule-solution of information duties is considered relatively more ‘autonomous’ than the prohibition on entering into a transaction. The position of these rules on the continuum, however, shows slight nuances from one author to another: where some understand the ‘information duties’ solution as enforcing the autonomy of the weaker party, others see it as a limitation of the latter’s autonomy and, consequently, a shift towards the solidarity pole. These variations in definition may be visualised as follows:

Figure 2: Duties of care in bank/client relations



Situations I and II represent the opinions of two persons. Although both consider the prohibition on entering into a transaction as more ‘solidarity-based’ than imposing information duties, person I considers both solutions to be more ‘autonomous’ than person II.⁷³ The continuum in this sense demonstrates a ‘double relativity’: while it depicts the relative positions of rule-solutions in their interrelation, it should also take account of the relative position of one adjudicator in respect of another.

real possibility that the buyer is pressured into accepting the waiver, instead of being free to make up his own mind.

⁷² Du Perron 2003, p. 197.

⁷³ Note that some may place the mentioned solutions closer to each other than others, distinguishing less disparity in the emphasis on autonomy or solidarity. Then a smaller stretch of the continuum will be covered. In this context, the figure above is a simplification, portraying the situation in which there is agreement on the relative distance of the rule-solutions on the continuum.

4.3.3 *A neutral point on the continuum*

Note that this subjective interpretation of the autonomy/solidarity continuum introduces a new element: a neutral point in the middle of the spectrum. Kennedy's theory of relative points, implying a mere analysis of 'more solidarity-based' (in Kennedy's terminology: altruist) or 'more autonomous' (individualist) rule-solutions, does not require putting a name to a solution: rule-solutions are considered in relation to each other, but not against fixed ideas of autonomy and solidarity. However, when case law and jurisprudence start defining rules as being based on the principle of solidarity or that of autonomy, the need arises to define the point at which the coin flips.

'Neutral', nevertheless, does not necessarily imply that no political stakes are present in the rule solution that is placed in the centre. As Kennedy has observed, rules have many sub-components.⁷⁴ In the 'liability for mistake' example, '[t]he mistake rule has to include both a sub-rule about what happens when the other party did not know in fact, but definitely should have known, about the mistake, and also a position on whether there will be liability for reliance losses caused by an innocent error. Each sub-component can be placed on the spectrum, so our view of the rule as a whole, in comparison with another solution, is a comparison between two hodge-podes. Two rules can be quite different in their components but seem "tied" or similarly placed on the continuum.'⁷⁵ In the centre of the spectrum, the 'solidarity-based' and 'autonomous' elements of a rule-solution thus establish a balance in which neither dominates.

It should be admitted that this addition to the continuum concept is not unproblematic. Kennedy's concept of a continuum explicitly presupposes that rule-solutions are 'individualist' or 'altruist' only *in a relative sense*.⁷⁶ They are thus not related to a specific definition of 'individualism/autonomy' or 'altruism/solidarity'. The introduction of a subjective element, demarcating the continuum, would carry the danger of making a political statement ('this is the ideology that contractual questions should follow in the light of fundamental rights argumentation') rather than presenting an objective analysis of the development of case law.

Although acknowledging this criticism, I would submit that the idea of a 'double relativity' of the continuum by itself to a great extent reduces the risk of entering into a political dialogue. The purpose of relating the conception of the continuum to the specific understanding of 'autonomy' and 'solidarity' in case law is to define the changes that have taken place in the judicial reasoning on a certain topic. Analysing these changes, at least in theory, does not necessarily mean taking a standpoint in the discussion on which solution would be the most desirable one from an ideological point of view.

In fact, in order to compare the rule-solutions in different legal systems it might be unavoidable to formulate a general idea of the conception of the autonomy/solidarity continuum in the jurisdictions involved. An 'objective' continuum depicting rule-solutions in different countries might be difficult to sketch, exactly because it would take the rules from their context. The relativity of the continuum might therefore be said to have a third dimension.

⁷⁴ Kennedy 2002a, p. 13.

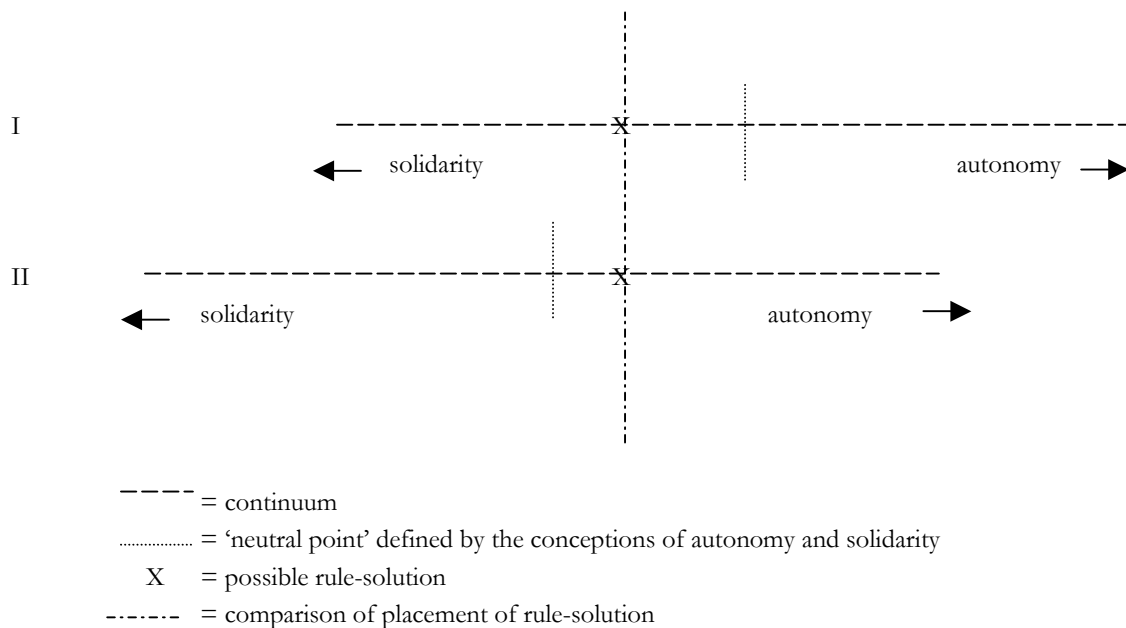
⁷⁵ Kennedy 2002a, p. 13-14.

⁷⁶ Kennedy 2002a, p. 15. See also Hesselink 2001, p. 49. Compare section 4.3.1 above.

4.3.4 Variations of the continuum according to jurisdictions

Apart from different people placing different accents regarding a judgment being ‘autonomous’ or ‘solidarity-based’, there is also the legal context within which the judgment is formed. As Wilhelmsson observes: ‘Comparative studies have shown how rules that may appear as welfarist [social; CM] in one jurisdiction are regarded as fairly traditional in another.’⁷⁷ This may be illustrated in the following way:

Figure 3: Rule-solutions in different jurisdictions



Situations I and II here illustrate the conception of the continuum in two different jurisdictions (by one person). Whereas a rule-solution may be seen as emphasising solidarity in respect of the legal system of country I, it may be regarded as (relatively) closer to the autonomy pole in country II. Another dimension is thus added to the relativity of the autonomy/solidarity continuum: not only does it reflect the relative autonomy or solidarity of rule-solutions with respect to each other and in the light of different people’s perspectives, it also might have to take account of the differences between jurisdictions.

4.3.5 A model for the analysis

In the subsequent analysis I will take as a starting point the first and third dimensions of the continuum, that is: the ideology expressed in the choice of rule-solutions, in the light of the classification of these solutions in the legal system involved. On the basis of these categorisations I will try to demonstrate the political influences in contract law adjudication, constituting the second dimension of the continuum, indicating the extent to which judges have deviated from ‘general’ political choices expressed in the legal framework governing a specific case.⁷⁸

⁷⁷ Wilhelmsson 2004, p. 713.

⁷⁸ See further section 5.3.2 below.

4.4 Conclusion

Paradoxically, the concept of an autonomy/solidarity continuum, which may be considered a tool for a deconstructive theory of contract law, becomes subject to deconstruction – and subsequent reconstruction – itself. Its practical application relates the conceptions of autonomy and solidarity to the political fundamentals of the legal system that is analysed. In terms of ideologies, autonomy is sometimes said to have affinity with right-wing values, such as liberty, self-determination and responsibility.⁷⁹ Solidarity then corresponds to the political left, promoting the protection of ‘weaker’ parties. However, these remain generalisations: what is ‘left’ in one country (e.g. the US), may be less so in another country (e.g. European states such as the Netherlands and Germany). As the figure above shows, the demarcation of the ideological spectrum may differ from one jurisdiction to another.

This brings us back to the Real Issues addressed by the Manifesto of the Social Justice Group, which involve the definition of the ideological agenda of European contract law. Applied to the analysis of autonomy and solidarity in the national case law of Germany, the Netherlands, Italy and England, the question is whether a shared notion of ‘social justice in contract law’ can be defined. If so, what is the role of the case law on fundamental rights in the process of defining social justice? What are the margins of the courts’ freedom to choose a certain rule-solution in the light of fundamental rights argumentation? These questions will be addressed in the following Chapters.

⁷⁹ Compare Hesselink 2001; Kennedy 1976, p. 1714, note 74; Auer 2002, p. 289-290.

5 Fundamental rights and the political dimension of contract law

For the further analysis of the constitutionalisation of contract law in the light of the autonomy/solidarity continuum it is important to keep in mind the different views on judicial law making. The opinion held on the distribution of tasks between the legislature and judiciary determines to what extent one may expect and accept that ideology influences the decision process of the judges. The analysis of theories of law making thus provides a basis for the further explanation of the different views on the desirability and mode of fundamental rights application in contract cases.

It will be submitted that, with an eye on ideological effects in contract law, the position of the judiciary raises more dilemmas than that of the legislator and the parties engaged in a contractual relationship (section 5.1). In relation to the application of fundamental rights in contract cases, these dilemmas regard the possibility of arguments of public policy being introduced in private law adjudication and, consequently, a blurring of the division between the legislature and judiciary. Dworkin's theory of adjudication offers a conceptual framework that might help clarify these problematic aspects, especially in combination with the critique of this theory formulated by the cls movement and, in particular, Duncan Kennedy (section 5.2). While Dworkin has developed a sophisticated, reconstructive 'rights thesis' that assumes a certain neutrality of judges, the critique attempts to deconstruct this idea of objectivity by demonstrating the vulnerability of rights reasoning to ideological influences. It thus illustrates how the ambition towards 'neutral' adjudication may in fact imply a denial of the political stakes involved in contract law cases (section 5.3). Building on this critique, the hypothesis will be developed that the application of fundamental rights in contract law might challenge such a denial by (re)opening judicial reasoning to a more express consideration of the political philosophy behind solutions in case law.

5.1 Legislator, parties and judges

In scholarly analysis, reference is regularly made to political stakes in adjudication, such as autonomy and solidarity. The development of the continuum concept¹ forms an illustration of this. Going back to the examples of fundamental rights application in contractual relationships, however, the question arises whether the subjects of analysis are themselves fully aware of the political implications of their actions. In other words, how do the legislator, judges and contract parties see their role in the choice of more 'autonomous' or more 'social' solutions? For the analysis of contract cases in which fundamental rights are applied the most intriguing part seems to be that of the judge, since his role is more elusive than that of the legislator and the contract parties.

The legislator by definition will have to make ideological choices when drafting regulations for societal developments. Is it, for instance, necessary to regulate consumer credit contracts? And, if so, to what extent should this regulation protect the consumer who wants to obtain credit for

¹ See Chapter 4 above.

making transactions on the stock exchange? Should consumers, in some cases, be prohibited from entering into such contracts and transactions? Not only is the legislator thus bound to make political decisions, it is often also considered compelled to take into account relevant fundamental rights issues while contemplating its options. This was affirmed by the German *Bundesverfassungsgericht* in its aforementioned *Lüth* judgment,² in which it said that the entire legal system should comply with the system of values established in the *Grundgesetz*. In the Netherlands, the fact that Parliament has to consider the constitutionality of legislation during the drafting process is one of the reasons why a judicial review of legislation has so far not been implemented.³ The British Human Rights Act 1998 in a similar way obliges the Minister in charge of a bill in either House of Parliament to declare the compatibility of the bill with the European Convention on Human Rights (section 19 HRA 1998). In Italy, last but not least, legislation should also comply with constitutional rights and principles and, like in Germany, a constitutional court watches over the constitutionality of laws (Articles 134-137 *Costituzione*).

Contract parties in principle have to comply with the provisions of the law and, therefore, indirectly with fundamental rights that are expressed in the mandatory rules of contract law. Moreover, the contract may always be subjected to a test as to its compatibility with requirements of ‘good faith’ or ‘good morals’ (the Netherlands, Germany, Italy) or be examined in light of the doctrines of ‘illegal contracts’ or ‘contracts infringing public policy’ (England). As we saw before, fundamental rights may be taken into account when applying such open norms or principles of law. The judge thus in principle has the final say on the protection of fundamental rights in the contractual relationship.

A brief side-note may be worth making here, since there are several reasons for which a case might not be adjudicated on its constitutional merits. First, parties for one reason or another may simply not bring the case to court. The costs of litigation may, for instance, be too prohibitive to pursue a claim, even if the claim itself would intrinsically be worth it. Second, the parties may fail to address the fundamental rights involved in the case, as a result of which the judge does not consider them either. Both arguments refer to issues of procedural law, which in their turn may relate to issues of social justice (access to the judicial system, professional assistance by a lawyer). It would be going too far to consider these issues here in detail, but it should be kept in mind that the cases discussed in this book probably form only the tip of the iceberg of contractual situations in which fundamental rights are of importance.

In any case, it seems that the judiciary plays a key role in safeguarding fundamental rights in contractual relationships.⁴ The courts in general are called upon to check the compatibility of the contract parties’ behaviour with the relevant legislation.⁵ Indirectly, they therefore always review the compliance of the parties’ conduct with the fundamental rights expressed in the applicable rules of contract law. Consider, for instance, the Dutch solution to the cases of relatives standing surety: although fundamental rights were not explicitly mentioned there, similar values as in the German *Bürgschaft* case (private autonomy, the principle of the social state) may have implicitly

² *BVerfG* 15 January 1958, *BVerfGE* 7, 198. See above, section 2.1.

³ However, a bill is pending which proposes to introduce a judicial review on the basis of a number of the ‘classical’ fundamental rights. *TK* 2002-2003, 28 331, no. 1-2.

⁴ Compare Vranken 1995, p. 144 ff. on the freedom of choice of judges, including the judges’ own view of their tasks.

⁵ On the relationship between the legislature and the judiciary, see Scholten 1974, p. 85-93.

inspired the court's factual interpretation of the doctrine of mistake and the information duties imposed on the bank. Consider also the major part of the Dutch case law regarding non-competition clauses in employment contracts: while the courts usually do not expressly refer to the freedom of profession of the employee (Article 19(3) *Gw*), it influences the balance of interests through the relevant civil code provision (Article 7:653 *BW*).⁶

The role of the judiciary becomes even more interesting when fundamental rights come into play in an explicit manner.⁷ As hinted several times in the preceding sections, the application of fundamental rights – or the underlying values expressed in these rights – might lead the courts to reconsider the rationale of the relevant rules of contract law. Thus, the political stakes in the adjudication of contract law cases could become clearer and the courts might openly pursue a shift of the rule-solution on the autonomy/solidarity continuum. This still rather abstract hypothesis forms the starting point for the further analysis of the effects of fundamental rights in European contract law which will be made later. Before embarking on this expedition, however, it seems appropriate to make some general remarks regarding the theoretical perspective taken on adjudication.

5.2 Taking rights and critique seriously

Several differences may be highlighted between the theories of adjudication of the earlier mentioned Lions and Foxes in legal theory,⁸ in particular Ronald Dworkin and Duncan Kennedy. The most relevant for the present subject seem to be several features of Dworkin's theory, which have been criticised by Kennedy: 1) the distinction between policies, principles and rights; 2) the belief in 'one right answer' for every case; and 3) the view of the coherence of the legal system.

5.2.1 Policies, principles and rights

Dworkin has defended that judicial decisions in civil cases 'characteristically are and should be generated by principle, not policy'.⁹ Arguments of policy and of principle, in his opinion, can both justify political decisions, but their aims differ: while policy arguments show that the political decision advances or protects some collective goal of the community as a whole, arguments of principle justify a decision by showing that it respects or secures some individual or group right.¹⁰

⁶ See the considerations regarding Article 19(3) *Gw* in the draft for a reformulation of Article 7:653 *BW*: *EK* 2004-2005, 28 167, nr. A; note that the law proposal has in the meantime has been rejected by the First Chamber of the Dutch Parliament. The example is also valid for Italian law, in which non-competition clauses are regulated in the civil code (Article 2125 *c.c.*, Article 2557 *c.c.*, Article 2596 *c.c.*) but case law occasionally refers to the underlying constitutional rights and principles (Articles 4 and 35 *Costituzione*). See, for instance: *Cass. civ.* 19 December 2001, n. 16026, *Mass. giur. lav.* 2002, 349; and *Cass. civ.* 13 June 2003, n. 9491, *Dir. e pratica lav.* 2003, 2644.

⁷ On the role of the judiciary in balancing interests protected by fundamental rights in public law, see Gerards 2006, p. 9-10.

⁸ See section 4.1.1.

⁹ Dworkin 1977, p. 84. See also section 5.2.2 below. For a comment on Dworkin's theory of principles of law, see for instance Alexy 1979.

¹⁰ Dworkin 1977, p. 82. In an earlier chapter of the same book, Dworkin defined a policy as the kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community. A principle, on the other hand, he defined as a standard that is to be observed, not because it will advance or secure an economic, political or social situation deemed desirable, but because it is a requirement of

For example, a policy argument in favour of the protection of weaker contract parties by means of consumer laws would be that such protective measures will improve market integration. An argument of principle that favours consumer protection, on the other hand, would emphasise the safeguarding of consumers' rights regarding for instance conformity of the goods or adequate information.

In Dworkin's opinion, arguments of policy, other than arguments of principle, lack the democratic legitimacy required for making decisions concerning a community (judges are often not elected). Moreover, they would allow a judge to retroactively impose a new duty on the losing party in a case, which implies a punishment (e.g. the recognition of a duty of care of the patient towards the dentist, resulting in a duty to co-operate in a blood test). Principles would not have such drawbacks, since they focus on individual or group rights, and thus do not require the detailed consideration of all demands of a community. Furthermore, a principle would justify imposing a duty on the losing party, since this duty is understood as preceding the relevant legislation: it existed already, even though it was not laid down in so many words in the relevant provisions of law.¹¹ Therefore, principles rather than policy should be applied when deciding cases in which no existing rules are available.

Fundamental rights or principles,¹² from the Dworkinian perspective, could be understood as justifying certain decisions in contract law cases. The Dutch *Hoge Raad's* judgment in the dentist case, for instance, might be read as securing the dentist's health interests that are related to his profession. On the other hand, protection of surgeons against the damage of a possible hiv infection may also be seen from a policy point of view: without adequate protection of their health interests, surgeons might no longer want to carry out operations.

Although the distinction between policies and principles has a logic, the example shows that it can be difficult to discern whether a specific case is solved on the basis of arguments belonging to the first or the second category. The exclusive use of arguments of principle might suggest that adjudication of a case leads to 'one right answer'.¹³ At the same time, policy arguments may (implicitly) play a role of equal importance and raise doubts regarding the 'rightness' of the answer found – that is, of the answer being the only 'right' one. In the dentist case, for instance, not only the policy of protecting the health interests of surgeons is of relevance, but also a policy in favour of the protection of patients. The latter emphasises the collective interest in having a well-functioning health care system, in which patients do not have to fear any invasion of their privacy or integrity. Then again, when focussing on the patients' rights to protection of privacy and integrity, elements of the principles argument re-enter in decision-making process. Indeed, Dworkin has acknowledged that arguments of principle sometimes intertwine with arguments of policy and that usually both are needed for making a political decision.¹⁴ Even in such cases, however, he maintains that judgments in civil cases should be based on the former rather than the latter in order to prevent the (not democratically elected) courts from legislating.

justice or fairness or some other dimension of morality. Dworkin 1977, p. 22. In the more elaborate description on p. 82 ff. he analysed the distinction in more detail.

¹¹ Dworkin 1977, p. 83-84.

¹² Many constitutional 'rights' rather seem to be principles, since they do not formulate a concrete right but promote the safeguarding of certain rights or interests. Think, for instance, of the principle of non-discrimination or human dignity.

¹³ See the next section.

Kennedy's criticism of Dworkin's distinction between principle (or rights) arguments and policy arguments relates to the claim that the first-mentioned would be less receptive to judicial ideology than the second. While policy argument has already been recognised as a potential Trojan horse for introducing ideology into law,¹⁵ rights argument as presented by Dworkin would seem to be immune from such influences: the judge chooses a certain solution not because he seeks to obtain a specific socio-economic, political result, but because the principle of law constrains him to this choice. Kennedy contests this supposed 'neutrality', arguing that, at least when considering American case law, 'rights reasoning seems no more plausibly exclusive of ideological influence than more apparently open-ended moral or instrumental argument'.¹⁶

This point of view is based on the role of rights (derived from principles) in the adjudicative process. According to Kennedy, (constitutional) rights in the traditional discourse are seen as 'mediators' in two dichotomies: they 'mediate' between factual and value judgments,¹⁷ as well as between law and politics.¹⁸ While facts are usually considered to be objective, values in general are deemed subjective. Starting from this assumption, a basic distinction can be made between rights and other kinds of normative argument: "The point of an appeal to a right, the reason for making it, is that it *can't be reduced* to a mere "value judgment" that one outcome is better than another. Yet it is possible to make rights arguments about matters that fall outside the domain commonly understood as factual, that is, about political or policy questions of how the government ought to act. In other words, rights are mediators between the domain of pure value judgments and the domain of factual judgments."¹⁹ 'Mediation' in this context means that rights reasoning has characteristics of both sides of the dichotomy: references to rights argument makes it possible to defend that an outcome (value judgment) is better than the alternatives. It suggests a certain neutrality of law making, aspiring to make policy decisions in the light of a more 'objective' argumentation.

The use of rights arguments for justifying choices does not, however, necessarily imply objectivity. This is confirmed by the idea of rights mediating in the dichotomy of law and politics: on the one hand, the constitutional rights argument is legal, since it is based on one of the enacted rules of the legal system; 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.²⁰ Although the application of rights argument may result in a certain 'closure' or apparent objectivity of the interpretation of a rule, the 'mediating' of rights between the two dichotomies thus bears a risk of ideology affecting adjudication.²¹

¹⁴ Dworkin 1977, p. 83.

¹⁵ Kennedy 1997, p. 110-111: 'Although policy argument *formally* excludes ideology, it is "soft" and so operates always under the suspicion of permitting ideology to enter *sub rosa*.'

¹⁶ Kennedy 1997, p. 125, precluding to Chapters 12 and 13 of the same book. Compare Unger 1996, p. 18.

¹⁷ Kennedy 1997, p. 305. See also Kennedy 2002b, p. 184 ff.

¹⁸ Kennedy 1997, p. 308, p. 310.

¹⁹ Kennedy 1997, p. 305.

²⁰ Kennedy 1997, p. 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 *GG*; Article 7 *Gw*; Article 21 *Costituzione*) or the right to enjoy one's property (Article 42 *Costituzione*; see also Article 1 of the 1st Protocol to the ECHR).

²¹ Kennedy 1997, p. 319-320. For examples, see Chapter 6.

5.2.2 *The rights thesis*

Dworkin's rights thesis aspires to exclude ideological arguments from adjudication. A particular aspect of his theory is that it in principle assumes there is a single 'right answer' for every case.²² This concept of a 'right answer' should not be misunderstood as referring to a pre-existing rule-resolution, which is there for the judge to find. Rather, the concept regards the process of discovering which party holds the strongest arguments for having the case decided in his or her favour.²³

In Dworkin's view, it is the judges' assignment to formulate right answers in specific cases. Other than the legislator, they are not free to follow their political philosophy in a single case, choosing a rule that deviates from earlier decisions or is inconsistent with the law in force. On the contrary, the judges, in Dworkin's opinion, have to choose the rule that 'fits' in the larger system of rules, and thus validate the political right of one of the parties involved in the case brought before them. Judges should, therefore, base their decisions on arguments of principle rather than on arguments of policy:²⁴

Judicial decisions are political decisions, at least in the broad sense that attracts the doctrine of political responsibility. If the rights thesis holds, then the distinction just made [between policy and rights; CM] would account, at least in a very general way, for the special concern that judges show for both precedents and hypothetical examples. An argument of principle can supply a justification for a particular decision, under the doctrine of responsibility, only if the principle cited can be shown to be consistent with earlier decisions not recanted, and with decisions that the institution is prepared to make in the hypothetical circumstances. That is hardly surprising, but the argument would not hold if judges based their decisions on arguments of policy. They would be free to say that some policy might be adequately served by serving in the case at bar, providing, for example, just the right subsidy to some troubled industry, so that neither earlier decisions nor hypothetical future decisions need be understood as serving the same policy.²⁵

According to Kennedy, as said before, the distinction between policies and principles is not convincing in the sense that rights reasoning seems no less immune from ideological influence than policy argument does. He has therefore criticised Dworkin's depiction of judicial adjudication. In fact, he argues, policy is omnipresent in (American) case law and, rather than deny its role, it should be further contemplated:

'It seems implausible, to say the least, that an interpretation of adjudication that simply excludes consequentialist or social-welfare-oriented policy argument altogether from the repertoire of legitimate judicial behavior can "fit" the practice. I think a reason why many practitioners find Dworkin unconvincing is that as a matter of fact American judges constantly deploy arguments that look exactly like the ones he claims they generally avoid.'²⁶

²² Dworkin 1977, p. 81: '[E]ven when no settled rule disposes of the case, one party may nevertheless have a right to win.' See also Dworkin 1977, p. 279 ff.

²³ Dworkin 1977, p. 279-280.

²⁴ Dworkin 1977, p. 82-90. Compare Kennedy 1997, p. 121-123.

²⁵ Dworkin 1977, p. 88. Although the civil law systems discussed in this book do not have a rule of precedent as strict as the common law, principles of legal certainty and uniformity of the law do require the courts to take into account preceding case law.

²⁶ Kennedy 1997, p. 125.

While Kennedy does not absolutely exclude that there may exist ‘right answers’ for certain cases – and points out that Dworkin in his turn takes criticism very seriously – he argues in favour of a broader debate. Dworkin’s theory, in his eyes, has reconstituted classic distinctions regarding the role of the judges:²⁷ Where judges around 1900 were considered to make as well as apply the law, Dworkin reconstructs their decision making to ‘rightness in interpretation’; objectivity of the courts is remodelled to arguments of principle; and the distinction of law and politics becomes ‘rights versus policies’. Such a reconstruction of legal concepts might give the appearance of a system of judicial adjudication that in principle is free from ideological influences; at most, rights and principles might be seen as the distillation of a political philosophy pursued by the legislator, but the constraints of ‘fit’ and coherence greatly limit the judges’ discretion, indicating a ‘right answer’. The role of the courts thus seems to be ‘depoliticised’ to a great extent.

Kennedy’s aim is to ‘deconstruct’ this view of adjudication, or rather: to reflect on the interaction between the rights thesis and the criticism it has received. Reconstructive projects, in his opinion, are all based on ‘making knowledge with a view to power, and power to serve the holders of that very knowledge’.²⁸ Contemplating the ideological processes that may underlie and affect adjudication could explain the goals pursued by these theories.

What might, in the light of this criticism, be said about the concept of ‘one right answer’? As was observed earlier, it seems doubtful whether it is always possible to make a clear-cut distinction between policy and principle, or between legislation and adjudication. Looking once more at the dentist example, several policy arguments could arguably underpin a number of different decisions in this case: Protection of patients in light of their faith in a well-oiled health care system would have implied rejecting the dental surgeon’s claim for the patient to undergo an hiv test. Protection of medical staff in light of the maintenance of an adequate number of qualified health care workers, on the other hand, pointed towards granting the claim. A choice between policies should thus be made in order to decide the case. But would arguments of principle unambiguously indicate a single ‘right answer’?

It could be said that there is a principle of protecting the rights of the dental surgeon to prevent damage to his health, which would justify the co-operation of the patient in a blood test. On the other hand, there might be a principle to protect the privacy and physical integrity of the patient, which would justify the opposite decision. There are thus (at least) two principles that point in different directions. The judge has to balance one against the other in order to resolve the case, but it does not seem obvious that one is more ‘right’ than the other. It does not seem to follow that one party has an objectively determinable ‘right to win’.

It would be going too far to discuss the implications of Dworkin’s rights theory and Kennedy’s criticism here in much further detail.²⁹ For the sake of clarity, I would prefer to avoid using the term ‘right’ answer, since it seems to imply that there is a solution for every case that is both morally as well as objectively the only possible outcome of the case.³⁰ In the previous sections I have referred to ‘just’ answers that the courts have to give in contract cases entailing interests that are protected by fundamental rights, precisely because principles expressed in these

²⁷ Kennedy 1997, p. 129.

²⁸ Kennedy 1997, p. 129.

²⁹ See further their works that have been referred to, and Lucy 1999.

³⁰ See also the part on ‘coherence’ immediately hereafter.

fundamental rights (and policies supported by them) may indicate several rule-solutions. Although it thus seems possible to distinguish more than one (morally) justifiable answer to a case, the final choice would require a second step: the judge's decision as to which side the balance of interests should tip.³¹

To what extent ideological convictions may colour this choice in 'fundamental rights and contract' cases will be explored on the basis of case law examples in the following sections. From a theoretical perspective, this question closely relates to the idea which one has of the coherence of the legal system.

5.2.3 Coherence

The concept of a 'right answer for every case' relates to a certain idea of coherence of adjudication. The coherence of a system of norms, as defined by MacCormick,³² means that the rules of a legal system can rationally be related to each other for the purpose of realising some common value or values, or for the purpose of fulfilling some common principle or principles. Fundamental rights, as highest-order values, in this view should fulfil the additional requirement that they, when taken together, delineate a satisfactory form of life.³³

Dworkin's rights thesis follows this conception of normative coherence. While Dworkin acknowledges the ideology of law making, he puts it in an objective perspective: The judge does not apply his 'personal' political philosophy when deciding 'new' cases that are not governed by existing rules, but applies the ideology of the legislator. Moreover, he follows this ideology *even if he does not agree with it himself*.³⁴ The judge can thus be neutral, since he should not base policy arguments on his personal views, but rather on the ideology of an imaginary 'author of all laws'.³⁵ In this way, it is assured that the answer 'fits' in the existing system of rules: the 'right' answer was there already, for the judge to find. This implies that the law will never 'run out' and that the judge will never have to legislate.

Kennedy's criticism of this view of coherence has already come to the fore in the previous subsections on 'policies, principles and rights' and 'the rights thesis'. His critique of reconstructive tools such as 'principle', 'one right answer' and the distinction between rights and policies indirectly challenges the idea of a coherent legal system. If it is accepted that rights reasoning is no less resistant to ideological influences than policy, it follows that judges might be less constrained in their law making function than is suggested by Dworkin's rights thesis. Even though they have to move within the framework created through legislation and case law, always starting from the rules in force, an absolute conception of 'fit' of a 'new' rule to this system appears difficult to uphold. The effect of ideology might lead judges to stretch the rules in order to include a solution that furthers their political view of an issue raised before them. Judgments that in reconstructive

³¹ Compare Scholten 1974, p. 123-124, p. 129-135.

³² MacCormick 1984, p. 39-42.

³³ MacCormick 1984, p. 42. Compare Loos 2006a on the coherence of domestic contract law and consumer law in the light of the effects of European law.

³⁴ Dworkin 1986, p. 226 ff. Compare Kennedy 1997, p. 36-37.

³⁵ Dworkin, 1986, p. 226.

theory are considered examples of decisions that are coherent with the system may be revealed to pursue a certain political philosophy rather than validate an argument of principle.³⁶

Looking, once again, at the dentist case, it may be said that the judges of the *Hoge Raad* sought a rule that ‘fitted’ within the existing system by placing their decision within the domain of ‘good faith’ and ‘norms of proper social conduct’, while also making reference to preceding case law.³⁷ As will be submitted later,³⁸ the coherence suggested may however be questioned in the light of the fundamental rights engaged by the case: mediating between factual and value judgments (do the dentist’s health interests outweigh the patient’s interests of privacy and physical integrity?) as well as between law and politics (constitutional protection and possible limitation of privacy and physical integrity), these fundamental rights address ideologically coloured dilemmas of deciding which interests deserve legal protection in relations between private parties. The mere reference to general clauses of ‘proper social conduct’ (Article 6:162 *BW*) and ‘reasonableness and fairness’ (Article 6:2 and 6:248 *BW*) makes it possible to avoid a more profound, explicit consideration of these ideological aspects of the case.³⁹ It gives the appearance of applying a generally accepted notion of these open norms, which has its basis in the political philosophy of Dworkin’s imaginary ‘author of all laws’. At the same time, however, it might thus ‘cover up’ ideological choices made by the judges themselves and deny the threats to the coherence of the system of rules.

This could be problematic, given that coherence is often considered as a justification for certain modes of legal reasoning.⁴⁰ MacCormick, for instance, has held that coherence imposes a constraint on judges, if it is interpreted in a negative sense: ‘unless, by the coherence test, some ruling or decision is at least “weakly derivable” from existing law, it is not permissible for judges in their judicial capacity to make such a ruling or decision, however desirable on other grounds it may be’.⁴¹ Kennedy’s critique of adjudication seems to imply that court judgments do not always pass this coherence test and, as such, would not be justifiable. Given the fact that judges usually formulate their considerations in terms of existing rules of law or general clauses, the question of justification, however, remains unasked and unanswered.

It is my view that fundamental rights, as mediators between factual and value judgments, might require a more open deliberation of this problem. This idea will be further elaborated in section 5.3.

5.2.4 *Effects of fundamental rights in contract law from a Dworkinian and a Kennedian perspective*

The example of the dentist case that has been used to illustrate some aspects of the discussed theories of adjudication makes clear that the view one has of judicial procedure is of importance for the role one attributes to fundamental rights in contractual relationships. It seems interesting to consider European case law in this field in the light of the theoretical discourse emerging from

³⁶ Compare Kennedy 1997, p. 127-128, considering Hercules, Dworkin’s ideal judge, a left-wing liberal on the basis of the ‘right answers’ defended in Dworkin’s publications.

³⁷ HR 12 December 2003, NJ 2004, 117, referring to HR 18 June 1993, NJ 1994, 347. Note that Dutch law does not recognise a system of precedents. However, the principle of legal certainty requires that judges to a certain extent take earlier case law into account.

³⁸ See section 7.a, taking the example of the Italian cases on *ex officio* reduction of contractual penalties.

³⁹ Compare Hesselink 1999.

⁴⁰ Dworkin 1986, p. 226 ff. Compare MacCormick 1984, p. 46.

⁴¹ MacCormick 1984, p. 47.

Dworkin's theory of adjudication and Kennedy's criticism. On the one hand, it may be seen to what extent the European courts distinguish arguments of principle and arguments of policy. On the other hand, a deconstruction of traditional modes of contract law reasoning on the basis of fundamental rights may raise awareness of the political stakes in contract cases.

In order to define a framework for this analysis I will now first formulate a general idea of the interaction of the theories and critique of respectively Dworkin and Kennedy in the field of fundamental rights and contract law cases. This includes taking up once again the autonomy/solidarity continuum described in Chapter 4. On the basis of the combined concepts, I will formulate a hypothesis of how fundamental rights affect contract law adjudication, which will then be tested in the subsequent sections.

5.3 Not just a river in Egypt:⁴² Fundamental rights and the denial of the political stakes in contract law adjudication

5.3.1 Lost in translation? Ideology and judicial behaviour

Although legal theory has developed views on the ideological agendas of the judiciary, and the pursuit of these agendas in specific cases, a question that remains is how the judges themselves perceive their 'law-making function'.⁴³ On the basis of the work of Dworkin and Kennedy, taking into account their differences, it might be said that ideology influences this judicial law-making function in several ways. The view taken on the possible effects of ideology determines what positions the judges might hold.

Dworkin's theory of adjudication presupposes that the political philosophy behind the formulation of new rules derives from an objective entity, which is the personification of the 'community'.⁴⁴ A judge, rather than pursuing his own ideology, has to verify his interpretation of the structure and political decisions of his community. In the light of Dworkin's distinction between policies and principles and his view that judges should base their decisions on arguments of principle rather than policy, judges thus can and should be neutral: they merely further the political views of the imaginary 'author of all laws'. Their decisions, if based on principle, would not be influenced by personal ideology. On the contrary, a judge who does not accept that his own political convictions might be constrained in the light of the political philosophy of his community is acting in bad faith when pursuing his own ideology.⁴⁵

While Dworkin thus speaks of a general political philosophy being extended in case law, Kennedy emphasises the ideology of individual judges. Even though some judges sometimes are aware of political stakes and though some may occasionally indeed adjudicate without being influenced by ideology, Kennedy points out several types of behaviour that indicate ideological influences. Judges, in his opinion, are often in denial of these effects and, as such, are acting in bad

⁴² On this topic, see Kennedy 1997, p. 192 ff. See also Minda 2001. The wordplay is by the American novelist Samuel Langhorne Clemens, better known as Mark Twain, who once remarked that 'Denial ain't just a river in Egypt'.

⁴³ Vranken 1995, p. 144 ff.

⁴⁴ Dworkin 1986, p. 225 ff., in particular p. 254-258.

⁴⁵ Dworkin 1986, p. 260.

faith.⁴⁶ Other than Dworkin, Kennedy thus does not hold judges to be acting in bad faith because of them *applying* their own ideologies, but because of them – unintentionally – *denying to do so*.

Kennedy distinguishes between different types of judicial behaviour, each of which to some extent is affected by ideology, even though judges are not willing to admit this either to their audience or indeed to themselves.⁴⁷ He considers judges acting as deniers in the three following ways:⁴⁸

- a) *Constrained activists* in principle accept that they should limit their interpretation to the legal materials, in other words: to the ideology expressed by the community. In case such constrained interpretation would lead the judge to a result that in his eyes is unjust, or if he sees an open texture, he will however try to mould the materials towards his own ideology. Nevertheless, his written judgment will in no case attest to the effect of ideology in the decision-making process.
- b) *Difference splitters* are not directly influenced by their own ideological views, but formulate a rule-solution by ‘splitting the difference’ or finding a midway point between a conservative and a progressive position. A difference-splitting judge tries to choose an ideologically ‘moderate’ position.⁴⁹ According to Kennedy, this might leave him in bad faith in two ways: First, because he might present his decision as free from ideological influences, while in reality it corresponds to his own ‘moderate’ views; the fact that he chooses the ‘middle of the road’ stance does not mean that his own ideology has not affected the decision. Second, a difference splitter who himself might adhere to either the conservative or the progressive solution is acting in bad faith to the extent that he does not acknowledge that the ideological positions of others determine the difference that he splits.⁵⁰
- c) *Bipolar judges*, last but not least, may also be divided into two subcategories: On the one hand, a bipolar judge may be described as an activist, first on one side of the political spectrum and then on the other. This type of judge will be open to the criticism that he is acting in bad faith, because he is an activist for both progressive and conservative rule-solutions.⁵¹ On the other hand, a bipolar judge may be a denier in the sense that he considers himself a ‘free agent’, while deciding on a case-by-case basis for either a conservative, a moderate or a progressive solution. He is acting in bad faith, because he might be influenced by his own ideas as well as what he thinks is his audience’s ideas on how many ‘conservative’ and ‘progressive’ decisions he can hand down in order to remain a ‘free agent’.⁵²

⁴⁶ Kennedy 1997, p. 192-194.

⁴⁷ On the subject of judicial argumentation concealing legal-political choices see also Vranken 2005, p. 28 ff., in particular p. 42-43.

⁴⁸ Kennedy 1997, p. 194-198; see also p. 182-186.

⁴⁹ Kennedy 1997, p. 185.

⁵⁰ Kennedy 1997, p. 196: ‘[T]he theory of even the most revisionist advocates of the rule of law is not that judges should consistently choose the path of ideological moderation, against their intuitions of justice when necessary, but that they should be in some sense nonideological. From the point of view of the critique, ideology is no less an influence if it comes in only through the back door, so to speak, by structuring his alternatives.’

⁵¹ Kennedy 1997, p. 197.

⁵² Kennedy 1997, p. 197: ‘This is his problem: He has a commitment to his idea of himself as a free agent, but he would doubt that commitment in himself if he found himself coming out too often on one side or the other.’

'Denial' in all forms distinguished here becomes a significant problem of judicial adjudication in European contract law if we accept that, at least in some cases, judges deviate from the 'community's ideology' and pursue their own political philosophy. The consequences of this behaviour relate to the distribution of tasks between the legislature and judiciary.

If legislation is seen as the expression of the (majority) opinion of a community, courts in civil law systems will normally hesitate in formulating 'new' rights in cases not covered by existing rules. Examples may be found in cases holding surrogate motherhood arrangements invalid and cases affirming the contractual waiver of certain socio-economic rights even though these seriously limit an employee's means of existence or personal choices.⁵³ Judges justify their cautious approach by saying that they do not want to 'legislate' where no common opinion has yet been expressed.⁵⁴ In stating this, they might, however, be in denial of the influence of their own ideology: Possibly, they themselves disapprove of surrogacy arrangements or further-reaching employee protection, but suggest a certain neutrality in their decision on the basis of their interpretation of the rules regarding immoral contracts (constrained activism, or difference splitting in its first meaning). Or they might consider themselves open to allowing the decision to go either way, while in the meantime keeping an eye on the ideology expressed in their earlier decisions in order to avoid creating a tendency towards a certain political orientation (bipolarity).

The same holds true for cases in which the courts do deviate from previous rules governing similar situations, such as in the cases concerning sureties by relatives that were discussed in Part I, or cases in which they supplement legislative rules, such as those regarding blood tests in medical relationships (the dentist case). Judges might deny that their judgment is influenced by ideological motives, presenting a discourse in which general clauses such as 'good faith' and 'good morals' constitute certain duties of care (constrained activism). Moreover, they might consider the choice made as representing a 'moderate' political position (difference splitting) – e.g. a blood test constitutes only a minor infringement of fundamental rights in respect of the greater potential damage to the health of the other party. Or they might see the decision as one of a kind, not influenced by any structural ideological opinion of their own (bipolarity).

5.3.2 *A fundamental rights hypothesis*

Here, the concept of 'ideological influences' requires some second thoughts. In Chapter 4 it was submitted that political stakes in cases concerning the effects of fundamental rights in contract law might be referred to as points on a continuum between solidarity and autonomy. The autonomy/solidarity dichotomy was understood in a limited, political sense, as opposed to Kennedy's broader, more egalitarian distinction between individualism and altruism. In the light of the considerations regarding the role of the judiciary that have been made in this section, it may now be better clarified why I have chosen for this conception of the autonomy/solidarity continuum and how the further analysis of case law will be conducted.

In the following, the hypothesis will be that political stakes in contract law more prominently come to the fore when a case is considered in the light of constitutionally protected

⁵³ These examples will be elaborated in section 6.2. See also Perfumi & Mak 2008.

⁵⁴ See, for instance, *Rb. Utrecht* 18 June 1997, *NJ Kort* 1997, 59 and *Rb. Rotterdam* 23 March 1998, *NJ Kort* 1998, 33, both regarding surrogacy arrangements. See also *Re C (A Minor) (Ward: Surrogacy)*, also known as: *Re A Baby*, [1985] Fam Law 191, (1985) 135 NLJ 106. See further sections 7.a and 7.b below.

rights and principles. Since fundamental rights have been born in the public sphere, regulating the relation between State and citizens, they express certain political choices.⁵⁵ Mediating between politics and law, they form the translation into legal rights of principles supported in society. They engage both arguments of principle and of policy. As such, they might affect the consideration of disputes arising in contractual relationships by addressing the political stakes underlying these cases and thus expressly identifying the policy choices judges will have to make.

I am not saying that such ideological effects may always occur and in all types of litigation, but it seems worthwhile investigating what it means for those cases in which they do. Indeed, a fuller awareness of the courts' ideological inspiration may entail changes in the perception of the judges' adjudicative role and of their relation to the legislator. If judges accept the critique that sometimes they are acting in bad faith when denying ideological influences, they might begin to consider more openly the political stakes in the cases that come before them. This could change the way in which they perceive their discretionary power with respect to legislative rules.

The autonomy/solidarity continuum will be used to illustrate the substantive effect on contract law of such shifting perspectives in adjudication. While the analysis of fundamental rights application may serve as a means of piercing through the denial of ideological influences in contract law cases, the dichotomy of 'autonomy v. solidarity' may clarify what are the political stakes involved in these cases. It provides the conceptual framework for classifying the rule-solutions chosen in the analysed case law, in order to establish whether and to what extent ideology has substantively influenced the choices made by the judges.

Considering the 'double relativity' of the continuum as described before,⁵⁶ the analysis starts from the assumption that the ideological position of the judge is of relevance when determining the position of the rule-solution that is chosen in a particular case in its relation to rule-solutions in other cases. A rule that one judge may consider based on solidarity, another may find tending more towards autonomy. Since European judges in general are far less (openly) engaged in politics than their counterparts in the US, it will be difficult to tell which are their starting positions. Moreover, if forms of denial do in fact occur in judicial adjudication, then it might be difficult to tell from the outcomes of the cases – and the motivation on which these depend – what psychological processes have in fact taken place.⁵⁷ However, this does not prevent us from considering the relative positions of the courts in light of the reasoning behind their judgments, if fundamental rights do indeed bring out the policy arguments involved.

Rather than speculate on the actual political philosophy of the judges, I will therefore consider their relative positions (second dimension of the autonomy/solidarity continuum), against the background of the legal system in which they have formulated their decisions (third dimension).⁵⁸ Against this general background it might be seen to what extent a decision deviates from what may be considered the ideology of 'the community' or 'the author of all laws', for instance in case of a change of an established rule of law on the basis of fundamental rights argumentation. Furthermore, it might be investigated whether the reference to fundamental rights has affected the ideological course taken by the court hearing the case. This could indicate whether

⁵⁵ Compare section 3.2.3.c.

⁵⁶ See section 4.3.2.

⁵⁷ A constrained activist, for instance, will not refer to ideological strategy in the judgment, but present his case completely within the framework of the legal materials.

the application of fundamental rights in contract cases does indeed make judges more aware of the political stakes in contractual cases and the discretionary power they have in deciding such cases, in short: whether the fundamental rights thesis holds.

⁵⁸ See section 4.3 above, as well as section A of the Epilogue to Part II.

6 Testing the fundamental rights hypothesis

The consideration of fundamental rights in contract cases usually boils down to a balance of interests.¹ It is within this framework of the balancing of contracting parties' interests in the light of fundamental rights that the courts' discretionary powers may be appealed to. Judges have to evaluate the specific interests of the parties in the light of the relevant legal rules and will sometimes supplement or adapt rules of legislation. Indeed, it has been submitted that where fundamental rights come into play, the policy behind the rules may have to be more closely scrutinised and that policy choices have to be made. The judges have to decide whether the constitutionally safeguarded interests outweigh the other party's interests protected by the rules of contract law – or the other way around. Questions they have to answer include: What is the basis for a (post-)contractual duty to minimise the damage of the contract partner if one has to allow an infringement of a fundamental right in order to comply with this duty? (e.g. the dentist case) And, on the other hand, on which grounds can an appeal to private autonomy and the principle of the social state undermine the performance of a contractual duty, such as in the suretyship cases? Can fundamental rights and values be placed on the same level as 'ordinary' party interests, as was done in the dentist case, or do they have a 'special status' in the private law balance of interests?

In this Chapter, I will analyse five types of cases in which fundamental rights argumentation has emerged in the case law of the countries selected for the analysis. These concern five different fields of law, each of which engages different policies: 1) non-competition clauses in employment contracts (socio-economic policy, employee protection); 2) sureties by relatives (financial services, weaker party and consumer protection); 3) reduction of contractual penalties (again weaker party protection; general interest); 4) confidentiality and duties of care in doctor/patient relationships (medical treatment, patient protection); and 5) surrogacy arrangements (family relations, protection of mother and child). Typical of all these cases is that there is usually a vulnerable, weaker party involved.²

Two main questions, deriving from the fundamental rights hypothesis formulated in section 5.3.2, will form the common thread running through the case law analysis. First, does fundamental rights reasoning indeed function as an indicator of the political stakes in these cases? Does it reveal the policy questions addressed by the specific factual situations and give the possibility to reconsider the rationale of existing rules? Second, do fundamental rights in these cases tip the balance of interests in favour of a decision that is not reached in similar cases that are resolved on the basis of purely private law reasoning? In other words, do fundamental rights have an identifiable effect in contract law cases, or is any reference to these rights merely rhetorical?³ In the next Chapter the answers to these questions will be used to reverse the analysis: if the fundamental rights hypothesis holds, then what does it tell us about the criteria for applying fundamental rights to contractual relationships?

The structure of the analysis of the case examples will be as follows. First, some brief remarks will be made regarding the institutional and procedural differences and similarities

¹ See Part I regarding the *Wechselwirkung* between fundamental rights and (open) norms of private law. In this sense also Gerards 2006, p. 4.

² With the exception perhaps of the example of penalty clauses; see section 6.2.3.

³ Compare, on this point, the Epilogue to Part I, under B.

between the countries involved in the research (section 6.1). The five given examples will then be subjected to a closer scrutiny of the role of fundamental rights (section 6.2). On the basis of this analysis an attempt will be made to define in what types of cases fundamental rights argumentation may be an adequate means of placing rule-solutions in a broader ideological framework (section 6.3). The model that will be used for this is the autonomy/solidarity continuum. The rule-solutions coming to the fore in the case studies will be analysed on the basis of their relative positions on a continuum depicting the general idea of political ideals in the legal systems involved.⁴

6.1 Institutional and procedural aspects

To what extent may judges be inclined to step into the shoes of the legislator?⁵ In the context of this question, a preliminary observation should be made regarding the significance of the institutional and procedural differences between the legal systems selected for the analysis: Germany, the Netherlands, England and Italy.⁶ While the German and Italian legal systems have a Constitutional Court at the top of the hierarchy of civil litigation (respectively the *Bundesverfassungsgericht* and the *Corte costituzionale*), the highest courts adjudicating contract cases in the Dutch and English systems are the respective Supreme Courts, the *Hoge Raad* and the House of Lords, counterparts of the German *Bundesgerichtshof* and the Italian *Corte di Cassazione*.

Although both the *Bundesverfassungsgericht* and the *Corte costituzionale* only carry out a judicial review of the compliance with fundamental rights of acts of state authorities,⁷ their decisions have nevertheless had an impact on individual private law cases as well. The competence of the German court is understood as including the constitutional review of judgments of the courts in civil cases.⁸ Moreover, the interpretation of laws by the Constitutional Courts will have an impact on the cases covered by these laws.

While analysing case law, it should therefore be kept in mind by which authority the judgment has been handed down. The approach of the various Supreme Courts in civil cases may differ from the approach of Constitutional Courts, because the former have been attributed with different competences with regard to the protection of fundamental rights than the latter. In the Netherlands, for instance, the courts in civil cases are not allowed to test laws against the Constitution (Article 120 *Grondwet*), which means that it is not possible for them to declare that a law provision is not in compliance with fundamental rights. In the absence of other procedures of

⁴ See further section 6.3, in particular 6.3.2.a.

⁵ Compare sections 2.1.3.a and 5.1.

⁶ On the relevance of institutional factors for the relationship between the ‘official’ and the ‘unofficial’ discourses in adjudication, see Lasser 2004, who makes a comparison between the US Supreme Court, the French *Cour de Cassation* and the European Court of Justice.

⁷ According to Article 93(1)(4a) *GG* and §§ 13(8a) and 90(1) *Bundesverfassungsgerichtsgesetz (BVerfGG)*, the German Constitutional Court may decide on complaints of unconstitutionality that are filed by any person claiming that one of his basic rights or one of his rights under certain other constitutional provisions has been violated by a public authority. Article 134 *Costituzione* provides that the Italian Constitutional Court adjudicates ‘disputes concerning the constitutionality of laws and acts with the force of law adopted by State or regions (...)’ (translation taken from http://www.oefre.unibe.ch/law/icl/it00000_.html, last consulted on 14 December 2006).

⁸ Compare Article 1(3) *GG*, which establishes the directly binding nature of constitutionally protected rights on the legislature, the executive and the judiciary.

constitutional review, this means that it is still up to the legislator to safeguard the compliance of laws with the *Grundwet*. A somewhat similar situation has been established by the Human Rights Act 1998 in England: Although the courts may declare the incompatibility of a law with the rights protected by this Act (section 4 HRA; section 6(1) in conjunction with section 6(3) HRA), they do not have the power to decide not to apply a statutory provision. Parliament is thus called upon to redress unconstitutionality.

With an eye on these differences in competence, it might be assumed that the *Bundesverfassungsgericht* and the *Corte costituzionale* will be more easily inclined to wear the mantle of the legislator than the courts in civil cases. Although the German Federal Supreme Court, the *Bundesgerichtshof*, like all German courts has to take into account constitutional rights when interpreting the rules of private law,⁹ it cannot declare that a law is unconstitutional. Consequently, it has a more limited discretion than the Constitutional Court. The same rings true for the Italian courts in civil cases, which can merely direct a question regarding the constitutionality of a law to the *Corte costituzionale*.¹⁰ The distribution of tasks among the courts will thus influence the approach they take when interpreting rules of law in the light of fundamental, constitutional rights.

Notwithstanding this institutional diversity between the selected countries, it should however be pointed out that there are also significant similarities.¹¹ Whilst the competences regarding the review of the constitutionality of laws may be distributed differently in each country, the judicial review of contractual clauses shows resemblances. German, Dutch and Italian law have all recognised the possibility of fundamental rights having an effect through the general clauses of private law, such as ‘good faith’ and ‘good morals’. Thus, it is possible for the courts in civil cases to review the compliance of contractual clauses with constitutionally protected values and, eventually, supplement or correct them. While English law tends to be averse to the use of such general clauses or open norms,¹² it has developed other mechanisms for reviewing the compliance of contractual clauses with fundamental rights. It may be said that the English courts have regularly used ECHR rights to interpret contractual clauses.¹³

Whereas each system has developed its own, more or less unique system of judicial review of legislation, the role of the courts in reviewing the compliance of contractual provisions with fundamental rights – generally speaking – seems to have taken similar shapes in the countries included in the present analysis.¹⁴ While keeping an eye on the relevant institutional differences, the techniques developed by the courts seem to be suitable for comparison. In the following, therefore, I will focus on the way in which fundamental rights reasoning has affected the selected case examples.

⁹ *BVerfG* 15 January 1958, *BVerfGE* 7, 198, 208-209 (*Liith*).

¹⁰ Article 1 of the *legge costituzionale* n. 1 of 9 February 1948, <http://www.giurcost.org/fonti/lcost1-48.htm> (last consulted on 14 December 2006).

¹¹ Compare Colombi Ciacchi 2006, p. 169-172.

¹² Note, however, the introduction of ‘good faith’ in English law by the European Directive on Unfair Terms in Consumer Contracts, Council Directive 93/13/EEC of 5 April 1993. On this subject, see Goode 1992 and Teubner 1998.

¹³ Bamforth 2003, p. 227 ff., who considers the role of the Human Rights Act 1998 in this process. See also Beloff & Mountfield 1996 and, on the interpretation of Convention rights by the British courts, Pannick 1998.

¹⁴ In the same sense Colombi Ciacchi 2006, p. 175, on the case law of not only Germany, the Netherlands, England and Italy, but also France, Ireland, Poland, Portugal, Spain and Sweden.

6.2 Fundamental rights and the policies involved in contract cases

In this section, the fundamental rights hypothesis that has been formulated in section 5.3.2 will be tested on five case studies. In this way, it may be seen to what extent fundamental rights reveal the political stakes in contract law cases and have an effect on the outcome of these cases. On the basis of this investigation, subsequently, criteria might be defined for resorting to fundamental rights in contract law adjudication.¹⁵

Please note that several of the examples will be taken from the case law discussed in Part I and, consequently, there may be some overlap as to the description of the facts and circumstances of the cases. Where possible, however, references to the earlier Chapters will be made in order to avoid repetition. The case studies will include the cases leading up to the German *Handelsvertreter* and *Bürgerschaft* decisions, i.e. non-competition clauses in employment contracts (section 6.2.1), and sureties by relatives (section 6.2.2). Subsequently, the Italian case law on the *ex officio* reduction of contractual penalties will be analysed (section 6.2.3). Furthermore, the Dutch dentist case will be used as an illustration of the application of fundamental rights to doctor/patient relations (section 6.2.4) and an example will be added that concerns both contract and family law, viz. surrogacy arrangements (section 6.2.5). For each of these examples, the policy questions involved will be described and the solutions of the problems in the various systems will be charted. Section 6.3 will then present a comparative analysis of the political stakes of autonomy and solidarity in these case studies.

6.2.1 Non-competition clauses¹⁶

In most European countries employment law is one of the fields which is most open to fundamental rights influences. Rights protecting employees have been included in national constitutional documents¹⁷ and, given the fact that employment relations frequently involve private parties, these rights have often gained a certain ‘horizontal effect’.¹⁸ They for instance play a role with regard to the drafting of certain clauses in employment contracts, such as those concerning non-competition by the (former) employee.

¹⁵ See Chapter 7 below.

¹⁶ On this topic see also Mak 2003b and Perfumi & Mak 2008.

¹⁷ See, for instance: Article 12 of the German *Grundgesetz*, Article 19(3) of the Dutch *Grondwet*, Articles 4 and 35 ff. of the Italian *Costituzione*. See also Article 47 of the Portuguese *Constituição*.

¹⁸ Compare sections 2.1.3 and 3.1.2. In Germany the *Bundesarbeitsgericht* (Federal Labour Court) for a number of years followed the doctrine of direct application and then (apparently) switched to a more indirect way of giving effect to fundamental employee’s rights; Canaris 1984, p. 202-203; Hager 1994, p. 373; and Starck 2001, p. 97, with further references. The Dutch courts have recognised the (indirect) effect of Article 19(3) *Grondwet* (see *Ktr. Amsterdam* 3 August 2001, *JAR* 2001, 202; *Ktr. Nijmegen* 17 May 2002, *JAR* 2002, 178; *Rb. ’s-Gravenhage* 4 December 2002, *JAR* 2003, 9; *HR* 4 April 2003, *JAR* 2003, 107; *Ktr. Rotterdam (Voorzieningenrechter)* 19 September 2003, *JAR* 2003, 235; *Ktr. Rotterdam (Voorzieningenrechter)* 25 February 2004, *JAR* 2004, 199; *Hof ’s-Hertogenbosch* 8 June 2004, *JAR* 2004, 236) as well as of other related constitutional rights; see, for instance, the decisions of the Supreme Court, *HR* 31 October 1969, *NJ* 1970, 57 (*Mensendieck I*) and *HR* 18 June 1971, *NJ* 1971, 407 (*Mensendieck II*), regarding the applicability of Article 23 *Grondwet* (freedom to teach). The Italian courts recognised the horizontal applicability of Article 36 *Costituzione* (right to health) as early as the 1950s; see section 2.1.3.c, with references. The *Supremo Tribunal de Justiça*, Portugal’s Supreme Court, even gave direct effect to the constitutionally protected freedom of profession, given that Article 18 of the *Constituição* establishes the directly binding nature of Article 47 on public as well as private parties; *Supremo Tribunal de Justiça* 12 January 1994, n. 084387 www.stj.pt (last consulted on 14 December 2006).

A distinction can be made between exclusivity clauses and non-competition clauses. The former stipulate that an employee should work exclusively for the employer with whom he concludes this clause. Even if working only part-time, the employee cannot take on other work in the same branch. Whereas this type of clause sees to the period of employment, non-competition clauses regard the time after the ending of the employment contract. In order to protect the company's market position an employer will often ask an employee to refrain from competing activities in the specific branch for a certain period of time after the ending of the contract. Like the exclusivity clause, the non-competition clause thus to a certain extent limits the employee's freedom to choose his profession, which enjoys constitutional protection in Germany (Article 12 GG), the Netherlands (Article 19(3) *Gw*) and Italy (Articles 4 and 35 *Cost.*).

a) *Policy issues*

Contractual clauses that constitute a (partial) waiver of the employee's free choice of profession address several issues related to the protection and advancement of the collective goals of the community. The legislators in the various European countries that have developed rules on exclusivity and non-competition¹⁹ will have contemplated these issues and have chosen a policy they would like to pursue. The choice of this policy depends on a balance of the interests of employees and those of their employers.

On the one hand, it may be assumed that an employer by means of an exclusivity or non-competition clause aspires to protect his market position, which is based on goodwill, special knowledge and investments made.²⁰ He has an interest in prohibiting his employees from working for competing companies, during and after the employment relationship. Contractual clauses thus serve the purpose of protecting the company's know-how and market position. From a general point of view, rules allowing these types of clauses correspond to a policy of protection of business interests and of the market positions of entrepreneurs.

On the other hand, however, employees may be considerably restricted in their choice of profession and, consequently, their personal development by clauses forbidding them to carry out competing activities during or immediately after the employment contract. The regulation of these clauses should therefore also take into account the interests of the employee. These engage two interrelated trends in policy making: In the first place, it is usually accepted that agreeing to exclusivity clauses or non-competition clauses, which constitute a (partial) waiver of freedom of profession, is part of the employee's freedom of contract. A person who has reached the age of majority and is of sound mind should in principle be given the possibility to make the contractual arrangements he wishes. This serves an autonomy-based policy that promotes market competition to improve the efficiency of the supply of goods and services.²¹ In the second place, though, social welfare policies should not be overlooked. European contract law and legal literature show a growing attention for the position of 'weaker parties' in contractual relationships.²² At the moment of the formation of the contract, the employee will often have a weaker bargaining power than the employer; he needs work to provide for himself and possibly his family, whereas the employer will

¹⁹ In Germany, for commercial agency § 90a *HGB*. In the Netherlands, for employment contracts Article 7:653 *BW*. In Italy, Article 2125 *c.c.*

²⁰ Grapperhaus 1995, p. 9, p. 101-105, p. 107.

²¹ Compare Social Justice Group 2004, p. 654.

usually be less dependent on having this specific person in his company and can more or less unilaterally determine the terms of the contract.²³ In order to redress this imbalance, policies of employee protection may be developed, which regulate the margins within which the parties may formulate exclusivity or non-competition clauses.

b) Cases

Since exclusivity and non-competition clauses have often been regulated by statutory provisions, an express consideration of the fundamental rights involved will usually not be made in specific cases. The relevant provisions should already form an expression of these rights and underlying values and indicate the policy pursued by the legislative authorities.²⁴ From this point of view, the contemplation of fundamental rights in contract cases should not have any added value nor lead to any other decision than would have been reached on the basis of purely private law reasoning.

The case law of the various selected countries, however, shows examples that support the hypothesis that fundamental rights might have a further-reaching effect. The best-known German judgment in this field is most probably the *Handelsvertreter* (commercial agent) case.²⁵ In this case, the Constitutional Court confirmed the unconstitutionality of the provisions of law allowing a non-competition clause that had a large impact on the commercial agent's choice of profession without offering any compensation for this limitation. Although it has been put forward that this decision attributes a too extensive protective function (*Schutztheorie*) to the courts as opposed to the legislature,²⁶ it has also met with approval because of its clarification of the State's duty to protect constitutionally guaranteed interests in relations between private parties.²⁷

The contemplation of fundamental rights in the *Handelsvertreter* case has brought to the fore the policy issues attached to non-competition clauses. In the first place, the *Bundesverfassungsgericht* pointed out that an injunction requiring the commercial agent to comply with the non-competition clause included in his contract would prohibit him from developing professional activities to such an extent that it endangered his means of existence.²⁸ This contemplation of employment and agency contracts as regulating economic relations recalls the concepts of distributive and corrective justice:²⁹ The legislator and judges should ensure that contractual arrangements serve a just distribution of economic welfare and to some extent have the power to reallocate welfare. Although the Federal Constitutional Court did not expressly reflect on the distributive effects of non-competition clauses, it addressed the question when and how courts should intervene to correct contractual arrangements that jeopardised the agent's economic basis

²² Besides the Manifesto mentioned in the previous footnote, see also Lurger 2005; Hesselink 2004b; Huls 2004.

²³ Of course, this is a simplification of the real world. A professional footballer, for instance, may very well be the party who almost unilaterally determines the terms of his contract with the team he agrees to play for. This is however an atypical situation. In most situations the description given here may be expected to hold true.

²⁴ See also section 2.1.3.a above.

²⁵ *BVerfG* 7 February 1990, *BVerfGE* 81, 242. Although the judgment regards a commercial agency contract, it may also be considered of importance for employment contracts, given the fact that the position of an agent bound to one firm is similar to the position of an employee; compare *BVerfGE* 81, 242, 257, where the Court considers that especially an *Einfirmen-Vertreter* may hold a weak bargaining position with respect to his principal regarding the non-competition clause.

²⁶ Hillgruber 1991, p. 69-86; Wiedemann 1990, p. 691-697.

²⁷ Hermes 1990, p. 1764-1768.

²⁸ *BVerfG* 7 February 1990, *BVerfGE* 81, 242, 253.

²⁹ Compare Nieuwenhuis 2000, p. 206-207.

of existence. In legal terms, this boiled down to the adequate protection of private autonomy: On the one hand, private parties should be free to conclude any contract they wished, but, on the other hand, this freedom could only be realised if both parties had indeed been in the position to freely determine the terms of the contract (*Selbstbestimmung*).³⁰

In terms of policy argument, the contractual limitation of the constitutionally protected freedom to choose one's profession (Article 12 *GG*) led the court to reconsider the rules on non-competition clauses laid down in the *Handelsgesetzbuch* (commercial code).³¹ Referring to parliamentary documents, it underlined the need to protect the commercial agent, who usually had a weaker bargaining position than his principal.³² It observed that the legislator on the one hand had had to leave enough space for the entrepreneur to safeguard his interests, while on the other hand compensating the weaker bargaining position of the commercial agent.³³ Moreover, the legislator had been constrained by constitutional values when drafting the provisions on non-competition clauses, since both the agent's and the company's interests were protected by the *Grundgesetz*. According to the Constitutional Court, the mandatory rule obliging the principal to compensate the agent for the period in which he could not develop competing activities (§ 90a(1)(3) *HGB*) struck an adequate balance between the two parties' interests, without disproportionately intervening in the freedom of contract.³⁴

The commercial code, however, contained an exception for cases of breach of contract by the agent; the principal then did not have to pay any compensation when invoking the non-competition clause (§ 90a(2) *HGB*). This rule deviated from the general policy of both protecting the entrepreneur's interests and redressing the commercial agent's weaker bargaining position.³⁵ Although the *Bundesverfassungsgericht* acknowledged that the entrepreneur could sometimes suffer damage as a consequence of a breach of contract by the agent, it argued for a differentiated solution for each specific situation. A general exclusion of compensation, such as formulated in § 90a(2) *HGB*, would disproportionately harm most agents.³⁶

It is interesting to note that the plaintiff himself had not emphasised such policy arguments, but had rather pointed out the *principles* that the lower courts' judgments allegedly infringed. Concentrating on the rights of the contract parties, he underwrote a principle that had been recognised by the *Bundesarbeitsgericht*, which held that no grounds could justify completely different

³⁰ *BVerfG* 7 February 1990, *BVerfGE* 81, 242, 254-255.

³¹ Note that, at the time the *Bundesverfassungsgericht* handed down its decision, the relevant commercial code provisions had already been adapted by the legislator. This, however, does not affect the importance of the *Handelsvertreter* case for the argument made here.

³² *BVerfG* 7 February 1990, *BVerfGE* 81, 242, 256-257, 260-261. The provision on non-competition clauses was added to the *Handelsgesetzbuch* (originally dating from 1897; *RGBl.* 1897, 219) by the law of 6 August 1953 (*BGBI.* I, 771).

³³ *BVerfG* 7 February 1990, *BVerfGE* 81, 242, 261.

³⁴ *BVerfG* 7 February 1990, *BVerfGE* 81, 242, 261: 'Zugunsten des Handelsvertreters wird damit berücksichtigt, daß dieser auf die Nutzung seiner Berufsfreiheit zur Sicherung der wirtschaftlichen Existenzgrundlage angewiesen ist, bei weitgehenden beruflichen Beschränkungen also eines finanziellen Ausgleichs bedarf. Zugunsten des Unternehmers wird dieser Ausgleich auf das Angemessene beschränkt und damit den Umständen des Einzelfalles angepaßt. Vor allem aber bleibt dem Unternehmer die freie Entscheidung, ob die Wettbewerbsunterlassung des Handelsvertreters im Hinblick auf dessen Stellung im Unternehmen so große Bedeutung hat, daß sie ihm eine Entschädigung überhaupt wert ist. Die wirtschaftliche Belastung des Entschädigungsanspruchs beeinflusst das Eigeninteresse des Unternehmers und damit dessen Vertragspraxis mit der Folge, daß übermäßige Beschränkungen der Berufsfreiheit vermieden werden.'

³⁵ *BVerfG* 7 February 1990, *BVerfGE* 81, 242, 261-262.

³⁶ *BVerfG* 7 February 1990, *BVerfGE* 81, 242, 262-263.

sanctions for breach of contract by the respective parties.³⁷ While the agent was only granted a right to choose to recede from the non-competition clause in case of breach of contract by the principal (§ 90a(3) *HGB*), the principal could invoke the non-competition clause in case of breach by the agent, without having to pay any compensation (§ 90a(2) *HGB*). According to the commercial agent, the provisions of the *HGB* thus violated the principle of equality.

Reading the *Bundesverfassungsgericht*'s decision in this case it might be concluded that the Court went further than merely adjudicating the constitutionality of the relevant commercial code provision on the basis of fundamental rights as codified in the *Grundgesetz*. It addressed the entire context of policy issues related to non-competition clauses, whether or not invoked by the parties, in order to see whether the balance struck by the legislator created a framework that did justice to both parties' (abstract) interests. Considering the role of fundamental rights as 'mediators' between law and politics,³⁸ it seems probable that the explicit appeal to these rights created an opening for such a discourse.

In other European legal systems the application of fundamental rights in cases concerning non-competition clauses has been less developed than in Germany, but several examples may be found that affirm the hypothesis that these rights engage policy issues and, through policy, the ideology underlying the rule-solutions chosen.

In an Italian case regarding an exclusivity clause, the *Corte di Cassazione* for instance considered that a part-time salary may not be sufficient to provide for the free and dignified existence of an employee's family (protected by Article 36 *Cost.*).³⁹ The employee should therefore be allowed to work for another company during the time which was not covered by her part-time contract. Furthermore, though taking freedom of competition (also in light of Article 41 *Cost.*) as the rule, Italian law supports a policy of loyalty between the employer and former employee by means of non-competition clauses (Article 2557 *c.c.*). The adjudication of such clauses has also engaged fundamental rights. Reading a non-competition clause in the light of the constitutional provisions protecting the free choice of profession (Articles 4 and 35 *Cost.*), the *Corte di Cassazione* has, for example, established that the employer cannot unilaterally determine whether or not to invoke the clause after the termination of the contract, thus seeking to avoid having to pay the related compensation.⁴⁰ Furthermore, interpreting the requirements regarding the object of the contract (Article 1346 *c.c.*) in light of the relevant constitutional provisions, the Court held a contractual limitation of the freedom of profession of an employee *on behalf of a company other than the one he worked for* to be null and void.⁴¹

³⁷ *BVerfG* 7 February 1990, *BVerfGE* 81, 242, 249.

³⁸ See section 5.2.1 above.

³⁹ *Cass. civ.* 26 October 2001, n. 13329, *Dir. e giustizia* 2001, fasc. 41, 51, with comment by Cardelicchio. A similar judgment was delivered by the French Supreme Court: *Cass.* 11 July 2000, *JCP* 2000.IV.2556 (*Mme Marchal c. Pimouget*). See Perfumi & Mak 2008.

⁴⁰ *Cass. civ.* 13 June 2003, n. 9491, *Dir. e pratica lav.* 2003, 2644.

⁴¹ *Cass. civ.* 19 December 2001, n. 16026, *Mass. giur. lav.* 2002, 349 with comment by Timellini. The case concerned a man who had been appointed as the commercial director of a company, which was part of a group of companies, and who had also bought 4 percent of the shares in the company. A couple of years later, the group agreed to sell all companies to another group. All members of the selling group, including the commercial director, promised not to act in competition with the buying group for a period of five years. There was no compensation established with regard to this non-competition clause. Some time later, the commercial director resigned and started to work for another, competing company. An arbitration committee ruled that he had thus

In the Netherlands, the courts have occasionally reverted to the constitutionally protected free choice of profession (Article 19(3) *Gw*) when adjudicating the compliance of non-competition clauses with the civil code (Article 7:653(2) *BW*).⁴² Sometimes, in this context, they also refer to the personal interests of the employee, since a non-competition clause limits his possibilities to provide for his means of existence by using the skills and experience he has acquired.⁴³

The Dutch Supreme Court, however, has rejected such an extensive effect of fundamental rights in a non-competition case in which *no specific clause* had been included in the contract.⁴⁴ The case regarded competition by the former owner of an insurance company after he had transferred the company to another. The *Hoge Raad* considered that, even if no specific non-competition clause has been included in the transfer contract, the contractual relationship of the parties might nevertheless require that the former owner of the company refrain from unfair competition. It rejected the statement that one could waive the ‘free choice of profession’ (safeguarded by Article 19(3) of the Constitution) and ‘professional development’ (insofar as included in a general personality right) only by means of a written agreement. According to the court, fundamental rights could not have such a far-reaching effect in this type of case. Moreover, fundamental rights did not oblige the courts to provide a more profound reasoning for the judgment that the limitations of competitive activities that were read into the transfer contract were necessary for the protection of the new owner’s interests.⁴⁵ Fundamental rights were thus ranked on the same level as other contractual interests.

Even though the *Hoge Raad* in this case stopped short of applying fundamental rights to consider the ideological background of the question, the reference to civil code provisions governing non-competition clauses led the court to remark on the policies at stake. In the court’s opinion the reference to the civil code⁴⁶ in the first place disregarded the fact that the mentioned provisions concern non-competition clauses, while in the case at hand there had been no such clause included in the contract.⁴⁷ Furthermore – and here the court introduced a policy argument – such a reference disregarded the fact that the civil code provisions concerned cases in which a weaker party (respectively a commercial agent or an employee, whose means of existence was at stake) was protected against a stronger party (the principal or employer), cases with which the present circumstances (the sale and transfer of a company by an independent businessman) could not be put on equal footing.

In this line of reasoning, fundamental rights were not needed to reveal the policies that found expression in the regulation of non-competition clauses; the court addressed the policies to explain the distinction between the cases covered by these rules and the present dispute. This shows that fundamental rights application is not always necessary for making judges aware of the

violated the non-competition clause and declared the nullity of the employment contract. He challenged this decision and eventually was successful in the *Corte di Cassazione*.

⁴² See, for example: *Ktr. Amsterdam* 3 August 2001, *JAR* 2001, 202; *Ktr. Nijmegen* 17 May 2002, *JAR* 2002, 178; *Rb. ’s-Gravenhage* 4 December 2002, *JAR* 2003, 9; *HR* 4 April 2003, *JAR* 2003, 107; *Ktr. Rotterdam (Voorzieningenrechter)* 19 September 2003, *JAR* 2003, 235; *Ktr. Rotterdam (Voorzieningenrechter)* 25 February 2004, *JAR* 2004, 199; *Hof ’s-Hertogenbosch* 8 June 2004, *JAR* 2004, 236.

⁴³ See the opinion of the Advocate-General in *HR* 4 April 2003, *JAR* 2003, 107, with reference to *Hof Amsterdam* 21 May 1992, *KG* 1993, 14.

⁴⁴ *HR* 1 July 1997, *NJ* 1997, 685 (*Kolkman/Cornelisse*). See section 2.3.2 above.

⁴⁵ *HR* 1 July 1997, *NJ* 1997, 685 (*Kolkman/Cornelisse*), 3.5.

⁴⁶ Articles 7:443 *BW* and 7A:1637x (old; the current Article 7:653) *BW*.

⁴⁷ *HR* 1 July 1997, *NJ* 1997, 685 (*Kolkman/Cornelisse*), 3.8.

political stakes in contract law. Sometimes the judges might revert to these by other means. This, however, does not preclude that reference to fundamental rights may be of use in cases in which the relevant policy issues do not emerge through other ways. An example would be the German case law on suretyships by relatives and spouses.

6.2.2 *Sureties by relatives*

In Part I we saw that one of the most important German judgments regarding the effects of fundamental rights in contract law was the so-called *Bürgschaft* decision of the *Bundesverfassungsgericht* of 1993. The judgment brought about a considerable change in the protection of sureties who were spouses or next of kin of the principal debtors.

a) *Policy issues*

The policy issues in this case example concern a choice between the protection of the relative standing surety and the protection of the bank with whom the suretyship agreement is concluded. The bank, of course, had an interest in the suretyship in order to secure its financial interests in case the principal debtor could not fulfil his obligations. The surety, however, might have to be protected against itself. In case a close relative or spouse is asked to stand surety, it seems very well possible that emotional pressure may induce him or her to enter into the agreement without fully realising the obligations related to the suretyship.

b) *Cases*

The exemplary case on this topic is the German *Bürgschaft* judgment,⁴⁸ which dealt with the question of the constitutionality of a daughter being held bound to a suretyship contract that she had signed for her father's loan from a bank. Since the daughter had no higher education, was regularly unemployed and earned only very little when she did work, she was not able to pay the amount for which she had stood surety.

The German Federal Supreme Court, the *Bundesgerichtshof*, was of the opinion that the contract should nonetheless be performed. *Pacta sunt servanda* was basically the principle which the court followed, reasoning that a person who had attained the age of majority and was of sound mind at the time the contract was concluded, could be assumed to be aware of the risks attached to a surety agreement. Furthermore, the bank employee assisting the conclusion of the contract had no duty to inform the daughter.

The Federal Constitutional Court (*Bundesverfassungsgericht*), as we have seen earlier,⁴⁹ held a different view. It found that the *Grundgesetz* required the courts in civil cases to evaluate the contents of surety contracts, in case impecunious relatives assumed high risks as a surety. In this way, they should redress contractual imbalances occurring in relationships in which a contractual party uses his stronger bargaining position in order to dominate the contract. Since the system of private law should provide for the widest possible realisation of all parties' autonomy and rights, the courts should play a leading part in the protection of 'weaker' parties by reviewing the contents and effects of the contract. The general clauses of private law were of great importance, because they provided the means for such a substantive check.

⁴⁸ *BVerfG* 19 October 1993, *BVerfGE* 89, 214. See section 2.2.2.

⁴⁹ Section 2.2.2.

In the *Bürgschaft* case, the German *Bundesgerichtshof* had failed to adequately address the question of an imbalance of power in the contractual relationship (*gestörter Vertragsparität*). According to the *Bundesverfassungsgericht*, it had thus infringed the principle of autonomy, safeguarded by Article 2 *Grundgesetz*. The case was therefore sent back to the court in order to rehear it. On this occasion the *Bundesgerichtshof* recognised the emotional pressure a son or daughter may experience when having to decide on signing a surety agreement on behalf of a parent. It held that if the bank requiring the suretyship knew about these circumstances, but nevertheless proceeded without adequately informing the son or daughter about the risks inherent in the suretyship, the agreement could be held void on the basis of § 138 *BGB* (good morals).⁵⁰

As we have seen,⁵¹ Dutch case law on suretyships by relatives mostly remains within the framework provided by private law, not taking fundamental rights explicitly into account. Nevertheless, basically the same outcome is achieved. In the case of *Van Lanschot/Bink*,⁵² the *Hoge Raad* protected a mother who had stood surety for her son, considering that the bank should have sufficiently informed her of the risks related to the agreement, especially given the emotional pressure she might have felt.

English law also tends to consider sureties on behalf of relatives within the framework of private law rules. Like the Dutch courts, it seeks to protect the ‘weaker’ party by using classic tools of contract law. An example is the judgment in *Lloyds Bank Ltd v. Bundy*,⁵³ concerning a father who had mortgaged his house, which was his only asset, to a bank in order to provide security for his son’s company debts. The court established that a special relationship of trust and confidence existed between Mr Bundy and the bank manager who obtained his signature. Given that relationship, and the bank’s knowledge of Mr Bundy’s reliance, the bank had been under a duty of care to recommend Mr Bundy to obtain independent advice before signing the forms.⁵⁴ It was contrary to public policy that benefit of the transaction be retained unless the bank positively showed that it had entirely fulfilled its duty of fiduciary care.⁵⁵

In the *Barclays Bank v. O’Brien* case,⁵⁶ furthermore, the House of Lords ruled that a bank could not enforce a surety obligation if it had knowledge of the surety (in this case, the wife of the principal debtor) having been induced to secure the debt as a result of misrepresentation, undue influence or other legal wrong on the part of the principal debtor (here, the husband). In such cases the bank could ‘reasonably be expected to take steps to bring home to the wife the risk she is running by standing as surety and to advise her to take independent advice’.⁵⁷ The bank, thus, had a duty of care towards the prospective surety, who was the wife of the principal debtor. Without

⁵⁰ BGH 24 February 1994, NJW 1994, p. 1341-1344.

⁵¹ Section 3.2.3.d. Compare also Cherednychenko 2004a and Colombi Ciacchi 2005.

⁵² HR 1 June 1990, NJ 1991, 759 with comment by C.J.H. Brunner.

⁵³ *Lloyds Bank Ltd v. Bundy* [1975] QB 326.

⁵⁴ *Lloyds Bank Ltd v. Bundy* [1975] QB 326, 339-340 (Lord Denning).

⁵⁵ *Lloyds Bank Ltd v. Bundy* [1975] QB 326, 342 and 346 (Sir Eric Sachs).

⁵⁶ *Barclays v. O’Brien* [1994] 1 AC 180.

⁵⁷ *Barclays v. O’Brien* [1994] 1 AC 180, Lord Nicholls, no. 50. This decision has been confirmed and further developed in *Royal Bank of Scotland Plc v. Etridge (No. 2)* [2001] UKHL 44; [2001] 3 WLR 1021, in which the House of Lords confirmed the practice of banks urging potential sureties to take independent legal advice and requiring written confirmation of having taken such advice.

referring to fundamental rights, the law lords thus reached a conclusion similar to that of the *Bundesgerichtshof* in its final decision in the *Bürgschaft* case.⁵⁸

Even though the reasoning of the Dutch and English courts shows important similarities to the argumentation of the German Constitutional Court, the policy choices involved in their judgments seem to have remained under the surface to a greater extent than in the German example. Although English judges sometimes include some policy considerations in their judgments, these appear to be given mainly as background information to the case, but do not seem to greatly influence the legal reasoning leading to the outcome.⁵⁹

In Italy, although there is a Constitutional Court, cases regarding suretyships have in principle been dealt with by the courts in civil cases. However, the case law on surety contracts has not so much focused on the existence of a family relationship between surety and principal debtor, but has rather concentrated on the conduct of the bank towards the potential surety. Although under previous Italian law the scope of the surety obligation could in principle be extended to obligations deriving from bank transactions that took place after the conclusion of the contract, the principle of good faith governing the relation between bank and surety could impede such an extension. In a case in which the extension of the credit covered by the surety was established as a result of a secret agreement between the bank and the principal debtor, the bank's conduct infringed good faith and, therefore, the surety would not be liable to pay the sum in question.⁶⁰ 'Good faith' in this case was said to go 'beyond' as well as 'against' contractual provisions, because it is based on the ethics of solidarity and – having the characteristics of a norm of 'public order' – ranks higher than the conditions agreed upon between the parties.

Even if the *Corte di Cassazione* did not explicitly refer to the Constitution, this interpretation of 'good faith' directly relates to the principle of solidarity that is considered a basic norm of contractual parties' conduct towards each other, as well as one of the principles on which the Italian nation state is based.⁶¹ In other, later decisions the court has in so many words said that judges should interpret 'good faith' in light of the 'duty of solidarity' codified in Article 2 *Costituzione*.⁶²

Summarising, the higher courts of the countries that have been compared here to some extent follow similar lines of reasoning.⁶³ All refer to the bank's duty to inform the vulnerable surety of the risks related to the contract, especially in a situation in which the surety may easily be mistaken

⁵⁸ Note that a first case concerning the application of the HRA 1998 in contract law also concerned consumer credit, i.e. the case of *Wilson v. First County Trust Ltd*. See section 2.5.2 and Prentice 2004.

⁵⁹ Compare *Barclays v. O'Brien* [1994] 1 AC 180, 188-189 and 195 ff. (Lord Browne-Wilkinson). Though policy considerations are 'kept in mind', the actual solution of the case results from considerations on the doctrine of notice.

⁶⁰ *Corte di Cassazione* 18 July 1989, n. 3362, *Foro it.* 1989, I, 2750. Note that the current provisions of the *Codice civile* require that the surety contract specifies the maximum amount of credit; Article 1938 c.c.

⁶¹ See Article 2 of the Italian *Costituzione* of 1948. It may be observed that this interpretation of the norm of 'good faith' is very similar to the line of reasoning of the Dutch Supreme Court when deciding on the basis of Article 6:248(2) *BW*. Compare Hesslink 2004c, p. 477, on the 'common core' of good faith interpretation in Europe.

⁶² *Cass. civ.* 20 April 1994, n. 3775, *Giust. civ.* 1994, I, p. 2159-2173 and *Cass. civ.* 24 September 1999, n. 10511, *Foro it.* 2000, I, 1929.

⁶³ The European Court of Justice, on the other hand, has not engaged in the debate on the protection of relatives standing sureties, determining that the Directive on doorstep selling did not extend to this type of case; C-45/96, ECJ 17 March 1998, *Jur.* 1998, I-1199 (*Dietzinger*). See also Gerstenberg 2004, p. 784-785.

as to the risks he or she assumes. This is for instance the case when there is a family relation between the surety and the principal debtor, and the former may feel emotional pressure to secure the latter's debts to the bank.

Whereas the Dutch and English courts limit themselves to this private law argument, the Italian Supreme Court seems to lean somewhat more towards a constitutional discourse, referring to the principle of contractual solidarity that governs the relationship between the parties. Only in German case law have such constitutional values been openly brought into play. Although it remains doubtful whether the *Bundesgerichtshof* would ever have introduced them of its own motion, the fact that the *Bundesverfassungsgericht* applied fundamental rights in order to overturn the *BGH*'s decision has revealed a constitutional undercurrent of contract law adjudication. In fact, I would say that the *Bundesverfassungsgericht*'s decision in the *Bürgschaft* case is one of the most striking examples of fundamental rights bringing out into the open the policy questions in contract cases and, moreover, the possibility for the courts to affect the choice for a certain policy of contract law.

Of course this statement should not be understood as a claim that fundamental rights reasoning always leads to the most 'just' outcome. My thesis is that this type of argument brings to the fore the policy issues engaged in the case and, consequently, the range of possible resolutions from which the court may choose. In that sense, it would add something to the traditional balance of interest in contract cases.⁶⁴ It could reduce the factor of coincidence in courts reaching similar decisions in similar cases.⁶⁵

That an eye should be kept on the extent to which fundamental rights really address the dispute between the contract parties is however demonstrated by recent Italian case law on the *ex officio* reduction of contractual penalties. This example makes clear that there may be differences of opinion regarding the duty of courts in civil cases to protect general interests of the legal order, which may be explained in the light of fundamental rights. In order to make the translation from contract law to the general interest, however, the fundamental rights involved should be clearly defined.

6.2.3 Reduction of contractual penalties⁶⁶

The reduction of contractual penalties has been the subject of debate in several recent Italian cases. The question was whether judges are allowed to lower the amount of manifestly excessive penalties, even though the parties have not requested such a reduction.⁶⁷ Traditionally, Italian law did not allow for such judicial activity, but under the new regime that the *Corte di Cassazione* has established judges are considered to have a power as well as a duty to redress excessively high penalties on their own initiative.⁶⁸

⁶⁴ See also Vranken 2005, p. 12-13, who uses the suretyship example to illustrate that it can be worthwhile considering individual cases from a wider perspective.

⁶⁵ Compare section 3.2.2.c.

⁶⁶ On this subject, see also Mak 2007.

⁶⁷ See section 2.4.2.

⁶⁸ *Cass. civ.* 24 September 1999, n. 10511, *Foro it.* 2000, I, 1929; *Cass. civ.*, joint divisions, 13 September 2005, n. 18128, *Foro it.* 2005, I, 2985. The Court has recently confirmed its new orientation in *Cass. civ.* 28 September 2006, n. 21066, www.cortedicassazione.it (last consulted on 8 November 2006).

a) *Policy issues*

The policy issues involved in this case example resemble those engaged by the sureties by relatives, although usually the emotional aspects will be of lesser relevance than in the latter situation. Policy issues may be distinguished on two levels.⁶⁹ In the first place, there is the general level of the legal order, on which the limits to party autonomy have to be determined and secured, also in light of the principle of solidarity.⁷⁰ For the contractual penalty this means that the courts have to assure autonomy for both parties in determining the consequences of the non-performance of the contract. An excessive penalty would disturb the contractual equilibrium, indicating the domination of the creditor over the debtor, and judicial intervention would therefore be required.⁷¹ It is the subject of discussion in Italian law whether this intervention should take the form of determining the nullity of the penalty clause under Article 1322 *c.c.* (freedom of contract) or of an *ex officio* reduction of a manifestly excessive penalty under Article 1384 *c.c.* (reduction of contractual penalties).

The second level on which questions of policy emerge is that of the parties themselves. On that level, a choice has to be made between the protection of the debtor and that of the creditor. Protection of the debtor might be seen in the light of the protection of the weaker party, if a parallel is drawn with consumer protection, as in the surety example. Nevertheless, it has to be kept in mind that the debtor of a contractual penalty is not always the weaker contractor and that a protective policy might therefore not by definition serve the intended party.⁷² On the other side of the balance there is the creditor's interest in the protection of his economic interests and in being secured compensation in case of non-performance. This interest relates to the question of respect for the anticipation of the liquidation of damage as it has been made by the parties, and thus for their autonomous decision-making.

b) *Cases*

The case law of the Italian *Corte di Cassazione* has changed approach on the question of the *ex officio* reduction of penalties in a rather drastic way, apparently on the basis of fundamental rights argumentation. Indeed, the traditional interpretation of Article 1384 *c.c.* did not permit the judge to reduce a manifestly excessive penalty on his own motion, since this would interfere with the contracting parties' autonomy.⁷³ The *Corte di Cassazione*, however, has now determined that the review of the height of the penalty refers to a general interest of the legal order and such a review therefore may, and even should, be conducted even if parties have not explicitly requested a reduction.

These different opinions on the possibility of an *ex officio* reduction of contractual penalties appear to relate to different views on the relation between the two levels on which policy questions have to be answered. According to Marini, for instance, the penalty clause imposes a *private law punishment* and as such should be subjected to judicial review.⁷⁴ This review would not

⁶⁹ Compare Zoppini 1991.

⁷⁰ Compare *Cass. civ.*, joint divisions, 13 September 2005, n. 18128, *Foro it.* 2005, I, 2985, no. 6.9.

⁷¹ Compare Schelhaas 2004, p. 434.

⁷² Section 2.4.2.

⁷³ Compare Palmieri 2006. See also *Cass. civ.*, joint divisions, 13 September 2005, n. 18128, *Foro it.* 2005, I, 2985, no. 6.9, summarising the various perspectives on the subject.

⁷⁴ Marini 1984, p. 152-155.

regard the interest of the individual parties, but a general interest of the legal order to exercise control over the punitive function of the contractual penalty. It seems that the *Corte di Cassazione* has followed this line of reasoning in its recent case law.⁷⁵

The Court's new orientation, however, has some problematic aspects attached to it, which come to the fore especially when also taking into account the second level that we have distinguished, the level of the parties. Zoppini has convincingly argued that the general interest of the legal order should only play a part in the adjudication of the validity of the penalty clause under Article 1322 *c.c.* (freedom of contract).⁷⁶ The possibility of a reduction under Article 1384 *c.c.* would offer a secondary control of the actual amount of the penalty in relation to the creditor's interest at the moment the contract was concluded. In a case of manifest excessiveness, a reduction would then be possible. Contrary to the question of validity, however, this secondary review in Zoppini's opinion does not concern the general interest to safeguard the limits to party autonomy and, therefore, cannot be effectuated *ex officio*. It regards the evaluation of the consequences of a clause the validity of which has already been verified in light of Article 1322 *c.c.*⁷⁷ Allowing the judge to reduce the penalty on his own motion would mean confusing the two levels of review.

Normally, these conflicting theoretical positions do not feature very prominently in court decisions; a reference to the established interpretation of the civil code provision usually suffices to provide grounds for the judgment.⁷⁸ Earlier the hypothesis has been submitted that the constitutional reading of contract law concepts might bring the underlying policy questions into the open. It is therefore interesting to see what role fundamental rights have played in the reasoning of the Italian Supreme Court in the contractual penalty cases.

The argument that judges should guard the limits of private autonomy in the light of the principle of solidarity refers to a balance that has to be struck between two values protected by the Italian Constitution: on the one hand, freedom of enterprise (Article 41 *Cost.*) and, on the other, the principle of solidarity (Article 2 *Cost.*).⁷⁹

A substantive review of a contract had already been recognised in earlier Italian case law, on grounds similar to those of the German *Bürgerschaft* decision. As we have seen before,⁸⁰ the *Corte di Cassazione* has determined that the courts in civil cases should guarantee that respect for the formal equality of contract parties would not result in accepting situations in which substantive justice was at risk.⁸¹ The principle of solidarity was considered to set a limit to a party's discretionary powers if this would endanger the other party's autonomy. The Italian Supreme Court now seems to have extended this line of reasoning to the question of an *ex officio* reduction of manifestly

⁷⁵ Palmieri 2000. The Italian courts are not allowed to refer to legal literature, so for that reason no explicit reference to Marini, or others, can be found in the judgments; see Article 118(3) of the provisions implementing the code of civil procedure, *Disposizioni attuative e transitorie del codice di procedura civile*, Regio. Decreto 18 December 1941, n. 1368.

⁷⁶ Zoppini 1991.

⁷⁷ Zoppini 1991.

⁷⁸ As can be seen from the recent decision *Cass. civ.* 28 September 2006, n. 21066, which repeats the main rules established in the 2005 judgment of the joint divisions of the Court.

⁷⁹ *Cass. civ.* 24 September 1999, n. 10511, *Foro it.* 2000, I, 1929; *Cass. civ.*, joint divisions, 13 September 2005, n. 18128, *Foro it.* 2005, I, 2985.

⁸⁰ Section 2.4.2.

⁸¹ *Cass. civ.* 20 April 1994, n. 3775, *Giust. civ.* 1994, p. 2164-2165.

excessive contractual penalties, requiring the courts to keep an eye on the possibilities for both parties to act in an autonomous manner.

Insofar as they address the limits of party autonomy, the Italian judgments on penalty clauses resemble the German Constitutional Court's decision in the *Bürgschaft* case.⁸² The German Court required a judicial review of the contents of the contract in light of the principle of self-determination (*Selbstbestimmung*) and the principle of the social state (*Sozialstaatsprinzip*). This means that judges have a duty to ensure that the contractual equilibrium is not disturbed and, therefore, have to interfere when a contract party dominates the other party to the extent that the other party can no longer act in autonomy.⁸³ A surety contract that puts at risk the means of existence of the surety, the relative of the principal debtor, may thus be held invalid.

A difference, however, appears to be that the German Court related this autonomy-based argument to a policy of weaker party protection, whereas the *Corte di Cassazione* has not made a distinction on the basis of the bargaining power of the debtor. In the example of sureties by relatives, it seems a fair assumption that the surety will be the weaker party in his relationship with the bank. In case of contracts including a penalty clause, however, it is far from certain that the debtor of the penalty (i.e. the one providing surety of compensation to the other party) will be weaker than the contract partner. Penalty clauses are often used in construction contracts, for instance, and in that case the debtor is the construction company. If the contract involves an individual, non-commercial client, it may be expected that the construction company will hold the stronger bargaining position. The Italian cases do not address this point.

It seems that the *Corte di Cassazione* has ignored two important aspects of the judicial review of the content of contracts. In the first place, the question of substantive equality has not been posed and, as we have just seen, the judgment seems to promote a general judicial duty to review the amount of contractual penalties. The Court focuses on redressing the formal contractual equilibrium and thus does not differentiate according to the bargaining position of the parties, i.e. it does not provide for the protection of weaker parties but argues for a general check on penalty clauses. While guaranteeing formal equality, the question remains whether substantive equality is protected in this way, since the debtor of the penalty is not necessarily the weaker contract party. An *ex officio* reduction of the penalty might thus, at least in theory, disturb the substantive contractual balance even further.⁸⁴

In the second place, it seems that the *Corte di Cassazione* has applied the argumentation regarding the protection of the general interest to the level of specific party protection. It justifies the *ex officio* review of contractual penalties on the basis of the judge's task to assure private autonomy. If we follow the aforementioned analysis by Zoppini, however, the general interest of the protection of autonomy regards the validity of the penalty clause rather than the possibility of reducing the penalty. An abuse of autonomy or, as the case may be, an infringement of the other party's autonomy could entail the nullity of the penalty clause under Article 1322 *c.c.* The question of a possible reduction would only arise if the clause were held valid, but the proportionality of the

⁸² *BVerfG* 19 October 1993, *BVerfGE* 89, 214 (*Bürgschaft*). Compare Comandé 2007.

⁸³ Compare the previous subsection.

⁸⁴ See also section 2.1.4.c.

amount of the penalty were contested by the debtor.⁸⁵ An *ex officio* reduction could not be justified on the basis of the general interest of the legal order.

The German *Bundesgerichtshof*, in its 1994 judgment in the *Bürgschaft* case, for similar reasons might have restricted itself to questions of the validity of the (surety) agreement, instead of opting for a reduction of the sum that had been contractually assured. As regards penalty clauses, moreover, German law explicitly excludes an *ex officio* reduction (§ 343 BGB).⁸⁶ The amount of the penalty might play a role in the adjudication of the validity of the clause,⁸⁷ just as the threat to the daughter/surety's *Existenzgrundlage* was of relevance for the evaluation of the validity of the suretyship.⁸⁸ But the question of a reduction would only seem to arise in case of a valid clause.

Dutch law on the reduction of contractual penalties also expressly requires a request to that extent by the debtor (Article 6:94(1) BW).⁸⁹ An exception is made for penalty clauses that solely concern costs for debt collection or procedural costs, the *ex officio* reduction of which is allowed on the basis of Article 242 of the *Wetboek van Burgerlijke Rechtsvordering* (the Dutch code of civil procedure). An explanation for this exception may be found in the argument that these types of cases are often solved through default judgments.⁹⁰ Given the often disproportionate amount of costs for debt collection in relation to the sum of the debt, the judge's power to *ex officio* reduce the penalty could be considered an instrument for the protection of the debtor. A further argument is that the amount of costs for debt collection and procedural costs is often easy to determine and the judge can, therefore, independently reach a judgment on the reasonableness of the sum agreed upon in the penalty clause and decide on a possible reduction.⁹¹

For the adjudication of 'normal' contractual penalties the judge would need more information from the parties and an explicit request for a reduction (or augmentation) of the penalty is thus required by Article 6:94 BW. It has been defended that in some cases an *ex officio* reduction of the amount of the penalty might be justified on the basis of Article 6:248(2) BW, but only if enough information has been provided by the parties. The results should not differ from those reached on the basis of Article 6:94 BW.⁹² In case of an objectively excessive penalty, furthermore, the penalty clause might be disapplied on the basis of Article 6:248(2) BW.⁹³ A cautionary judicial approach to the reduction of penalties in any case is promoted, with an eye on respect for the autonomy of the parties.⁹⁴

In the same vein, the *Hoge Raad* has recently determined that judges in civil cases do not have to establish *ex officio* whether a penalty clause included in standard terms is 'unfair' in the sense of Directive 93/13/EEC.⁹⁵ The reason for this was that the list of terms attached to the

⁸⁵ See, again, Zoppini 1991.

⁸⁶ Schelhaas 2004, p. 222-223, with references to the history of § 343 BGB.

⁸⁷ BGH 23 January 2003, VII ZR 210/01, and BGH 8 July 2004, VII ZR 24/03, www.bundesgerichtshof.de (last consulted on 9 November 2006).

⁸⁸ BVerfG 19 October 1993, BVerfGE 89, 214 (*Bürgschaft*).

⁸⁹ At the request of the creditor, moreover, the judge may award additional compensation in the case of an unreasonably low penalty (Article 6:94(2) BW). See also Schelhaas 2004, p. 71 ff.

⁹⁰ Schelhaas 2004, p. 71-72.

⁹¹ Schelhaas 2004, p. 72, with references to parliamentary documents.

⁹² Schelhaas 2004, p. 73-79.

⁹³ Schelhaas 2004, p. 76.

⁹⁴ Schelhaas 2004, p. 72 and p. 80-81, with references to case law.

⁹⁵ HR 24 March 2006, RvdW 2006, 311.

Directive was being considered as ‘indicative’ only, which meant that there would be no obligation for the Dutch judges to take this list into account when assessing standard contract terms in the light of Article 6:233(a) *BW* (dealing with the voidability of standard terms).⁹⁶ Although this judgment finds support in legal literature,⁹⁷ an important point of criticism may be based on the European Court of Justice’s decision in the *Océano* case.⁹⁸ It has been defended that the ECJ has not only given national judges the power to evaluate the fairness of contract clauses *ex officio*, but has even put them under an obligation to do so, in order to give effect to the Directive.⁹⁹ From this perspective, judges should take an active part in assuring the compliance of penalty clauses with the European rules on unfair standard contract terms.

The Dutch rules thus resemble the German ones insofar as they tend to lean towards upholding reasonable penalty clauses on which parties have agreed in autonomy and require the debtor’s action for adjudicating the possibility of a reduction of the penalty. The role of fundamental rights in this type of case nevertheless seems limited to their inspiration for balancing freedom of contract¹⁰⁰ against the need for weaker party protection.

In England, finally, a distinction is made between penalty clauses and liquidated damages clauses.¹⁰¹ The former serve as coercion for the debtor to perform the principal obligation and are invalid according to English law. The latter give a genuine pre-estimate of the loss suffered by a breach of contract and are valid.¹⁰² In general the courts will take a cautious approach in defining a contractual provision as a penalty clause: ‘freedom of contract is the norm and the penalty clause jurisdiction is the exception’.¹⁰³ As has been pointed out by McKendrick, the problem is thus how to demarcate the scope of the rule.¹⁰⁴ Should parties be left free to decide for themselves the remedial consequences of a breach of contract, thus having freedom of contract prevail? Or should the scope of the rule be broadened in order to prevent parties from avoiding judicial intervention by editing the clause so as to have it fall outside the rule? As McKendrick observes, ‘[t]his is a difficult policy question and its resolution depends upon the balance to be struck between freedom of contract, on the one hand, and a concern for fairness (both in procedural and substantive terms) on the other’.¹⁰⁵ The principles at stake are thus similar to those in the other legal systems discussed here, although no reference to fundamental rights is made and the

⁹⁶ See no. 3.5.4 of the Court’s judgment, and no. 2.50-2.53 of the opinion of Advocate-General Wesseling-Van Gent.

⁹⁷ Schelhaas 2004, p. 313-317, with further references. See also no. 2.51 of the Advocate-General’s opinion in the case of 24 March 2006.

⁹⁸ Loos 2001, p. 102, referring to C-240/98 – C-244/98, ECJ 27 June 2000, *Jur.* 2000, I-4941 (*Océano Grupo Editorial v Rocío Murciano Quintero and others*).

⁹⁹ Loos 2001, p. 102 and by the same author, 2006b, p. 73. Loos, however, observes that it is not said that judges will always make use of this *ex officio* power, since they are not always aware of European rules that have not been codified in the Civil Code; Loos 2001, p. 102.

¹⁰⁰ For instance HR 17 December 2004, *NJ* 2005, 271; the opinions of Advocate-General Wesseling-Van Gent in HR 3 December 2004, *NJ* 2005, 238 and HR 24 September 2004, *NJ* 2006, 201; and the comment of Hijma on HR 13 February 1998, *NJ* 1998, 725. Compare section 1.2.3.

¹⁰¹ Treitel 2003, p. 999-1000; McKendrick 2003, p. 1096-1097. See also Schelhaas 2004, p. 155 ff.

¹⁰² *Dunlop Pneumatic Tyre Company Ltd v. New Garage and Motor Company Ltd* [1915] AC 79.

¹⁰³ McKendrick 2003, p. 1102. Compare section 1.2.3.

¹⁰⁴ McKendrick 2003, p. 1103.

¹⁰⁵ McKendrick 2003, p. 1103. See also Schelhaas 2004, p. 170-172.

discussion revolves around the question of the validity of the clause instead of the possibility to reduce the penalty.

Summarising, the Italian case law on the *ex officio* reduction of contractual penalties quite strongly deviates from the solutions in the other legal systems. On the basis of fundamental rights argumentation, the *Corte di Cassazione* has argued that judges have the power and duty to reduce manifestly excessive penalties on their own motion. Its deliberations, however, leave considerable room for criticism, as has been proved in Italian case comments. From the comparison with Dutch, German and English law it moreover appears that the policy issues engaged by the question of *ex officio* reducibility have only been marginally taken into account.

It might seem, thus, that the Italian judgments challenge the hypothesis that reference to fundamental rights more openly brings the policy argument to the fore. Though the *Corte di Cassazione* considers the topic in terms of constitutionally protected principles of autonomy (Article 41 *Cost.*) and solidarity (Article 2 *Cost.*), its judgment remains vague as to the policy choices that may be made with regard to the judicial power to reduce contractual penalties. Nevertheless, I would hesitate to jump to the conclusion that the fundamental rights thesis no longer holds.

In my opinion, the Court's vagueness as to the policies served by a choice for an *ex officio* reduction of penalties does not contradict the part of the fundamental rights hypothesis that says that these rights mediate between the political level and the level of contract law rules. In fact, the *Corte di Cassazione* acknowledges the relationship between the general interest and the contractual level, insofar as it considers the judicial power to reduce manifestly excessive penalties to be a power given 'not in the interest of the party, but in the interest of the legal order, to avoid that contractual autonomy surpasses the limits within which the parties' interests are worthy of protection'.¹⁰⁶

The problem seems to lie in the elaboration of this statement. While the Court touches upon the relation between public and private interests, its further reasoning fails to name the various policy choices that were available. However, even this observation in my view does not oppose the fundamental rights hypothesis, given that the *Corte di Cassazione* – after its initial emphasis of the 'constitutional reinterpretation' of concepts of contract law – hardly develops its reasoning regarding compliance with fundamental, constitutional rights. In particular, it has not specified how the principle of solidarity should be interpreted and what effect it has on the limits to party autonomy.¹⁰⁷ The Court, for example, does mention¹⁰⁸ the meaning of Article 2 *Cost.* for the interpretation of good faith as established in earlier case law, but it does not extend the idea of solidarity as safeguarding substantive justice to the question of the reducibility of contractual penalties. In fact, as has been said earlier, it does not differentiate according to the bargaining strength of contract parties, in order to protect weaker parties against stronger ones.

¹⁰⁶ *Cass. civ.*, joint divisions, 13 September 2005, n. 18128, under 6.9: '(...) il potere di controllo appare attribuito al giudice non nell'interesse della parte ma nell'interesse dell'ordinamento, per evitare che l'autonomia contrattuale travalichi i limiti entro i quali la tutela delle posizioni soggettive delle parti appare meritevole di tutela, anche se ciò non toglie che l'interesse della parte venga alla fine tutelato, ma solo come aspetto riflesso della funzione primaria cui assolve la norma.'

¹⁰⁷ See also section 6.3.2.c below.

¹⁰⁸ *Cass. civ.* 24 September 1999, n. 10511, under 2.6.2, referring to *Cass. civ.* 20 April 1994, n. 3775. See also section 2.4.2.

Italian case law on an *ex officio* reduction of contractual penalties thus may not be the best example of fundamental rights argumentation having an added value with respect to contract law adjudication, seeing that it has not fully evaluated the policy issues attached to the topic. However, it cannot be considered to seriously undermine the hypothesis that fundamental rights bring these policy questions into the open, for the simple reason that the fundamental rights argument has remained underdeveloped.

Notwithstanding this criticism of the case law, a merit of the Court's constitutional interpretation of the question of an *ex officio* reduction of contractual penalties – though incomplete – might be seen in the fact that it has provided a framework for the discussion in the legal literature of the different views on the subject. The application of fundamental rights has brought the policy questions out in the open, which could stimulate the discussion on the choices which the *Corte di Cassazione* has made. From a comparative point of view, however, it appears that the elaboration of these questions in case law could have been more specific and could have led to an affirmation of the traditionally cautious approach towards a judicial reduction of penalties.

6.2.4 *Post-contractual duties in doctor/patient relations*

A contractual relationship that also clearly entails questions of self-determination and protection is the one between patient and doctor. The question is to what extent the parties should respect certain duties of care for one another, also in the phase after the formal ending of the contract, that is after the performance of the treatment. The case study we will look into now is atypical in the sense that it concerns the protection of the medical practitioner rather than the patient. It builds on the dentist judgment of the Dutch *Hoge Raad*, in which the court was presented with the question whether a duty to co-operate in an hiv test could be derived from a medical treatment contract in the light of the requirements of good faith and fair dealing.¹⁰⁹

a) *Policy issues*

The policy issues involved were, on the one hand, related to the doctor/patient relationship, in which the patient usually holds a weaker position and, for that reason, is protected by specific legislation.¹¹⁰ On the other hand, however, it was the dentist who in this case needed to obtain certainty about the possibility of an infection resulting from blood-on-blood contact that had taken place during the intervention. Therefore, the health interests involved were, atypically, not in the first place those of the patient, but those of the doctor.

In the mirror case, which would be the usual relationship between doctor and patient, the question is to what extent the doctor is obliged to continue his care for a patient after the ending of the treatment. Both policies of the protection of health interests ('after-care') and of self-determination (the patient's decision how to proceed) are involved.

b) *Cases*

The quite recent decision of the Dutch Supreme Court, the *Hoge Raad*, serves as an example of finding 'justice' by taking into consideration fundamental rights in a contractual relationship.¹¹¹ It

¹⁰⁹ See section 2.3.2.

¹¹⁰ Articles 7:446-468 of the Dutch civil code.

¹¹¹ HR 12 December 2003, NJ 2004, 117.

is somewhat more complex than, for instance, the suretyship example. While the latter regarded the *protection* of the fundamental rights of a clearly ‘weaker’ contract party, the Dutch dentist case concerned the *limitation* of a party’s fundamental rights. It addressed the standards of care applicable in medical treatment relations, situated in the ‘no man’s land’¹¹² between tort and contract liability.

This case, on the one hand, affirms that under certain circumstances it is necessary to take into account fundamental rights when balancing the interests of contract parties. In this case it would hardly be possible to allow the claim for the blood test without looking into the effects on the physical integrity of the other party. On the other hand, however, the case illustrates that fundamental rights may be limited on the basis of the balance of the parties’ interests. In this sense they can be said to play a different role than in the relation between State and citizen, in which fundamental rights in principle are of an absolute nature (the State may not infringe them) and limitations are only allowed on the grounds named in the Constitution. The formal equality of contract parties implies that the limitation of a fundamental right always has to be seen in the light of all interests of the other party and that these interests may be deemed to outweigh the interest protected by the fundamental right.¹¹³ In the present case, it was thus held that the minimisation of damage to the dentist’s health could be considered more important than the patient having to undergo a minor infringement of his physical integrity by having blood taken from him. This followed from the principle of ‘reasonableness and fairness’ in contract law, which governed the parties’ conduct towards one another.¹¹⁴

The dentist case seems to build on a theory of *Wechselwirkung* of fundamental rights and contract law that is similar to the German one developed in the *Lüth* case that was mentioned earlier. It applies general clauses of private law in order to determine the boundaries of fundamental rights in contract law, considering whether a limitation is justified in the light of standards of ‘good faith’ and ‘proper social conduct’, while at the same time reading these open norms against the constitutional background.

To some extent the doctrine of *Wechselwirkung* however appears to have developed less than in Germany. While the Dutch courts integrated the fundamental rights of the patient into the balancing of contract-related interests without considering in so many words the ‘ranking’ of these rights, the German courts might follow a different line of argument. In a case concerning a tenant who had not told his landlord about the fact that he had been placed under legal guardianship because of a mental illness, the *Bundesverfassungsgericht* ruled that there had not been any duty to disclose this information.¹¹⁵ The landlord could not terminate the contract on this ground. Thus, it appears that the right to self-determination in respect of personal medical information (safeguarded by Articles 1(1) and 2(1) GG) in German law prevails over the contracting partner’s right to information (Article 5 GG). Applied to the blood-test case, this would mean that the

¹¹² Compare Busnelli 1991b, p. 539-577, referring to Gilmore, *The Death of Contract*, Columbus, Ohio 1974.

¹¹³ In Dutch law, this aspect of the ‘fundamental rights in private law’ discourse is still under discussion. Note that one of the general objections against applying fundamental rights in contract law concerns the integration of these rights into the balancing of interests: if fundamental rights are put on the same level as private law interests, does that not erode their content? See, for instance, Dute 2003.

¹¹⁴ See further section 2.3.2.

¹¹⁵ *BVerfG* 11 June 1991, *BVerfGE* 84, 192.

patient's right not to know about a possible hiv infection, or not to tell the other party, would outweigh the dentist's interests in minimising his damage. The situation, however, differs from the tenancy case on the point where *the other party's health interests* are engaged. While the landlord might have merely suffered pecuniary damage as a result of the tenant keeping silent about his mental condition, the dentist risked the negative side-effects of the medication he would have to take in case of uncertainty about the possibility of hiv infection. On this basis, the balance of interests would probably go the other way than in the tenancy case, also under German law.

In this context, it should be observed that there is no Constitutional Court in the Netherlands, whereas Germany has its *Bundesverfassungsgericht*.¹¹⁶ Although the Dutch courts in civil cases regularly consider the applicability of fundamental rights, their caution with regard to this application may be partly explained by the lack of a specialised court. The judges seek to resolve the cases within the system of contract law before looking at the constitutional aspects. In Germany, on the other hand, the *Bundesverfassungsgericht* reviews the constitutionality of acts by the public authorities, i.e. the executive, the judiciary and the legislature (§ 13 *BVerfGG*). It therefore does not seem surprising that this court has more profoundly considered the role of fundamental rights also in contract law cases.

In terms of policy issues, it may be said that the Dutch case has brought into the open the dilemmas related to the possible limitation of the fundamental rights of a party who in principle is the 'weaker' one in the contractual relationship. Roles were reversed when the health interests of the dentist came into play. In this sense, the example shows that solidarity in contractual relationships cannot always be based on the formal status of a party (doctor v. patient, big enterprises v. consumers, landlord v. tenant).

The policy pursued in this case, consequently, might be said to be one of protection of the substantively weaker party, which was the dentist. In particular the judgment of the Court of Appeal made this clear, when it spoke of the duty of care 'encompassing a post-contractual duty of the patient to do what was required, within reasonable margins, in order to limit the damage the dentist had suffered during the treatment'.¹¹⁷

It is interesting to note that in an Italian case similar considerations have been made regarding the post-contractual relation between doctor and patient, albeit that in this case the patient was the weaker party.¹¹⁸ The patient, who suffered from a lowering of his voice, had undergone surgery for the removal of a polyp on his vocal cords. Despite continuous requests from the patient, the surgeon had however not informed him about the results of the examination of the polyp. After a few months, the patient underwent another operation, performed by a different surgeon, and it was found that he suffered from cancer, which had also spread to the larynx. Consequently, the larynx had to be completely removed, as a result of which the patient lost the use of his voice and could not return to his job. He sued the first surgeon for the damage suffered, in particular on the ground that the surgeon had failed to communicate the results of the examination of the first polyp to him.

¹¹⁶ Compare section 6.1.

¹¹⁷ *Hof Amsterdam* 18 April 2002, *TvGR* 2003, p. 110-121, in particular consideration n. 4.17.

¹¹⁸ *Trib. Firenze* 7 January 1999, *Resp. civ.* 2000, 157, with comment by Bellanova.

The *Tribunale di Firenze* considered the case in the light of the doctor's duty to inform the patient, which required him to correctly inform the patient about the precautionary measures the latter should take to remain in good health, also in the phase after the conclusion of the medical performance in the strict sense (i.e. the removal of the polyp). Only in this way could the patient be given the possibility to decide how to act and which further treatment to undergo (the principle of self-determination).

The court based its decision on the requirements of good faith that governed the post-treatment relationship between doctor and patient, without making explicit reference to fundamental rights, such as the right to health protected by Article 32 of the Italian *Costituzione*. As in the aforementioned Dutch case on a non-competition clause,¹¹⁹ the court nevertheless did consider the policies involved. It emphasised the need to ensure that the patient could autonomously decide on the treatment he would undergo, on the basis of full information given by the surgeon. Moreover, it emphasised that the surgeon could not assume that the patient would actively ask for information and he could not, in the absence of such active collaboration, consider himself absolved from his duty to inform.

The duty of care imposed on the doctor could, thus, be deemed to be a duty of solidarity, in the sense that it required him to act in the patient's interest even if he himself would not gain anything by acting in this way. At the same time, the doctor's solidarity-based conduct should assure the patient's autonomy, in the sense that the latter would be free to decide how to proceed. The judgment thus seems to have something in common with the Dutch dentist case, as well as with the German *Bürgerschaft* case, given that it requires solidarity in order to protect autonomy. I will come back to this in section 6.3, relating the idea to the model represented by the autonomy/solidarity continuum and to the effect of fundamental rights in contract law.

6.2.5 Surrogacy arrangements¹²⁰

A final example may serve to look somewhat beyond the scope of general contract law adjudication. Surrogate motherhood is a complex phenomenon that, from a legal perspective, involves both questions of family law and contract law. Evolving bio-technology has made it possible for new arrangements to emerge that allow couples suffering from fertility problems to have a child. The intended parents may agree with a surrogate mother that she will carry and give birth to a child resulting from artificial insemination. In the case of 'heterologous' artificial insemination the surrogate donates an egg that is inseminated with the semen of the intended father, whereas in the case of 'homologous' artificial insemination¹²¹ the child, genetically, is completely the intended parents' child even though it is carried by the surrogate mother.

European legal systems have chosen different ways to regulate these types of arrangements.¹²² Basically, there are two moments of regulation: First, there is the question

¹¹⁹ See section 6.2.1.

¹²⁰ On the role of fundamental rights in the adjudication of surrogacy cases, see Perfumi & Mak 2008. For a comparative analysis of the (il)legality of surrogate motherhood, see Boele-Woelki & Oderkerk 1999.

¹²¹ In Italian '*utero in affitto*', which literally means 'renting of the womb'. See the *legge* (formal law) n. 40 of 2004.

¹²² As will be presently explained, most European legal systems do not allow surrogacy contracts. England forms an exception. See Perfumi & Mak 2008. On a global level, a famous example is the *Baby M* case, adjudicated by the Supreme Court of New Jersey, 3 February 1988, 109 N.J. 396, 537 A2d 1227 (1988). The Court held that surrogacy arrangements should not be permitted, unless 'the surrogate mother volunteers, without any payment, to act as a surrogate and is given the right to change her mind and to assert her parental rights'. Furthermore, the

whether surrogacy contracts should be considered valid or, rather, void. Second, and in some cases apart from the issue of the validity of the agreement,¹²³ the question arises how to define the legal relations between the child, the intended parents and the surrogate mother once the child has been born.

England was one of the first European countries to enact statutory provisions on surrogate motherhood. The Surrogacy Arrangements Act of 1985¹²⁴ allowed surrogacy contracts, albeit under strict conditions. This Act has been partly amended and supplemented by the Human Fertilisation and Embryology Act 1990, which stipulates that a surrogacy agreement in any case is unenforceable against any of the persons who have entered into it.¹²⁵

German¹²⁶ and Italian¹²⁷ laws forbid surrogacy arrangements. In Germany, §1(1)(7) of the *Embryoschutzgesetz* (Embryo Protection Act) of 1990 stipulates that anyone who assists in the artificial insemination of a surrogate mother or in the implantation of an embryo in the surrogate's uterus is liable under criminal law.¹²⁸ §13b and 13c in conjunction with §14b of the *Adoptionsvermittlungsgesetz* forbid intermediation in surrogacy arrangements, meaning that a third party who develops intermediating activities to bring together intended parents (*Bestellertern*) with a woman willing to serve as a surrogate mother (*Ersatzmutter*) commits a criminal offence.¹²⁹ §13d, moreover, forbids advertising with the aim of finding surrogates or intended parents.¹³⁰ The surrogate herself and the intended parents, however, are in these cases excluded from criminal liability.¹³¹

Brazilian Federal Council of Medicine has adopted a Resolution which permits 'homologous' artificial insemination, though only if the surrogate mother is a close relative of the genetic mother and the 'temporary donation of the womb' has a non-commercial character; www.portalmedico.org.br/resolucoes/cfm/1992/1358_1992.htm, last consulted on 30 August 2006).

¹²³ Even though a legal system might consider surrogacy arrangements to be invalid, it is still possible that the contract is performed in practice, or that arrangements are made without a contract being concluded between the parties. Also in these cases, it has to be decided what is the legal status of the child.

¹²⁴ Surrogacy Arrangements Act 1985, 16 July 1985.

¹²⁵ Section 36 of the Human Fertilisation and Embryology Act 1990, published on www.opsi.gov.uk/acts/acts1990/Ukpga_19900037_en_1.htm (consulted on 18 January 2006).

¹²⁶ The *Embryoschutzgesetz* (Embryo Protection Act) of 13 December 1990, *BGBI. I* 1990, 2746 (amended by the law of 23 October 2001, *BGBI. I* 2001, 2702) and the *Adoptionsvermittlungsgesetz* (Adoption Agency Act) of 2 July 1976, *BGBI. I* 1976, 1762 (newly proclaimed on 22 December 2001, *BGBI. I* 2002, 354).

¹²⁷ *Legge* n. 40/2004.

¹²⁸ §1(1)(7) *Embryoschutzgesetz*: 'Mit Freiheitsstrafe bis zu drei Jahren oder mit Geldstrafe wird bestraft wer es unternimmt, bei einer Frau, welche bereit ist, ihr Kind nach der Geburt Dritten auf Dauer zu überlassen (Ersatzmutter), eine künstliche Befruchtung durchzuführen oder auf sie einen menschlichen Embryo zu übertragen.'

¹²⁹ §13b *Adoptionsvermittlungsgesetz*: 'Ersatzmuttervermittlung ist das Zusammenführen von Personen, die das aus einer Ersatzmutter entstandene Kind annehmen oder in sonstiger Weise auf Dauer bei sich aufnehmen wollen (Bestellertern), mit einer Frau, die zur Übernahme einer Ersatzmutter bereit ist. Ersatzmuttervermittlung ist auch der Nachweis der Gelegenheit zu einer in §13a bezeichneten Vereinbarung.' §13c: 'Die Ersatzmuttervermittlung ist untersagt.' §14b(1): 'Wer entgegen §13c Ersatzmuttervermittlung betreibt, wird mit Freiheitsstrafe bis zu einem Jahr oder mit Geldstrafe bestraft.'

¹³⁰ §1(3)(2) *Embryoschutzgesetz*: 'Nicht bestraft werden, in den Fällen des Absatzes 1 nr. 7 die Ersatzmutter sowie die Person, die das Kind auf Dauer bei sich aufnehmen will.' §13d *Adoptionsvermittlungsgesetz*: 'Es ist untersagt, Ersatzmütter oder Bestellertern durch öffentliche Erklärungen, insbesondere durch Zeitungsanzeigen oder Zeitungsberichte, zu suchen oder anzubieten.'

¹³¹ §14b(3) *Adoptionsvermittlungsgesetz*: 'In den Fällen der Absätze 1 und 2 werden die Ersatzmutter und die Bestellertern nicht bestraft.'

In Italy, law n. 40 of 19 February 2004 has overruled preceding case law, in which surrogacy was sometimes allowed.¹³² The law prohibits both heterologous artificial insemination and ‘*utero in affitto*’, thus effectively forbidding any form of surrogacy. In June 2005 a referendum took place regarding a possible change to this law, but this referendum remained without effect because the required quorum of voters had not been reached.¹³³

The Dutch legislature has until now left it up to the judiciary to deal with surrogacy contracts. Like in Germany, intermediation in surrogacy arrangements has been forbidden in criminal law (Article 151b of the *Wetboek van Strafrecht*, the Dutch criminal code). But no statutory provisions have been drafted on the contractual aspects of the subject.¹³⁴ Although several bills have been proposed, the legislative authorities have not succeeded in reaching a political agreement on these types of arrangements. In principle, however, it may be said that surrogacy contracts cannot be considered void on the basis of a violation of ‘good morals’ or public order. The Minister of Health expressed her approval of resorting to surrogacy in certain exceptional cases in a letter to Parliament in 1997¹³⁵ and the *Planningsbesluit IVF* of 1998 (a ministerial regulation on in-vitro fertilisation)¹³⁶ allows both artificial insemination of the surrogate’s eggs and of another woman’s eggs (i.e. the intended mother’s). Considering the existing practice of surrogacy, approved by the Minister, it can thus not be upheld that surrogacy agreements infringe good morals (Article 3:40 *BW*).¹³⁷

In the Netherlands, the discussion in the legal literature has consequently concentrated on the question of how to regulate the family relations between the child, the intended parents and the surrogate mother. The main question has been whether it is possible to interpret the civil code provisions regarding parental affiliation and parental authority in the sense that a transfer of legal parenthood from the surrogate mother to the intended parents can be established.¹³⁸

Finally, an important aspect of the regulation of surrogacy arrangements that has been emphasised in the legal systems that to some extent allows these types of contracts is the non-commercial character of the agreement. In England, the Surrogacy Act 1985 explicitly forbids the negotiation of surrogacy arrangements on a commercial basis (section 2 of the Act). This does not exclude that the parties agree on a sum to be paid to the surrogate mother for the expenses

¹³² *Trib. Roma* 17 February 2000, *Foro it.* 2000, I, 972, which will be further discussed in the subsequent subsection. Other decisions had held surrogacy contracts invalid: *App. minorenni Salerno* 25 February 1992, *Nuova giur. civ.* 1994, I, 177, *Repertorio Foro it.* 1994, Adozione [0160], n. 46; and *Trib. Monza* 27 October 1989, *Foro it.* 1990, I, 298.

¹³³ In the prelude to the referendum, a lively debate took place on the social and political aspects of the proposed changes. The failure of the referendum, which posed four questions regarding medically-assisted procreation, has partly been ascribed to the call for a boycott by several pro-life organisations and the Catholic Church. See, for instance, the publications on this subject on the website of the newspaper *La Repubblica* around the dates of the referendum, 12 and 13 June 2005: www.repubblica.it, in particular E. Mauro, *Le ragioni del naufragio laico*, *La Repubblica* 14 June 2006. Others attribute the high abstention rate to a general disinterest and lack of information; for example, R. Mannheimer, *Astensione? Ha vinto il disinteresse*, *Corriere della Sera* 14 June 2006.

¹³⁴ Vlaardingerbroek 2003, p. 171.

¹³⁵ TK 1996-1997, 25 000 XVI, nr. 51.

¹³⁶ *Planningsbesluit in-vitrofertilisatie*, *Stcrt.* 1998, 95, amendments *Stcrt.* 2000, 242 and *Stcrt.* 2004, 34.

¹³⁷ Heida & Van der Steur 2001, p. 209-210, p. 212. See also Nieuwenhuis 2001, p. 1797. In a slightly different sense Vlaardingerbroek 2003, p. 176, who gives an overview of the various opinions on the validity of specific parts of the surrogacy agreement. Vranken 2005, p. 106-108, argues in favour of differentiation according to the circumstances of the case in order to establish a norm for evaluating the validity of the contract.

¹³⁸ See, among others: Kalkman-Bogerd 1998, p. 198-202; Heida & Van der Steur 2001, p. 212-213; Vlaardingerbroek 2003, p. 173-175.

incurred, including loss of earnings.¹³⁹ In the Netherlands, concerns have been expressed regarding commercial surrogacy arrangements, in which a woman chooses to be a surrogate mother on the basis of financial motives – as opposed to the surrogate who acts out of compassion or solidarity, for instance a woman bearing a child for her infertile sister or friend.¹⁴⁰ Although intended parents and a commercial surrogate are not liable in criminal law, third parties who aspire to make a profit by negotiating surrogacy arrangements commit a criminal offence according to Articles 151b and 151c of the criminal code.

a) *Policy issues*

The debate on surrogacy in Germany, the Netherlands, England and Italy demonstrates several policy issues related to the regulation of these types of arrangements. In general, there is a tendency to discourage recourse to surrogacy as a means for couples suffering from fertility problems to have a child. The Dutch Minister of Health in her aforementioned letter to Parliament, for instance, wrote that in general a cautious approach should be taken towards surrogate motherhood, because of a lack of empirical data and in light of the assumption that surrogacy in any case would put a psychological and emotional strain on the parties involved.¹⁴¹ In fact, legal literature on the subject points out that regulations in this field should take into account the various risks attached to surrogacy arrangements.¹⁴² It is not unusual, for instance, for the surrogate mother to experience a conflict of conscience when giving up the child that she has carried. Moreover, the health interests of the surrogate related to the pregnancy have to be taken into account. The intended parents, on the other hand, might face emotional and psychological problems when having to deal with a surrogate mother who remains present in the child's life, for instance when the surrogate is a sister or close friend of the couple. Furthermore, there is a risk of emotional distress in case the surrogate refuses to give up the child. In conflict situations between the intended parents and the surrogate mother, the child itself may also be emotionally and psychologically affected. Finally, even if everything goes as planned and the relationship between the parties is good, it may not be excluded that the child suffers from certain psychological damage as a consequence of the fact that he or she has been born out of a surrogacy arrangement.¹⁴³

Notwithstanding these problematic points, it is sometimes stated that surrogacy under certain conditions may offer an adequate remedy for taking away the pain of involuntary childlessness.¹⁴⁴ From a more pragmatic point of view, it has also been observed that the nullity of

¹³⁹ Compare *Re C (Surrogacy: Payments)*, also known as: *Re X's Application Under s. 30 of Human Fertilisation and Embryology Act 1990* [2002] EWHC 157, [2002] 1 FLR 909, [2002] Fam Law 351.

¹⁴⁰ Heida & Van der Steur 2001, p. 209, referring to a report by the Dutch Health Council.

¹⁴¹ TK 1996-1997, 25 000 XVI, nr. 51, p. 1.

¹⁴² See on Dutch law: Vlaardingebroek 2003, p. 174; Nieuwenhuis 2001, p. 1798. On German law: Lüderitz 1990, p. 1636. For Italy, see the Opinion of the Comitato nazionale per la bioetica of 17 June 1994, www.palazzochigi.it/bioetica, as well as Sesta 2000, p. 208. For a brief comparative overview in light of the Italian referendum of 2005, see www.repubblica.it/2005/e/sezioni/politica/dossifeconda/allestero/allestero.html (last consulted on 30 August 2006).

¹⁴³ Compare Merkel-Walther 1991, p. 73 ff.; Heida & Van der Steur 2001, p. 211; Pessers 2005, p. 43 ff. See also the report of the Italian Comitato nazionale per la bioetica of 17 June 1994, www.palazzochigi.it/bioetica, under point 3.

¹⁴⁴ TK 1996-1997, 25 000 XVI, nr. 51, p. 2.

surrogacy arrangements can hardly be insisted upon in a society in which institutions that provide the medical facilities that help realise this type of procreation are in fact allowed.¹⁴⁵ A policy based on this view seems to aspire towards the reconciliation of the regulatory framework with the reality of biotechnological evolution, doing so by determining the limits within which intended parents may make use of the state of the art in procreative medicine.

At the centre of the debate on surrogacy, whether presenting arguments in favour or against, are usually the interests of the child that is the subject of the arrangements made by the intended parents and the surrogate. The Italian Commission on Bioethics considered that ‘the well-being of the newborn child should be considered the central point of reference for the evaluation of the various techniques of procreation.’¹⁴⁶ This view is confirmed in Dutch, German and English law.¹⁴⁷ As we shall see in the analysis of case law, however, there are significant differences in the interpretation of the child’s best interests, not only between legal systems but sometimes also between courts belonging to the same jurisdiction.

The emphasis which is placed on the non-commercial character of surrogacy arrangements in principle may be considered as one of the means for securing that the interests of the child are adequately protected. At the same time it seeks to protect potential surrogates. The non-commercial nature of a surrogacy agreement should prevent the trade in children as well as ensure that a woman’s willingness to become a surrogate mother is not based on her financial needs.¹⁴⁸

Considering the various policy issues, a difference with the dilemma of non-competition clauses and sureties by relatives comes to the fore. In the latter cases, the choice of policy inevitably meant a choice that to a greater or lesser extent favoured one of the parties’ interests: a choice for the protection of an employee’s freedom of profession inevitably limited the employer’s possibilities to secure his company’s interests. And a choice for the protection of the surety implied a loss for the bank. The policy questions related to surrogacy have a more ambiguous relation to the parties involved. A policy of child protection does not necessarily imply a prohibition of surrogacy and, thus, a choice against the intended parents’ and surrogate’s interests. A policy of protecting the surrogate, on the other hand, does not necessarily harm the child’s interests. And a policy of protecting the intended parents’ interests in procreation does not necessarily go against the interests of the child and the surrogate either. From this perspective, policies might concur.

b) Cases

Given the fact that English, German and Italian law have legislative provisions on the subject of surrogate motherhood, there are not many court decisions regarding the validity of these types of arrangements. In the Netherlands, on the other hand, there is no legislation on the compliance of surrogacy contracts with good morals (Article 3:40 *BW*) and case law focuses on the regulation of existing relations between the surrogate mother, the intended parents and the child born as a result of the arrangements made.

¹⁴⁵ Nieuwenhuis 2001, p. 1797.

¹⁴⁶ See its aforementioned report on techniques for medically-assisted procreation of 17 June 1994, www.palazzochigi.it/bioetica, under point 4.

¹⁴⁷ For case law references, see the next subsection. See also Vlaardingbroek 2003, p. 178; Heida & Van der Steur 2001, p. 211.

¹⁴⁸ Lüderitz 1990, p. 1636.

In England, several cases have arisen that concern surrogacy contracts, but none have been solved on the basis of fundamental rights argumentation. It has been affirmed in case law that commercial surrogacy agreements are unenforceable and, also in light of the prohibition of commercial surrogacy under criminal law, the expenses for such a contract could thus not be claimed in damages from the hospital that was to blame for the intended mother's infertility.¹⁴⁹ In other cases, concerning children already born following surrogacy contracts, the courts had to rule on matters of custody. The most important element in the consideration of these cases was the best interest of the child in the specific case.¹⁵⁰ Policy questions were left to the legislature, considering that: 'The moral, ethical and social considerations were for others and not for the wardship court which was solely concerned with what was best for the child in the circumstances.'¹⁵¹

In Germany, legislation has confirmed earlier case law, in which a commercial surrogacy contract was held to infringe 'good morals'.¹⁵² The court interpreted 'good morals' (§ 138 BGB) in the light of the system of values incorporated in the *Grundgesetz*.¹⁵³ The fact that the child would be the object of a bargain, and would thus be treated as a commodity, put the child's interests at risk. Therefore, the contract was held to be void. As we have seen,¹⁵⁴ the German legislator later enacted criminal law provisions in order to prohibit the practice of surrogacy.

As said, in Italy the legislature has overruled preceding case law by expressly forbidding surrogacy contracts.¹⁵⁵ In the context of fundamental rights application in contractual relationships, however, it might be interesting to briefly look into the argumentation that was used by the courts for first rejecting and subsequently allowing certain surrogacy arrangements.¹⁵⁶

In a judgment from 1989,¹⁵⁷ the district court of Monza held void a contract according to which a couple had paid 15 million lire (ca. 7,500 euro) to a surrogate mother for carrying and giving birth to a child, conceived through artificial insemination with the husband's semen. The surrogate had agreed in the contract to renounce the rights inherent in motherhood. In addition to the contract fee, the agreement stipulated that she received a monthly payment of 1 million lire (ca. 500 euro) and that the intended parents provided her with an apartment for the period of the pregnancy. During the pregnancy, moreover, the surrogate mother managed to raise the compensation to 40 million lire (ca. 20,000 euro), a Jaguar car and the ownership of a business. After giving birth to the child, however, she refused to hand over the child to the intended parents. The couple then brought a claim before the *Tribunale di Monza* for the enforcement of the

¹⁴⁹ *Briody v St Helen's and Knowsley Health Authority*, [2000] 2 FCR 13, [2000] Lloyd's Rep Med 127.

¹⁵⁰ E.g.: *Re C (A Minor) (Ward: Surrogacy)*, also known as: *Re A Baby*, [1985] Fam Law 191, (1985) 135 NLJ 106; *Re P (Minors) (Wardship: Surrogacy)*, [1987] 2 FLR 421, [1988] FCR 140, [1987] Fam Law 414, (1987) 151 JPN 334.

¹⁵¹ *Re C (A Minor) (Ward: Surrogacy)*, also known as: *Re A Baby*, [1985] Fam Law 191, (1985) 135 NLJ 106.

¹⁵² *OLG Hamm* 2 December 1985, *NJW* 1986, 781.

¹⁵³ *NJW* 1986, 782, with reference to *BVerfG* 15 January 1958, *BVerfGE* 7, 198 (*Lüth*).

¹⁵⁴ See the introduction to this section.

¹⁵⁵ *Legge* n. 40/2004, see the introduction to this section.

¹⁵⁶ On these cases, see also Perfumi and Mak 2008. Parts of the descriptions of cases and the legal literature are based on the work I have done as a young researcher in the Italian team of the RTN 'Fundamental Rights and Private Law in Europe'; see also the Introduction to this book.

¹⁵⁷ *Trib. Monza* 27 October 1989, *Foro it.* 1990, I, 298, with a comment by Ponzanelli.

contract and for custody of the child, but this was turned down. The Monza court considered the surrogacy contract to be void, because of the unlawfulness of its object (Article 1418(2) in conjunction with Article 1346 *c.c.*). The court's argumentation ran along several constitutional and civil law lines: In the first place, the Constitutional Court's interpretation of Articles 2 and 30 *Cost.* required that a child be raised in the most adequate place, which in principle should be within the biological family. Furthermore, Article 2 *Cost.* could not be read as including a right to procreation as part of the more general personality right. Besides, according to provisions of the civil code, it was not possible to contractualise the juridical status of a person (here: the mother and child), nor was it possible to contract on the use of one's body or body parts (Article 5 *c.c.*). Finally, given the illegality of the contract, the court considered that the possibilities for regulating the relationships between the various parties involved, like in the Netherlands,¹⁵⁸ were limited to family and adoption law: The biological father could recognise his child (Article 250 *c.c.*) and ask for it to be included in his family (Article 252 *c.c.*). The intended mother – but also the surrogate's husband – could then try to adopt the child, according to Article 44(b) of the law of 4 May 1983, n. 184.¹⁵⁹

The turning point in the case law, which was later overruled by the Italian legislature, came with the judgment of the district court of Rome of February 2000.¹⁶⁰ The case concerned a married couple who were not able to have children because of a malformation of the woman's uterus. Using the intended parents' genetic materials, several embryos were created *in vitro*, which were preserved in anticipation of the availability of a surrogate mother. When a woman was found who was willing to act as a surrogate, not requiring any monetary compensation, the doctor however refused to implant an embryo. Though he had signed a contract that stipulated his performance of the treatment, he held that the applicable Deontological Code forbade him from assisting in practices of surrogate motherhood. The intended parents asked the court to establish the validity of the contract and authorise the doctor to perform his contractual obligations. Indeed, though referring to the same constitutional provisions as the court of Monza, the *Tribunale di Roma* came to the opposite conclusion, i.e. it held that the agreement was valid. The court extensively contemplated the judicial task in guaranteeing the respect for individual self-fulfilment in an evolving society. In this light, it recognised a right to become parents and to make choices based on the desire to have children, not only through adoption but also through the transmission of one's genes (Articles 2 and 3(2) *Cost.*, in combination with Article 32 *Cost.*). Furthermore, the Rome court was of the opinion that a contract arranging for a surrogate mother to carry the intended parents' (genetic) child did not infringe Article 5 *c.c.*, since the 'renting of the womb' did not lead to a permanent diminution of the surrogate's physical integrity. Emphasising the inseparable bond between the person and her body, the court considered that the freedom to cooperate in a surrogacy arrangement was in fact part of the surrogate's freedom to develop her personality (Articles 2 and 3 *Cost.*). Finally, the fact that the surrogate mother was acting out of solidarity and not for profit prevented the commercialisation of motherhood. Thus, the contract could be held admissible and legitimate.

¹⁵⁸ Though in the Netherlands the illegality of the contract is doubted, given that medical practice facilitates the realisation of surrogacy, which has been approved of by the Minister of Health; Nieuwenhuis 2001, p. 1797.

¹⁵⁹ See also *App. minorenni Salerno* 25 February 1992, *Nuova giur. civ.* 1994, I, 177, with a comment by Bitetti.

¹⁶⁰ *Trib. Roma* 17 February 2000, *Foro it.* 2000, I, 972; *Giust. civ.* 2000, I, 1157, with a comment by Giacobbe; *NGCC* 2000, I, 310, with a comment by Argentesi. See also the comments by D'Avack 2000; Fineschi, Frati & Turillazzi 2000; Sesta 2000; Zatti 2000; and Trerotola 2003.

Where the *Tribunale di Monza* focused on the protection of the rights of the child, the Rome court underlined the rights of the intended parents and the surrogate mother to realise their rights under Article 2 of the Constitution.¹⁶¹ The latter decision has been criticised due to the fact that no constitutional norm protects a ‘right to become a parent’ or a ‘right to procreation’.¹⁶² Furthermore, it has been observed that more attention should have been paid to the non-commercial character of the surrogacy arrangement, in order to prevent that abuse is made of women who are in a weak economic position.¹⁶³

Finally, the *Tribunale di Roma* partly justified its active position in regulating these types of contract on the ground that, at the time it evaluated the case, no legislation was available. It reasoned that in the absence of legal prohibitions, surrogacy contracts could be allowed. This argument has been contested in legal literature, considering that the lack of legislative action did not authorise the courts to fill in the legal ‘gap’ according to their own ideological convictions.¹⁶⁴

With the coming into force of law n. 40 of 2004, the latter argument has lost its relevance, since the legislature has now expressly forbidden any form of surrogacy.¹⁶⁵ *Legge* 40/2004, however, is not uncontroversial.¹⁶⁶ Indeed, shortly after its entry into force the *Corte costituzionale* was presented with the question whether it would be constitutionally admissible to organise a referendum regarding the possible abolition of this law. The Italian Constitutional Court rejected the request for a referendum covering the entire law, considering that the law’s contents were of a ‘constitutionally binding nature’, since they sought to give effect to fundamental rights of the person.¹⁶⁷ Its modification or ineffectiveness on the basis of a referendum would breach constitutional norms and could, consequently, not be allowed.¹⁶⁸ A referendum regarding certain specific parts of *legge* 40/2004 was nevertheless allowed by the *Corte costituzionale*.¹⁶⁹ This included the provisions prohibiting heterologous artificial insemination (Articles 4(3) and 12(1) of the law), the possible abolition of which was considered not to endanger the minimum level of constitutional protection offered by the law as a whole.¹⁷⁰ As said earlier,¹⁷¹ the referendum that was eventually organised in June 2005 remained without consequence, because the minimum amount of votes required for its effectiveness was not reached. The debate concerning the referendum once again confirmed the delicacy of the topic of medically assisted procreation and the difficulty in conciliating the opposing views on questions concerning, among other issues, surrogacy arrangements.¹⁷²

¹⁶¹ Argentesi 2000, *NGCC* 2000, p. 320.

¹⁶² D’Avack 2000, p. 706; Giacobbe 2000, p. 1167

¹⁶³ D’Avack 2000, p. 706. Compare Busnelli 2004, p. 52.

¹⁶⁴ Giacobbe 2000, p. 1164; D’Avack 2000, p. 706. See also Sesta 2000, p. 208, who remarks that, even in the absence of a prohibition by law, the incompatibility of the surrogacy contract with provisions of family law as well as with the norms of ‘public order’ and ‘good morals’ seems impossible to overcome.

¹⁶⁵ See the introduction to this section for further references.

¹⁶⁶ Compare, Rescigno 2002b, p. 981, who notes that many people, during the drafting process of *legge* 40/2004, were strengthened in their conviction that sometimes the silence of the legislature is to be preferred over the enactment of an unsatisfactory law.

¹⁶⁷ *Corte cost.* 13 January 2005, n. 45, under 4 and 5.

¹⁶⁸ *Corte cost.* 13 January 2005, n. 45, under 6.

¹⁶⁹ *Corte cost.* 13 January 2005, n. 47, 48 and 49.

¹⁷⁰ *Corte cost.* 13 January 2005, n. 49.

¹⁷¹ See subsection 6.2.5.a above.

¹⁷² See subsection 6.2.5.a for further references.

Given the lack of political consensus on the matter, the Dutch legislature has left it to the judiciary to handle surrogacy cases. Most courts have however adopted a cautious approach, in the absence of legislation and of consensus on the problem in society.¹⁷³ Nevertheless, it seems that in the decisions in which fundamental rights have been considered the courts pay more attention to the policy questions raised by surrogacy than the decisions based on a balance of interests in the classic private law meaning.¹⁷⁴

Though the courts have not decided on the validity of surrogacy contracts, their judgments on the legal status of the child have addressed the question of the approach that judges should take to these types of arrangements. Like the *Tribunale di Monza*, the Dutch courts have mostly stressed the need to protect the ‘best interests of the child’.¹⁷⁵ They have held that, if it were accepted that the provisions of the civil code could be interpreted as allowing the transfer of parental authority from the surrogate mother to the intended parents, then it still had to be verified whether it was in the child’s interest to proceed in this way.¹⁷⁶

In decisions rejecting the request for the surrogate mother to be relieved from parental authority over the child because of her being incapable or unfit to fulfil her duties to care for and raise the child (Article 1:266 *BW*) the courts in general consider that the child’s interest would in any case stand against a transfer of custody.¹⁷⁷ In judgments granting the request for the transfer of custody, on the other hand, it is usually considered that it would be in the child’s interest to arrange for such a transfer, given the special circumstances in which it has been born and is being raised.¹⁷⁸ The child’s interest can thus serve both as an argument in favour and an argument against the transfer of custody, depending on the circumstances of the case.

Reference to fundamental rights for determining what solution would be in the child’s best interest mostly concerns Article 7 of the Convention on the Rights of the Child (CRC), which provides the child with ‘the right to know and be cared for by his or her parents’.¹⁷⁹ On the basis of this provision it has been argued that the preliminary assumption should be that a child is raised and taken care of by the biological parents.¹⁸⁰ The protective measures of Title 14 of Book 1 of the Civil Code, including the limitation or termination of parental authority, were considered to confirm this, since such measures could only be taken if they served the child’s interest and if the child’s interest did not oppose them.¹⁸¹

¹⁷³ *Rb. Utrecht* 18 June 1997, *NJk*ort 1997, 59, overruled on appeal by *Hof Amsterdam* 19 February 1998, *NJk*ort 1998, 32; *Rb. Rotterdam* 23 March 1998, *NJk*ort 1998, 33.

¹⁷⁴ See also Perfumi & Mak 2008.

¹⁷⁵ For instance: *Hof Amsterdam* 19 February 1998, *NJk*ort 1998, 32, n. 3.3; *Rb. Rotterdam* 23 March 1998, *NJk*ort 1998, 33; *Hof 's-Gravenhage* 21 August 1998, *NJ* 1998, 865, n. 8; *Hof Leeuwarden* 6 October 2004, LJN: AR3391, www.rechtspraak.nl (consulted on 17 November 2006), n. 16-17; *Rb. Utrecht* 26 October 2005, LJN: AU4934, www.rechtspraak.nl (consulted on 17 November 2006), n. 3.6.3.

¹⁷⁶ *Rb. Utrecht* 18 June 1997, *NJk*ort 1997, 59, under c.

¹⁷⁷ *Rb. Utrecht* 18 June 1997, *NJk*ort 1997, 59, which was overruled on appeal by *Hof Amsterdam* 19 February 1998, *NJk*ort 1998, 32; *Rb. Rotterdam* 23 March 1998, *NJk*ort 1998, 33; *Hof Leeuwarden* 6 October 2004, LJN: AR3391, www.rechtspraak.nl (consulted on 17 November 2006), n. 16-17.

¹⁷⁸ *Rb. Amsterdam* 26 April 1995, *NJ* 1995, 589; *Hof Amsterdam* 19 February 1998, *NJk*ort 1998, 32; *Hof 's-Gravenhage* 21 August 1998, *NJ* 1998, 865.

¹⁷⁹ This provision can directly be invoked before the Dutch courts on the basis of Article 93 *Gw*; see also section 1.1.3.

¹⁸⁰ *Rb. Rotterdam* 23 March 1998, *NJk*ort 1998, 33; *Hof Leeuwarden* 6 October 2004, LJN: AR3391, www.rechtspraak.nl (consulted on 17 November 2006), n. 16-17. See also *Rb. Utrecht* 18 June 1997, *NJk*ort 1997, 59, which was overruled on appeal by *Hof Amsterdam* 19 February 1998, *NJk*ort 1998, 32.

¹⁸¹ *Hof Leeuwarden* 6 October 2004, LJN: AR3391, www.rechtspraak.nl (consulted on 17 November 2006), n. 16.

It is remarkable that the reference to fundamental rights has almost exclusively been made in decisions *rejecting* the transfer of legal authority, in which Article 7 of the CRC has been applied to ‘fill in’ the interest of the child, in the sense that, in principle, it would be best for the child to be raised by his or her biological parents. The application of fundamental rights thus focused on the protection of the child, while addressing the policy arguments that spoke against a transfer of legal authority: pedagogical and psychological effects on the child, and the identity of the child.¹⁸² Although the courts in these judgments did not rule on the validity of the surrogacy contract as such, their considerations might thus be interpreted as discouraging these types of arrangements.

In judgments granting the transfer of legal authority over the child the question of compatibility with Article 7 CRC was not raised.¹⁸³ The courts limited their decisions to Article 1:266 *BW* and found that, under certain circumstances, it could be in the interest of the child to request for parental authority to be transferred to the intended parents.¹⁸⁴ In this context, it could be of importance that the child, genetically speaking, was completely the child of the intended parents (‘homologous’ artificial insemination, renting of the womb).¹⁸⁵ Moreover, it was of relevance that all parties involved, the surrogate mother and her partner as well as the intended parents, had (previously) agreed on the necessary arrangements.¹⁸⁶ The courts thus explicitly focused on the regulation of the situation in which a child had already been born¹⁸⁷ and did not reflect on more general policy issues regarding surrogacy arrangements.

It thus seems that judges shy away from extending the scope of civil code provisions governing parental authority when they consider these against the background of a lack of societal consensus and the rights of the child according to international treaties. When they consider a case primarily within the framework of family law rules, they tend to look more at the facts of the specific case, apparently without contemplating the consequences for the bigger picture, e.g. the question of the regulation of surrogacy arrangements. For the specific child in the specific case it is then evaluated whether it is in his or her best interest to change parental authority.

Summarising, the Dutch, English and Italian case law on surrogacy shows that fundamental rights may be of importance for the interpretation of what is in the best interest of the child. This may regard the validity of the contract as well as the question of how to define the relationship between the child, the surrogate mother and the intended parents (i.e. parental authority over the

¹⁸² *Rb. Rotterdam* 23 March 1998, *NJk*ort 1998, 33; *Hof Leeuwarden* 6 October 2004, LJN: AR3391, www.rechtspraak.nl (consulted on 17 November 2006), n. 24. See also *Rb. Utrecht* 18 June 1997, *NJk*ort 1997, 59, which was overruled on appeal by *Hof Amsterdam* 19 February 1998, *NJk*ort 1998, 32.

¹⁸³ *Rb. Amsterdam* 26 April 1995, *NJ* 1995, 589; *Hof Amsterdam* 19 February 1998, *NJk*ort 1998, 32; *Hof 's-Gravenhage* 21 August 1998, *NJ* 1998, 865.

¹⁸⁴ *Hof Amsterdam* 19 February 1998, *NJk*ort 1998, 32.

¹⁸⁵ *Hof 's-Gravenhage* 21 August 1998, *NJ* 1998, 865. If the intended parents are then considered the biological parents, Article 7 CRC would even support them having legal authority over the child. On the interpretation of ‘biological’ parenthood, see however the considerations of the *Trib. Roma* 17 February 2000, *Foro it.* 2000, I, 972, which correctly comments on the blurring definitions of parenthood as a consequence of biotechnological evolution. In this sense also Nieuwenhuis 2001, p. 1798.

¹⁸⁶ *Rb. Amsterdam* 26 April 1995, *NJ* 1995, 589; *Hof Amsterdam* 19 February 1998, *NJk*ort 1998, 32; *Hof 's-Gravenhage* 21 August 1998, *NJ* 1998, 865. Other than, for instance, in: *Hof Leeuwarden* 6 October 2004, LJN: AR3391, www.rechtspraak.nl; *Rb. Utrecht* 26 October 2005, LJN: AU 4934, www.rechtspraak.nl (consulted on 17 November 2006).

¹⁸⁷ ‘Bringing the legal regulation of parental authority into line with the factual situation in which the child is raised.’ *Hof Amsterdam* 19 February 1998, *NJk*ort 1998, 32.

child). In Italian case law dating from before the law of 2004, moreover, fundamental rights have been applied to safeguard the rights of the intended parents as far as procreation was concerned and the rights of the surrogate mother with regard to free determination of the use of her body to co-operate to surrogacy arrangements.

As results from the contrasting decisions in surrogacy cases, also within legal systems, it is a topic that is difficult to regulate, given the politically controversial nature of the questions related to parenthood, the giving up of a child and the child's emotional and psychological development. In Germany and Italy, the legislature has eventually chosen to forbid surrogacy, whereas the English legislature allows it, though under strict conditions. The Dutch legislature so far has not taken any action and the Dutch Supreme Court has not yet ruled on the subject, as a result of which decisions are taken on a case-by-case basis and no uniform approach has so far been established.

The effects of fundamental rights in the available case law may be seen in the manner in which the courts approach the questions related to the surrogacy cases coming before them. In cases in which no reference is made to such rights, the judges tend to ignore or deny the influence their decision might have on future case law or on recourse to surrogacy as a means of procreation. Even if they might recognise the ethical and social problems related to the topic, they are of the opinion that their decisions will not touch upon these dilemmas.¹⁸⁸ In cases in which fundamental rights are taken into consideration, the judges seem to be more aware of the potential impact of their decisions on surrogacy practices and, maybe for that reason, appear inclined to take a more cautious approach. These conclusions from case law support the thesis that fundamental rights application makes the judges more aware of the policy issues involved in these types of contractual arrangements.

6.3 Contract law between autonomy and solidarity

6.3.1 Introduction

What does it mean for the politics of European contract law if fundamental rights guide case law solutions back to their political roots? Assuming that policy might introduce political stakes in contract cases,¹⁸⁹ does this technique of case solution bring out into the open any shifts on the political spectrum of contract law?

In this section, the five case studies conducted in the previous section will be measured against the continuum of autonomy and solidarity described in Chapter 4 (section 6.3.2). It will be argued that judgments that take into account fundamental rights tend to give a clearer idea of the policies considered by the courts than judgments that leave implicit the values protected by such rights. Or, to put it in other words, the courts that (explicitly) apply fundamental rights to contract cases appear to be more aware of the political stakes in these cases than the courts that do not (or only do so implicitly).

¹⁸⁸ Compare the English case *Re C (A Minor) (Ward: Surrogacy)*, also known as: *Re A Baby*, [1985] Fam Law 191, (1985) 135 NLJ 106.

¹⁸⁹ Kennedy 1997, p. 110-111. See also section 5.3.2 above.

The implications of this awareness for the development of European contract law, however, do not seem self-evident. This might be related to the fact that the courts – both in cases entailing fundamental rights and in cases remaining within contract law – appear to have a tendency to focus on the principle of party autonomy rather than elaborate on the policies of social or distributive justice involved. An attempt will be made to explain this fact in the light of the unclear definition of ‘social justice’ in European contract law (section 6.3.3).

From there, the argument will again be limited to the role of fundamental rights in the judicial consideration of policies of autonomy and solidarity (section 6.3.4), which will form the starting point for the concluding Chapter.

6.3.2 The continuum revisited

When reflecting on the five case studies in the previous section, several particular features deserve attention. First, the examples confirm that contract cases in which fundamental rights have been applied often address politically charged questions, the answers to which are not immediately clear.¹⁹⁰ Second, they show that the application of fundamental rights in principle concurs with the acknowledgement of the policies engaged. Third, it seems that, nevertheless, recourse to fundamental rights is not an absolute necessity for raising these policy issues. Fourth, however, in cases in which no such recourse is made, political stakes more often appear to remain implicit and problems of contract law remain unresolved.

Translating these statements into the ‘comparative’ understanding of the model of the autonomy/solidarity continuum (subsection a), it may be said that the fundamental rights hypothesis that was introduced in section 5.3.2 in principle holds true (subsection b). The revelation of policy choices in contract cases may clarify the shifting limits of freedom of contract (subsection c). Its implications for contract law adjudication, however, need to be further analysed, especially as regards the conception of solidarity (section 6.3.3 and Chapter 7).

a) General remarks

In order to make a comparison of the rule-solutions that have been chosen for the different case examples in the various legal systems, some remarks should be made with regard to the relative understanding of the continuum between autonomy and solidarity in different courts (the double relativity of the continuum, explained in section 4.3.2) and in different countries (the third dimension of the continuum; see section 4.3.4). Although these can be no more than general observations, for the most part based on the overall picture emerging from the analyses of case law and legal literature that have been presented in Part I, they serve to provide a background to the subsequent assessment of the specific case solutions that have been described in section 6.2.

Freedom of contract and its limits. As we have seen, party autonomy and freedom of contract are central principles of the contract laws of all selected countries.¹⁹¹ Moreover, the conception of freedom of contract in the various legal systems is quite uniform: parties are free to enter or not to enter into contracts, with parties of their choice and on the terms desired by the contracting

¹⁹⁰ Compare section 5.2 regarding the concept of a ‘right answer’.

¹⁹¹ Section 1.2.1, section 4.2.2.

parties.¹⁹² It has also been recognised in all systems that there are limits to freedom of contract, which serve to guarantee the contractual equilibrium¹⁹³ and to secure the conformity of contracts with principles of law and societal values.¹⁹⁴

Differences might be indicated in respect of the point where the limits to freedom of contract have been drawn.¹⁹⁵ While the definition of freedom of contract is more or less the same in all selected countries, the margin that is given for setting limitations to this freedom differs from one legal system to another. If it is accepted that this margin is determined by, on the one hand, internal restrictions to autonomy¹⁹⁶ and, on the other, considerations of solidarity, then it depends on the conception of these elements how the national systems relate to one another.¹⁹⁷

The double relativity of the autonomy/solidarity continuum. In this context, it should be kept in mind that a rule-solution may often be justified both from the perspective of autonomy and from that of solidarity.¹⁹⁸ For example, one person might consider information duties in suretyship relations as requiring solidarity on the part of the stronger party (the bank) with the weaker party (the potential surety), whereas another might see these duties in the light of the protection of the autonomous decision-making of the surety. As long as both views support the same rule-solution for the case of suretyships by relatives, there is no apparent disagreement. In the judgments in specific cases, policy issues will often not explicitly come to the fore, since the solutions to the cases do not necessarily have to specify the policy choices foreseen by the courts. This appeared to be the case in, for instance, Dutch and English case law on this subject.¹⁹⁹

If solidarity-based and autonomy-based perspectives support different rule-solutions for the same type of case, however, the question arises which view will prevail. In that case, different policies will be at stake – basically, one of weaker party protection, the other of self-determination. The choice for a rule-solution may then be related to the pursuit of a certain policy. In Germany, for example, the *Bundesgerichtshof's* decision in the *Bürgschaft* case fitted an autonomy-based theory rather than a solidarity-based one, since it did not aim at weaker party protection but assumed the formal equality of parties at the time the contract was concluded. In this type of case, the judges in specific cases would, ideally speaking, pay more explicit attention to the policy issues involved in order to justify their decision, since it deviates from the solution that would have been reached from the opposed perspective. The later decision of the *Bundesverfassungsgericht* in the *Bürgschaft* case made this clear, insofar as it explicitly analysed the stakes of autonomy, understood as self-determination, and solidarity, implying weaker party protection.²⁰⁰ It criticised the *BGH* for not having elaborated these policy questions.

The concurrence of aims of autonomy-based and solidarity-based policies thus gives an explanation for that fact that policy choices may not come to the fore in judgments in civil cases.

¹⁹² See also Lando & Beale 2000, comments to Article 1:102 PECL.

¹⁹³ Section 4.2.2.

¹⁹⁴ Section 1.2.

¹⁹⁵ In this sense also Marella 2006, p. 257-258, who, however, argues against a reference to fundamental rights in relation to the social model of contract law in Europe.

¹⁹⁶ Sections 4.2.1 and 4.2.2.

¹⁹⁷ Section 4.3.4.

¹⁹⁸ Compare section 4.3.2 above on the 'double relativity' of the autonomy/solidarity continuum.

¹⁹⁹ Compare section 6.2.2.b.

²⁰⁰ See also section 6.3.3 below.

The divergence of policies, on the other hand, clarifies why certain judgments have been heavily criticised by supporters of the policy choices opposed to the ones opted for in the decisions. Since these discourses are often only implicit in case law, it is usually difficult to compare case solutions, within as well as among jurisdictions. In the previous sections, it has been defended that a clearer picture might be obtained of the policy choices made in these cases on the basis of the analysis of fundamental rights argumentation in contract cases. In this section, this line of thought will be elaborated for the five case examples that have been presented in section 6.2.

Variations of the continuum according to jurisdictions. On a general level, the following nuances may be defined in Dutch, German, Italian and English and contract law.²⁰¹ English law tends to emphasise freedom of contract to a somewhat greater extent than the other systems, whilst in Italian contract law the solidarity between parties has been stressed increasingly often. Dutch and German law seem to occupy an in-between position, taking freedom of contract as a starting point, but protecting ‘weaker’ parties in certain contractual relationships. But do these different accents account for the rule-solutions chosen in the five case examples of the previous section?

If similarities rather than differences are focused upon, it appears that the main question in each example is whether to grant parties full (formal) autonomy or to protect ‘weaker’ parties against the other party and against themselves. In other words: should parties be allowed to use their freedom of contract even to the extent that it might limit their freedom, or should the State (the legislature and judiciary) intervene and redress the (substantive) contractual equilibrium? This dilemma seem to be characteristic for the current discourses on the development of contract laws in Western European countries, including the ones selected for the present analysis.²⁰² From an overall, comparative perspective, the (stretching of the) autonomy/solidarity continuum on which this discussion may be depicted seems a rather stable one, encompassing solutions ranging from a free rein given to freedom of contract (relatively autonomous) to extensive protection of ‘weaker’ parties through legislation and judicial intervention (relatively solidarity-based).

An attempt will now be made to place the various rule-solutions of the case examples on this comparative continuum. Comparing this continuum with deviating points of view coming to the fore in the case law of domestic courts, it may be seen to what extent national differences in placing accents on autonomy or solidarity shine through in specific solutions (the third dimension of the continuum). The purpose is to illustrate the way in which fundamental rights argumentation makes it possible to get a clearer idea of the relative positions of the solutions on the continuum. Furthermore, on the basis of the explicit considerations of the domestic courts in some of the cases, it may be possible to assess whether the judges were aware of their influence on policy choices and, if so, what results this has yielded in terms of choices for autonomy or solidarity (the second dimension of the continuum).

²⁰¹ See also section 1.2.3.

²⁰² Micklitz 2000; Hesselink 2002a and 2006b, p. 144; Schelhaas 2004, p. 431-436. See also Kennedy 2006; and Marella 2006, p. 265 ff., on the question how a ‘social model’ sets limits to freedom of contract. And see section 4.1.2 above.

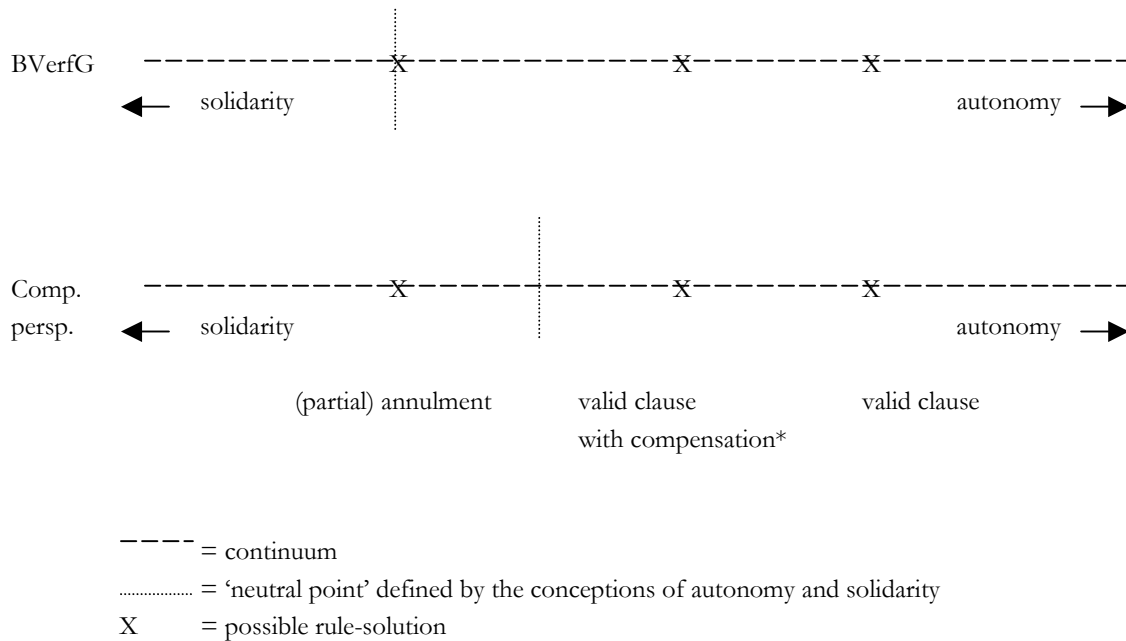
b) *Case solutions between autonomy and solidarity*

The hypothesis defended in this book is that judgments involving fundamental rights make explicit the policies involved in the case examples.²⁰³ It may now be seen what this means for the actual decisions of the courts. In order to determine how the solutions chosen by the various courts relate to one another they may be placed on a (comparative) autonomy/solidarity continuum. Where relevant, notes will be added regarding particular national features and the place of the courts in the national legal systems.

1. If we start with the case of exclusivity and non-competition clauses, we may depict the several different rule-solutions as points on the autonomy/solidarity continuum in the following way. Solutions that tend to favour the protection of the enterprise's interests would go towards autonomy, especially if they aim to protect freedom of contract by upholding the non-competition clause. Solutions in which the protection of the employee's free choice of profession prevails, would be relatively closer to solidarity, in particular if they take into account the effect of the non-competition clause on the possibility for the employee to provide the means of existence for himself and his family. The position taken by the German *Bundesverfassungsgericht* will be depicted separately, since it diverges from the comparative perspective. In this way, some tentative remarks may be made on the German Constitutional Court's understanding of the continuum (second dimension) and on the manner in which its case law may be perceived in relation to that of the other selected legal systems (i.e. the third dimension of the model of the continuum, visualising the variations among jurisdictions).

²⁰³ Section 5.3.2.

Figure 1: Non-competition clauses



* note that this rule-solution might also be deemed 'solidarity-based', depending on the importance awarded to weaker party protection; in general, however, its primary justification seems to be the parties' freedom to make arrangements regarding the employee's or commercial agent's post-contractual (non-)activity

In this picture, I have made an attempt to illustrate the positions of the various courts in relation to the general, comparative continuum that was mentioned in the previous subsection. The idea behind the illustration is that the reasoning of the courts presents a certain conception of which rule-solutions are 'autonomy-based' and which tend to lean more towards 'solidarity'. In other words, one court may consider the validity of a non-competition clause in light of the employee's or commercial agent's freedom of contract (*Bundesverfassungsgericht*), whilst other courts may regard the annulment of such clauses as a means of protecting weaker contract parties (explicitly in this sense the *Hoge Raad*, implicitly the *Corte di Cassazione*).²⁰⁴

Though this illustration should be considered a simplification, it shows that the decision of the German Federal Constitutional Court (nullity of a non-competition clause extensively limiting a commercial agent's freedom of profession and not providing for any compensation) from the comparative perspective might be considered 'solidarity-based'. While the German Court edited its judgment in terms of the protection of private autonomy, it effectively chose for a shift of policy towards a more 'solidarity-based' adjudication of non-competition clauses.²⁰⁵

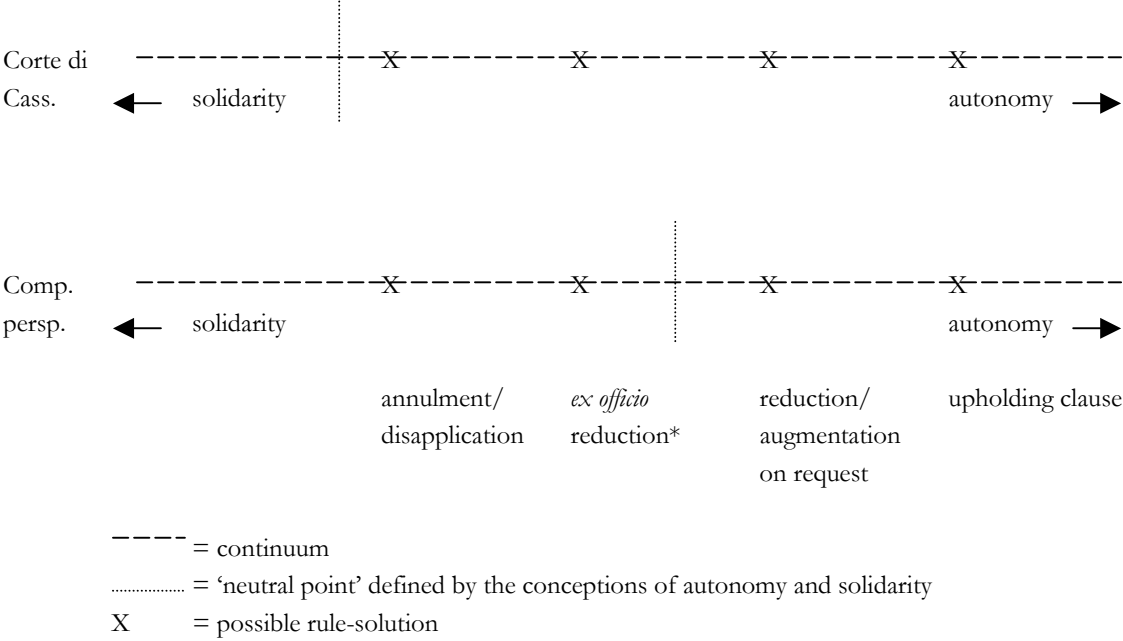
²⁰⁴ References in this section are to the cases mentioned in section 6.2.1.b.

²⁰⁵ Compare Marella 2006, p. 266: 'Unlike the paternalistic model, the social model sets limits to freedom of contract to make relations *inside the market* conform to a solidarity rationale.' And the same author, commenting on the case law of the *Bundesverfassungsgericht* in the field of fundamental rights and contract law, p. 267: '[T]he intervention of the state in terms of limits to freedom of contract is required because the unfair contract disregards the weak party's fundamental rights.'

protected principle of solidarity (Article 2 *Cost.*).²⁰⁸ Although solutions may be chosen that are very similar to those in the other countries, the policy choices underlying the course taken by the courts thus regard different stakes: in the German, Dutch and English cases, autonomy-based arguments are used to ensure formal and substantive equality of contract parties,²⁰⁹ whereas in Italian case law, solidarity-based arguments are introduced to make sure that formal equality does not endanger substantive equality.²¹⁰

3. The rule-solutions regarding the reduction of contractual penalties comprise: considering the clause to be valid, annulling the clause, reducing the amount of the penalty upon the request of the debtor, and an *ex officio* reduction of the penalty. On the autonomy/solidarity continuum this would result in the following illustration of the courts' positions:

Figure 3: Reduction of contractual penalties



* note that the Italian *Corte di Cassazione* does not seem to make a distinction between situations in which the debtor is a stronger or weaker contract party; it is therefore difficult to say whether this rule solution is relatively more 'autonomy-based' or 'solidarity-based' than the other solutions, given that solidarity in the Court's view seems to regard formal equality of the parties rather than substantive equality or weaker party protection (see section 6.2.3.b).

In Germany, the Netherlands and England, though keeping in mind their differences,²¹¹ the predominant approach to contractual penalties is a constrained one. In England, the choice is between upholding an agreement as being a liquidated damages clause (meaning that the freedom

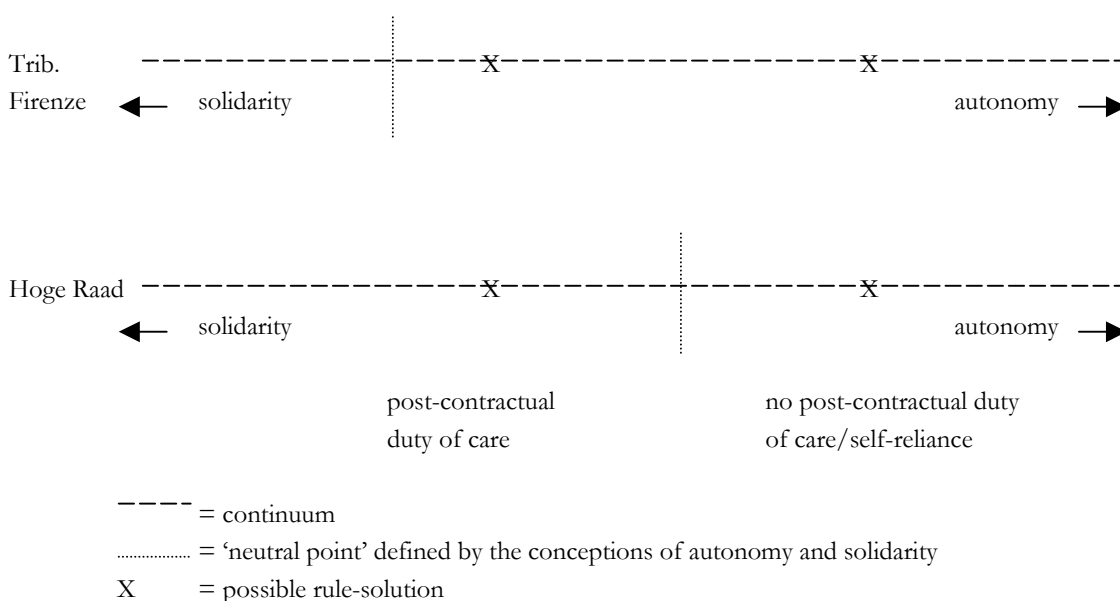
²⁰⁷ The rule-solutions are those discussed in section 6.2.2.b. Compare also the illustration of the various dimensions of the autonomy/solidarity continuum; section 4.3.
²⁰⁸ See also section 2.4.2.
²⁰⁹ See the decisions mentioned in section 6.2.2.b.
²¹⁰ Compare *Cass. civ.* 20 April 1994, n. 3775, *Giust. civ.* 1994, p. 2159-2173; see section 2.4.2.
²¹¹ For a comparative analysis, see Schelhaas 2004, in particular Chapter 9.

of contract of the parties will prevail) and the annulment of coercive penalty clauses (fairness).²¹² In Germany and the Netherlands, the reduction (according to Article 6:94(2) also augmentation) of penalties is another option, though only at the request of the debtor (in case of augmentation, the creditor), with an eye on respect for party autonomy.

In Italy, following the recent case law of the *Corte di Cassazione*, which applied fundamental rights, the protection of (positive) private autonomy has been extended to include the possibility for the judge to reduce a manifestly excessive penalty *ex officio*. This is partly justified by the fact that the principle of solidarity (Article 2 *Cost.*) sets limits to the freedom of contract, which have to be safeguarded by the courts. It is, however, not very clear how the Court interprets ‘solidarity’ and, consequently, whether its argumentation for an *ex officio* reduction of penalties is convincing.²¹³

4. Cases regarding post-contractual duties in doctor/patient relations may simply be systematised according to a duty of care being acknowledged or being rejected.

Figure 4: Post-contractual duties in doctor/patient relations



Earlier,²¹⁴ we have distinguished between two situations: on the one hand, the usual case of the patient being in a weaker bargaining position than the doctor; on the other hand, the example of the dentist case, in which the dental surgeon was in a weaker bargaining position than the patient from whom the co-operation in an hiv test was requested. Although the two case examples differ considerably in terms of the factual circumstances from which they arise, they have an important feature in common: both regard the impossibility for the weaker contract party to decide on possible medical treatment after the termination of the contract, on which impossibility the other party's conduct has an influence. A patient cannot freely decide which measures to take after the

²¹² McKendrick 2003, p. 1103.

²¹³ See further section 6.2.3.b and Mak 2007.

²¹⁴ Section 6.2.4.

parties' choice for their own good.²¹⁶ From this point of view, the validity of non-commercial surrogacy arrangements may also be placed in the direction of solidarity, given, moreover, the solidarity this rule-solution supposes between the surrogate mother and the intended parents. A commercial surrogacy contract, if held valid, would lean more towards autonomy, since it leaves the parties the necessary space to make arrangements as they wish.

The district court of Rome has been one of the few courts to have explicitly allowed a surrogacy contract.²¹⁷ It emphasised the autonomy of the intended parents, expressed in a right to become parents, and the autonomy of the surrogate, articulated in her freedom to develop her personality (all rights being constitutionally protected). The Rome court thus placed the non-commercial contract within the ambit of autonomy rather than solidarity. Possibly, this is related to the fact that the court focused on the rights of the intended parents, and it did not so much consider the protection of the interests of the child.

Dutch case law on the transfer of parental authority from the surrogate to the intended parents is difficult to place. If this construction is admitted, then this might be interpreted as an indirect approval of surrogacy. On the other hand, this solution regards the regulation of a situation that has already come into being – the child has been born; the court is presented with a *fait accompli* – and might not so easily be read as approving the phenomenon of surrogacy in general. Both the admittance and the rejection of a transfer of parental authority might even be seen as forms of paternalism, given that State institutions (the courts) decide on what is best for the parties, in particular the child. This comes to the fore especially in the decisions in which fundamental rights, such as Article 7 CRC, have played a part and the courts have interpreted the interest of the child in the light of pedagogical and psychological studies showing that it would be best for the child to grow up with his or her biological parents. A rejection of the request for the transfer of parental authority on this basis might in any case be seen as discouraging recourse to surrogacy.

Concluding this section, the overall picture seems to confirm, in the first place, that rule-solutions in contract cases can be placed on a continuum between relative points of autonomy and solidarity. In the second place, the judgments in which fundamental rights have been considered may be said to give a better idea of the policy questions which the courts have dealt with than the decisions in which such argumentation has not been applied. Consequently, the position of the courts in the former decisions was easier to determine than in the latter ones.

A remarkable feature of the judgments in which fundamental rights were applied to contractual relationships is that they underline the importance of party autonomy to a greater extent than other decisions (or legislative solutions). This comes to the fore most prominently in the depictions of the examples of non-competition, sureties by relatives, and an *ex officio* reduction of contractual penalties. Similar conclusions might, however, be drawn from the example of surrogacy arrangements, even though only for the decision of the *Tribunale di Roma*.

²¹⁶ Compare Marella 2006, p. 261-262.

²¹⁷ *Trib. Roma* 17 February 2000, *Foro it.* 2000, I, 972. See section 6.2.5.b.

In this context, it is worth noting that the decisions involving this type of argumentation have often been criticised for limiting party autonomy to too great an extent.²¹⁸ In all cases, the central issue appears to be where to draw the line between respect for the parties' freedom of contract and the need for judicial intervention for the purpose of guaranteeing the parties' autonomy. The tension between autonomy and solidarity seems to be of vital importance in this process in today's contract law, since the limits to freedom of contract are often determined on the basis of the requirements set by a principle of solidarity, in particular when one contract party is considerably 'weaker' than the other.

c) *Shifting limits to freedom of contract*

'Autonomy' in the judgments of the German as well as the Italian courts mostly seems to refer to *Selbstbestimmung* or *autodeterminazione*, that is: the principle of self-determination. The *Bundesverfassungsgericht* in its *Handelsvertreter* judgment related this concept to the principle of freedom of contract:

'This far-reaching limitation of the choice of profession does not have its primary basis in acts of the State. More than that, it has been the plaintiff [the commercial agent] himself who contractually agreed to the obligation [of non-competition]. Although such a legal binding of oneself entails a limitation of professional mobility, at the same time it forms the concretisation of individual freedom.'²¹⁹

The Court then went on to emphasise that freedom of profession, safeguarded by Article 12(1) *GG*, did not only serve the personal development of the working person in society, but in the first place guaranteed citizens the right to establish an economic basis for their existence (*Existenzgrundlage*). Thus, Article 12(1) *GG* touched upon the distribution of income and wealth in society, seeking to establish a framework within which private individuals would be able to obtain a salary and foresee in their needs.

The Court recognised that restrictions of this freedom were often agreed upon in contracts between private parties, for instance by means of non-competition clauses in agency or employment contracts. The principle of private autonomy guaranteed that parties could decide themselves how to balance their opposing interests in such contractual clauses, even if this implied a (partial) waiver of one party's fundamental rights on behalf of the other. The State in principle had to respect these arrangements.²²⁰ This point of view for the most part corresponds to the conception of freedom of contract in Dutch, Italian and English contract law.²²¹

As said earlier,²²² autonomy by this definition is inherently limited in contract relations: the freedom of one party determines the boundaries to the freedom of the other. The principle of freedom of contract does not allow one party to limit the other to such an extent that the latter's freedom is reduced to the theoretical level. The legislature and judiciary therefore have to determine the margins within which parties are free to make their arrangements.²²³ The

²¹⁸ On the German *Bürgschaft* and *Handelsvertreter* decisions, see section 2.2.2. On the Italian penalty clause cases, see section 2.4.2 and section 6.2.3.b.

²¹⁹ *BVerfG* 7 February 1990, *BVerfGE* 81, 242, 253-254.

²²⁰ *BVerfG* 7 February 1990, *BVerfGE* 81, 242, 254.

²²¹ See section 1.2.1, with further references.

²²² See, in particular, section 4.2.1.

²²³ *BVerfG* 7 February 1990, *BVerfGE* 81, 242, 254.

Bundesverfassungsgericht justified this interference of the State in contractual relations on the basis of the idea of autonomy as self-determination:

‘Such limits [to private autonomy] are indispensable, since private autonomy has its basis in the principle of self-determination (*Selbstbestimmung*), that is: it requires that the conditions for free self-determination are given. If one of the contracting parties so strongly dominates that he can in fact unilaterally decide on the terms of the contract, this constitutes *Fremdbestimmung* for the other party.’²²⁴

According to the court, it was the task of the legislature and the judiciary to redress such social and economic contractual imbalances. When contractual arrangements were made regarding (waivers of) fundamental rights, they had to guarantee that both contract parties’ rights were adequately protected.

The same line of reasoning can be found in the *Bürgerschaft* judgment, where the Court considered that the failure of the courts in civil procedure to address the question of whether both parties had been able to freely decide on the conclusion and contents of the contract constituted a denial of the constitutionally protected principle of private autonomy.²²⁵ This argumentation is similar to the case law of the *Corte di Cassazione* establishing a duty for the courts to ensure the substantive equality of the contract parties through reviewing the contents of the contract in light of the principle of good faith, read in combination with the constitutional principle of solidarity.²²⁶ Both parties should be put in a position to freely conclude a contract and negotiate the terms of the agreement.

In this context, it is interesting to note that even if a party has not been completely free to decide to enter into a contract, the interests of the other party might be held to impose a (post-contractual) duty of care on the former party towards the latter. This was the case in the Dutch judgments regarding the patient who was required to undergo an hiv test for the purpose of minimising the damage to the dental surgeon who had treated him. According to the Court of Appeal, whose judgment was confirmed by the *Hoge Raad*, the fact that the patient needed dental surgery, and was thus not entirely free in his choice to enter into a medical treatment contract, did not prevent that a duty of care was derived from this contract.²²⁷ This duty of care served the protection of the dentist’s autonomy, insofar as the patient’s co-operation in an hiv test would clarify whether there was a risk of infection with the virus and, consequently, whether the dental surgeon should take prophylactic medication. Although the courts do not say so in so many words, the possibility of self-determination for the dentist is protected in this way as well, since he is given the information on which basis he may decide whether or not to take medication.²²⁸

²²⁴ *BVerfG* 7 February 1990, *BVerfGE* 81, 242, 254-255.

²²⁵ *BVerfG* 19 October 1993, *BVerfGE* 89, 214, 231-235, referring to the *Handelsvertreter* case. See also the recent judgments on life insurance contracts; *BVerfG* 26 July 2005, *NJW* 2005, 2363 and 2376.

²²⁶ In particular, *Cass. civ.* 20 April 1994, n. 3775, *Giust. civ.* 1994, p. 2159-2173 at p. 2164-2165. See also the cases on an *ex officio* reduction of contractual penalties, section 6.2.3.b; and the judgment of the *Trib. Firenze* regarding the duty of care owed by a doctor towards a patient, section 6.2.4.b.

²²⁷ *Hof Amsterdam* 18 April 2002, *TrGR* 2003, p. 114, n. 4.23. See also the conclusion of Procurer-General Hartkamp, n. 15.

²²⁸ Compare the Italian case *Trib. Firenze* 7 January 1999, *Resp. civ.* 2000, 157.

These observations on the notion of self-determination to a greater and lesser extent bring to the fore the tension between autonomy and solidarity in contract law adjudication. In the decisions of the Italian, Dutch and German courts²²⁹ reference to solidarity has been made when determining the – shifting – limits to freedom of contract. The *Corte di Cassazione* has explicitly adhered to the constitutional reinterpretation of provisions of contract law, on the basis of the principle of solidarity among contract parties (Article 2 *Cost.*).²³⁰ Limits to freedom of contract should thus be set in accordance with this principle. The Dutch *Hoge Raad* has not made such explicit reference to solidarity, but a tendency towards the protection of the weaker contract party with respect to the stronger one also comes to the fore in, for instance, its judgment in the hiv-test case: the patient is requested to make a sacrifice (i.e. to allow the relatively minor infringement of his rights of physical integrity and privacy) on behalf of the dental surgeon.

Protection of structurally weaker contracting parties has also been of importance in German case law. Though the main focus of the *Bundesverfassungsgericht* in the discussed cases was on autonomy, aspects of distribution undoubtedly played a part.²³¹ The clearest reference to these aspects may be seen in the recourse to the *Sozialstaatsprinzip*.²³² The principle of the social state is given effect in contract law through the courts in civil cases, which have to make sure that imbalances between weaker and stronger contract parties are redressed:²³³

‘If (...) there is a typical situation of structural inferiority of a contract party, and the consequences of the contract weigh extremely heavily on this party, then the legal order should react to this and make possible corrections. This follows from the constitutional protection of private autonomy (Article 2(1) GG) and the principle of the social state (Article 20(1) and Article 28(1) GG).’²³⁴

These types of judicial considerations illustrate how strands of autonomy-based argument are intertwined with threads of solidarity-based reasoning. A strong emphasis on the principle of freedom of contract goes hand in hand with the consideration of the social, distributive role of contracts.²³⁵ The place of the rule-solutions in the discussed cases on the autonomy/solidarity continuum thus depends on the ‘sum’ of their subcomponents²³⁶ or – on the level of adjudication – the balance of interests made in the specific case.

The cases in which fundamental rights have been applied often seem to indicate a shift on the imaginary continuum between autonomy and solidarity. These shifts concern not only a move towards a relatively more autonomous or a more solidarity-based solution, but often also seem to

²²⁹ On the basis of the five case examples I find it difficult to include English case law in this analysis, since the examples were mostly covered by statutory laws and the cases that were mentioned did not refer to fundamental rights.

²³⁰ *Corte cost.* 3 February 1994, n. 19, *Giur. cost.* 1994, 136; *Cass. civ.* 20 April 1994, n. 3775, *Giust. civ.* 1994, p. 2159-2173 at p. 2164-2165; *Cass. civ.* 24 September 1999, n. 10511, *Foro it.* 2000, I, 1929; *Cass. civ.*, joint divisions, 13 September 2005, n. 18128, *Foro it.* 2005, I, 2985.

²³¹ Compare Marella 2006, p. 267-268.

²³² *BVerfGE* 81, 242, 255 (*Handelsvertreter*) and *BVerfGE* 89, 214, 232 (*Bürgerschaft*).

²³³ Compare Marella 2006, p. 267.

²³⁴ *BVerfGE* 89, 214, 232. See also *BVerfGE* 81, 242, 255.

²³⁵ Notice that arguments of principle here also intertwine with arguments of policy. Compare section 5.2.1.

²³⁶ Compare section 4.3.

indicate a shift in the weight that either autonomy or solidarity – often autonomy – is given in the court’s balancing or sum of components.

Looking at the five pictures drawn in this subsection, we see, for example, a shift from holding that non-competition clauses and suretyships are valid, irrespective of the position of the actual agent or surety, (a relatively autonomy-based solution) towards a possible annulment of such clauses or agreements in light of the structural inequality of the contract partners (a relatively solidarity-based solution) in German law, and as regards sureties also in the other legal systems. At the same time, the German *Bundesverfassungsgericht*’s observations on self-determination seem to indicate that the Court, in order to realise these more solidarity-based solutions, places them in a rhetoric of protection of party autonomy.

Furthermore, the Rome district court’s approval of surrogacy arrangements could be deemed a shift towards autonomy, in respect of the ‘paternalistic’ prohibition of such contracts by the Monza court and by the Italian and German legislature. Accordingly, the reasoning of the *Tribunale di Roma* considered non-commercial surrogacy contracts in terms of party autonomy more than any of the other courts or legislatures has done.

Finally, the example of the reduction of contractual penalties shows how Italian case law has seen a shift from a judicial reduction of the penalty at the request of the parties (a relatively more autonomy-based) to the possibility of an *ex officio* reduction on behalf of the debtor (a relatively more solidarity-based solution). Again, the judgments of the *Corte di Cassazione* justify this shift on the basis of the assurance of private autonomy, here explicitly referred to as a *general interest of the legal order* instead of a principle that needs to be guaranteed in specific cases for the purpose of establishing justice in individual disputes (*Einzelfallgerechtigkeit*). Although doubts may be raised as to lifting the specific question of an *ex officio* reduction of penalties to the level of the general interest,²³⁷ the Italian court here makes explicit what fundamental rights refer to in contract law cases, namely the policy issues involved in these cases and the role of the judges in determining the rule-solution on a relative scale of autonomy and solidarity.

What emerges from this analysis is thus a renewed interest in the scope of private autonomy and, more specifically in contractual relationships, freedom of contract. The shifting limits to autonomy are determined by considerations of solidarity, which are introduced through the mediation of fundamental rights.

Of course, several objections may be raised against this view on developments in contract law adjudication. First of all, the need for such a reinterpretation of concepts of contract law in the light of fundamental rights may be questioned, given in fact the freedom from State intervention that parties enjoy in the realm of contract law.²³⁸ Related to this are questions of coherence and legal certainty.²³⁹ This criticism regards the relation between law and politics, and consequently the value of the comparative legal-political analysis itself, and this will therefore be further considered in Chapter 7 below.

A second, important argument directly touches upon the hypothesis that fundamental rights may reveal political stakes in contract cases. It says that the limitation of freedom of contract

²³⁷ See section 6.2.3.b.

²³⁸ Compare Smits 2003, p. 162; Grosheide 2001, p. 48.

²³⁹ Compare section C of the Epilogue to Part I and section 7.a below.

through fundamental rights argumentation emphasises these ‘rights rather than equality or it emphasises inequality only through the violation of fundamental rights’.²⁴⁰ This implies that in cases in which fundamental rights are invoked, imbalances of power between contracting parties will be addressed and redressed, while more in general there will be little attention for situations of inequality in contract law. An appeal to fundamental rights, from this perspective, could reveal political stakes in individual cases, but it would not result in determinate and clear outcomes that could serve the solution of future cases.

It cannot be denied that the application of fundamental rights in the case law of the countries analysed here has been fragmented and, at times, apparently dependent on institutional and procedural factors as well.²⁴¹ In cases similar to one another, either within a legal system or in different jurisdictions, fundamental rights have sometimes been used, while at other times purely private law reasoning has been followed. Assuming that decisions engaging fundamental rights have more often addressed policy questions than judgments in which these rights have not been considered, it would thus seem possible to argue that only in the former cases has the inequality of contract parties been stressed.

In my opinion, nevertheless, this cannot be the case. The fact that fundamental rights have only been applied in certain cases does not mean that the same policy issues do not underlie similar cases.²⁴² In cases in which no reference to fundamental rights has been made, there is the possibility that judges have addressed the inequality between contract parties, albeit within the framework of contract law. At the same time, there is the possibility that judges have not looked at these aspects of the case, since for some reason they have not been aware or have even been in denial of the political stakes in the dispute. The (hypo)thesis that fundamental rights reveal the policy questions of a certain case might be used to reduce these ‘coincidental’ factors²⁴³ in contract law adjudication: by explicitly contemplating the consequences of certain case solutions for the policy pursued (weaker party protection v. protection of economic interests) equality may be emphasised in the solution to the case. This will be reflected in similar cases, even if no express reference to fundamental rights is made.

A further question that, however, does affect all cases is when, exactly, situations of inequality occur and how they should be dealt with. In other words, how should the shifting limits to party autonomy and freedom of contract be defined in terms of solidarity or ‘social justice’?²⁴⁴ If the understanding of solidarity is not clear, the translation of policies – through fundamental rights – to contract law rules will be difficult to make. This, then, is not due to the indeterminate nature of fundamental rights in themselves, but rather to the confusion of different forms of ‘social justice’ in European contract law.

²⁴⁰ Marella 2006, p. 268-269, who is of the opinion that this results in ‘indeterminate and/or unclear outcomes in terms of social justice’.

²⁴¹ Section 6.1.

²⁴² This is also depicted in the illustration of case solutions on the autonomy/solidarity continuum that was made in the previous subsection.

²⁴³ Compare section 3.2.2.c above.

²⁴⁴ This question refers back to the definition of solidarity, which has been discussed in section 4.2.2.

6.3.3 Varieties of 'social justice' in European contract law

In the light of the analysis of cases against the autonomy/solidarity continuum, a central problem of the legal-political analysis of contract cases appears to be the variety of conceptions of 'social justice' or 'solidarity' in European contract law. Indeed, it might be presumed that one of the reasons why a 'principle of solidarity' has not yet found a specific formulation in European case law, as the principle of autonomy or self-determination has, might be the range of definitions of the concept.²⁴⁵

Thomas Wilhelmsson has also observed that 'solidarity' as an ideological conception seems to be too broad to make a more precise analysis of developments in contract law. 'Social justice' or 'welfarism' in contract law, in his opinion, can be roughly understood as reflecting 'the intrusion of the values of the welfare state into the market-oriented structure of traditional contract law'.²⁴⁶ But further specification is needed, since different understandings may generate different results.²⁴⁷

Wilhelmsson has suggested classifying the variations of social justice (or welfarism) on the basis of a number of dichotomies: commutative and distributive justice; market-rational and market-rectifying regulation; the internal relationship between the contract parties and the external relationship to others; ability-orientation and need-orientation; the protection of parties and the protection of other values.²⁴⁸ In each of these dichotomies the latter part usually indicates a shift towards social justice in contract law, whereas the former part relates to traditional contract law. In Wilhelmsson's view, each of the dichotomies refers to different aspects of social contract law and is thus independent. At the same time, however, they are overlapping.²⁴⁹ Taking into account these somewhat unclear relationships between the dichotomies, Wilhelmsson distinguishes six types of 'welfarism' in contract law:²⁵⁰

- 'Market-rational welfarism: Regulation aimed at improving party autonomy and the function of the market mechanism (e.g. information rules);
- Market-correcting welfarism: Regulation aimed at rectifying outcomes of the market mechanism in order to promote acceptable contractual behaviour (e.g. substantive fairness rules);
- Internally redistributive welfarism: Regulation aimed at redistributing benefits in favour of a group of weaker parties in a contractual relationship (e.g. rules affecting the main subject-matter of the contract);
- Externally redistributive welfarism: Regulation aimed at redistributing benefits in favour of the disadvantaged within a group of contract parties in similar situations (e.g. equality rules);

²⁴⁵ Compare Lurger 2004, p. 281-287.

²⁴⁶ Wilhelmsson 2004, p. 713. Wilhelmsson prefers using the term 'welfarism' instead of the more vague notion of 'social justice', since he believes the new approaches in contract law to be mainly connected with the values of the welfare state. In this section, I will – except in the enumeration of varieties given by Wilhelmsson – refer to 'social justice' in order to avoid using many different terms throughout the book. Like Wilhelmsson, however, I consider 'welfarism' as being synonymous with, if somewhat vaguer than, social justice.

²⁴⁷ Wilhelmsson 2004, p. 713. Compare Meli 2006, p. 166, who addresses the question 'which kind of welfarism are we searching for in European contract law?'

²⁴⁸ Wilhelmsson 2004, p. 716 ff.

²⁴⁹ Wilhelmsson 2004, p. 723-724.

²⁵⁰ Wilhelmsson 2004, p. 725.

- Need-rational welfarism: Regulation aimed at giving benefits to parties with special needs in comparison with other parties in similar situations (e.g. rules on *social force majeure*);
- Public values welfarism: Regulation aimed at giving contract law protection to interests and values not related to the parties (e.g. protection of environmental values and human rights).⁷

It appears that cases concerning fundamental values in contract law may engage all levels of the scheme. The aforementioned dentist case, for example, could be placed on the level of ‘market-correcting welfarism’, since a post-contractual duty of care owed by the patient towards the dentist was recognised on the basis of ‘good faith’. Cases concerning the discrimination of contract parties, for instance gender discrimination in employment contracts, on the other hand, refer to ‘externally redistributive welfarism’, as they build on the principle of equality.

In this context, the ‘intensity’ of a measure or rule is of relevance. As Wilhelmsson says: ‘A “small” measure in the latter categories may very well be less welfarist than a thorough one in the first ones. A very stringent market-rational rule, setting strict demands on the content of information to inexperienced customers, may have more welfarist effects than, for example, an equality rule with insufficient remedies, and this may also have been the intention of the legislator.’²⁵¹

It should therefore be emphasised that Wilhelmsson’s scheme does not correspond to the aforementioned autonomy/solidarity continuum, nor is it a specification of this spectrum. Rather, the continuum and the welfarist (social justice) assessment scheme complement one another: The welfarist scheme defines several lenses through which rule-solutions can be seen, taking into account the intensity of the rule. On the basis of the outcome of this assessment, the rule-solution can be understood as more or less ‘solidarity-based’ or ‘autonomy-based’. This qualification could be considered the aforementioned ‘sum of subcomponents’²⁵² that determine the place of the rule on the autonomy/solidarity continuum.

An example may help to clarify this. While some will consider information duties in consumer credit relations as expressing ‘market-rational welfarism’ (improving the autonomy of the weaker party),²⁵³ others may see such rules in the light of ‘internally redistributive welfarism’ (redistributing benefits to impecunious relatives standing surety) or, from the fundamental rights perspective, ‘public values welfarism’ (protecting fundamental values of human dignity and autonomy, as well as the principles of the social state²⁵⁴). Furthermore, they will take into account the intensity of the rule: Someone looking from the ‘market-rational welfarism’ perspective may consider a strict information duty as emphasising solidarity, more so than someone considering the protection of weaker parties from the level of ‘internally redistributive welfarism’. The latter will for instance consider that more or more detailed information will not always help weaker

²⁵¹ Wilhelmsson 2004, p. 726.

²⁵² Section 4.3.3.

²⁵³ Compare, however, Spieß 1994, p. 1228: ‘Wenn die wenigen Fälle, in denen die Selbstbestimmung mißglückt, zum Maßstab für die Entscheidungsfreiheit ganzer Bevölkerungsgruppen gemacht werden, schneidet man gerade den “Schwachen” die Möglichkeit ab, durch Eingehen durchaus kalkulierbarer wirtschaftlicher Risiken ihre eigene Situation zu verbessern.’

²⁵⁴ Compare the German *Bürgschaft* decision, *BVerfG* 19 October 1993, *BVerfGE* 89, 214.

parties, but rather improve the position of parties capable of assessing the information and claiming their rights.²⁵⁵ Depending on the lens through which one sees the rule-solution, nuances may occur in the position which one gives it on the continuum. Considering the different conceptions of the autonomy/solidarity continuum in light of Wilhelmsson's scheme provides an explanation for the disparities in the assessment of rule-solutions.

6.3.4 Conclusion

In the end, it seems that the analysis of the effects of fundamental rights in contract cases in terms of autonomy and solidarity does add something to our understanding of the balance of these principles in contract law adjudication.²⁵⁶ It paints a more complex picture of the different shades of freedom and protection that characterise the solutions to contractual disputes.

Furthermore, this analysis can teach us something about the role of fundamental rights in contractual relationships. The case studies in this Chapter have shown how fundamental rights seem to address the underlying policy issues in any case in which they are applied. As mediators between politics and law, they define the values shared in society that have to be integrated into the solution to contract cases. In this sense, their meaning is more unambiguous than that of any principles of contract law, for the latter seem to suggest an objectivity which they cannot live up to, whereas the former do not pretend to give any 'right answer'.²⁵⁷ And as such, the application of fundamental rights may play an important role in keeping contract law, especially its general clauses, in line with societal views on autonomy as well as 'social justice'.

In the next, final Chapter, it will be investigated what this intermediary function of fundamental rights means for their specific application in contract cases. Picking up the analysis where we left off at the end of Chapter 3, it will be seen what criteria might be provided for the further development of the effects of fundamental rights in contract law.

²⁵⁵ Pinto Oliveros 2004; see also section 4.3.2 above.

²⁵⁶ In a different sense, Smits 2003, p. 162.

²⁵⁷ Compare section 5.2.1 above.

7 What the comparative legal-political analysis explains

The impact of fundamental rights on contractual relationships, although not a ‘new’ phenomenon,¹ has lately received considerable attention in the European legal academic discourse among private lawyers.² It has almost generally been acknowledged that some fundamental rights may sometimes affect the interpretation or application of some rules of contract law in disputes between private parties.³ Consequently, legal research by now mainly focuses on the determination of the variables in this formula, that is on the mapping of the contract cases in which a fundamental right has been of importance in the adjudication of the dispute.⁴ It seems that the emphasis of the discourse on fundamental rights and contract law in this process lies on the question *how* to integrate the values protected by these rights into contract law adjudication. The question *why*, in the first place, fundamental rights play or should play a role in the resolution of disputes between contracting parties has not occupied centre stage for a long time.⁵

This comparatively little regard for the ‘why question’ in the debate is to be regretted, for reasons of legitimacy as well as for those concerning the further development of the doctrine of this so-called ‘horizontal effect’. The application of fundamental rights in contractual relations between citizens requires a justification, since it goes beyond the original function of these rights as protection of the citizens in their ‘vertical’ relation to the State. As has been argued in the previous Chapters,⁶ it seems that traditional theoretical distinctions, such as the theories of direct and indirect effect, cannot fully explain why fundamental rights are given application in interprivate relations. In order to further analyse the effect that certain rights may be given in certain cases, it was therefore considered of importance to explore other theories of legitimacy. Of particular interest has been the question whether specific argumentation justifying the effect of fundamental rights could be found in the steadily growing body of contract law cases in various European countries. This could provide a more stable basis for future judgments on the subject.

On the basis of the analysis made in this Part of the book, an answer may now be sought to the questions given in the Introduction to the book. Considering that sufficient support has been found for the thesis that fundamental rights argumentation reveals the policy issues underlying contract law disputes, a ‘reversal’⁷ of the central questions may be made: if fundamental rights indicate policy issues, then in what cases and in what manner should this type of argumentation be applied?

¹ See, for instance, on German law: Nipperdey 1950; Dürig 1956; Canaris 1984. On Dutch law: Drion 1969; Koekoek 1985. On Italian law: Lombardi 1970; Corte Costituzionale 1990.

² To name only a few examples, there is the Research Training Network ‘Fundamental Rights and Private Law in the European Union’, see www.lider-lab.org/rtn; and in September 2006, the Society of European Contract Law (Secola) organised a conference on the theme ‘Constitutional Values and European Contract Law’. Furthermore, recent publications have addressed the topic from various angles. See, for instance, Social Justice Group 2004; Gerstenberg 2004, Colombi Ciacchi 2006.

³ See the references made in the previous footnotes. Compare also Canaris 1999; Smits 2003; Cherednychenko 2006b.

⁴ As a matter of fact, this was the main goal of the aforementioned RTN project on fundamental rights and private law.

⁵ Compare sections A and B of the Introduction to this book.

⁶ In particular Chapter 3.

⁷ Compare section 3.2.3.d.

a) *To what extent do fundamental rights affect contract law?*

What is the relation between fundamental rights and contract law and to what extent may fundamental rights argumentation be used to legitimise the choice for a certain rule-solution in a certain case? As we have seen earlier, the theories of direct and indirect effect represent two opposing views on the relation between constitutional and private law, but provide little guidance as to the intensity of the effects of fundamental rights in contract law.⁸ The question now is whether the comparative legal-political analysis of case law has succeeded in explaining the dynamics of this relationship and in establishing guidelines for taking up fundamental rights in a contract law balancing of interests.

Explaining the politics of direct and indirect effects

An important advantage of the legal-political model that has been designed for the analysis, as embodied by the autonomy/solidarity continuum,⁹ is that it does not presuppose a choice in principle for either a theory of direct effect or a theory of indirect effect.¹⁰ Thus, it does not exclude variations in the impact of fundamental rights on contract law adjudication. In fact, it embraces the idea that the form which an effect of a fundamental right takes in a contractual relationship may vary according to the fundamental right involved, the nature of the contractual relationship and, last but not least, the policy pursued through the rule-solution that is chosen by the court adjudicating the case. This means that various intensities of effects of fundamental rights may be distinguished.¹¹

Indeed, the comparative legal-political analysis further explains the problems attached to the debate on direct and indirect effects. It has approached the topic from the outside, whereas the analysis made in the first Part of the book looked at the phenomenon of fundamental rights application within contract law reasoning.

From the internal point of view, the motivation for promoting either a theory of direct effect or one of indirect effect may not be very clear. Although considerations on the public/private law divide and the independence of contract law from State intervention may be made, argumentation in favour of either theory often focuses on the technical insertion of fundamental rights in contract law, rather than openly discussing its desirability.¹²

In reality, however, someone arguing against direct effect – or in favour of indirect effect – might be said to profess a political view on the desirability of introducing questions of public interest (policy issues) into private law: Canaris' translation of the distinction between *Eingriffsverbote* and *Schutzgebote* to private law,¹³ for instance, has been said to give a merely 'technical' explanation of the choice for indirect effect, while in fact it covered up a political preference for the non-interference of public interests with private law cases.¹⁴ A direct application of fundamental rights to private law cases, at the same time, has sometimes been rejected exactly

⁸ Chapter 3.

⁹ Sections 4.2 and 4.3.

¹⁰ On the mutual exclusivity of the two theories see sections 3.2.1.a and 3.2.1.b above.

¹¹ On this point, see section 7.b below.

¹² Compare section 3.2.2.b and the Epilogue to Part I.

¹³ Canaris 1999, p. 37 ff.

¹⁴ Lurger 2002, p. 238; Hesselink 2002a.

because it would represent a political project, by allowing public interests to interfere with private relations. From an external point of view, a (judicial) choice for a theory of direct effect or a theory of indirect effect may thus be explained on the basis of ideological views, even if this does not emerge from the ‘technical’ grounds given by the author or judge.

The legal-political perspective

The thesis that has been defended in the previous Chapters is that the application of fundamental rights in contract cases will make judges more aware of the policy issues they are dealing with when adjudicating these contractual disputes. Support for this thesis has been found in five case studies.¹⁵

Fundamental rights, it has been argued, may be said to bridge the gap between politics and law. Argumentation based on these rights translates policy choices into law, whereas the fact that such argumentation has its basis in enacted rules makes it legal as well.¹⁶ Seeing that this intermediary functioning of fundamental rights in contract law adjudication has brought out into the open the policy issues involved in the case studies in Chapter 6, it confirms that there are political stakes in contract cases. Given the fact that these stakes come to the fore more often and more prominently in cases involving fundamental rights argumentation than in cases based on pure contract law reasoning,¹⁷ this form of argumentation may be said to reveal policy issues in cases in which these would otherwise possibly not have been addressed.

This perspective thus deviates not only from the emphasis on the distinction between theories of direct and indirect effects, which it reveals to be closely connected with the political views of the proponents of these doctrines.¹⁸ It also contradicts Dworkin’s assumption that the rights argument would be less receptive to ideological influence than the policy argument.¹⁹ Paradoxically, (fundamental) rights themselves emphasise the policy issues at stake in contractual disputes. They introduce arguments of public interest, for which in a depoliticised view on contract law adjudication there would be no place. As such, the application of fundamental rights in contract cases also challenges the idea of a ‘right answer’ for every case: If even rights-based adjudication can be considered as essentially political, then it seems difficult to maintain that judges ‘fit’ their decisions into a coherent system of contract law, not influenced by their personal ideological opinions.

Of course, this view on the subject is not uncontroversial, since it challenges the classic idea of contract law as a field in which parties in principle are free to arrange their interrelations as they wish, without having to heed matters of general interest.²⁰ In my opinion, however, this idea or ideal of contract law as a sovereign system can no longer be defended without prejudice. In the first place, the large number of protective rules that have been laid down in legislation protecting weaker parties, such as consumers, tenants and employees are illustrative of the so-called ‘socialisation’ of private law.²¹ These rules have become so important that they can no longer be

¹⁵ Chapter 6.

¹⁶ See section 5.2.1, with further references.

¹⁷ Sections 6.2 and 6.3.

¹⁸ See the previous subsection.

¹⁹ Sections 5.2.1 and 5.2.2.

²⁰ Compare Dürig 1956, p. 157-158; Canaris 1984, p. 225 ff.; Smits 2003, p. 49 ff. Compare Barak 2001, p. 21-22.

²¹ On Dutch law, see Valkhoff 1949 and Koopmans 1970.

seen as a mere exception to the autonomy-centred idea of contract law as a neutral, a-political field, in which freedom of contract is the most important principle.²²

In the second place, the growing attention for the constitutional aspects of contract law, also on the European level,²³ further emphasises that this field of law is no longer perceived as independent of societal interests. The growing impact of fundamental rights on contract law adjudication forms part of this process of ‘constitutionalisation’. In my opinion, it touches upon the principles of autonomy and solidarity that find expression in contract law rules and, as has been extensively argued throughout this book, brings to the fore the policy choices expressed in the choice of case solutions tending either to lean towards autonomy or towards solidarity. Since it indicates the choices that have been made for relatively more autonomy-based or solidarity-based solutions, the application of fundamental rights thus contradicts the view that contract law is immune to ideological influence.

Autonomy and solidarity

Judgments in contract cases may be analysed against a continuum between autonomy and solidarity in order to compare the policy choices made by the courts.²⁴ From the analysis made in Chapter 6 it follows that decisions interpreting contractual disputes in terms of fundamental rights tend to focus on party autonomy and freedom of contract, while at the same time the courts acknowledge that considerations of solidarity may limit the way parties make use of their freedom.²⁵

The emphasis on party autonomy might be explained by the fact that contract law traditionally reserves a central place for this principle.²⁶ Notwithstanding the omnipresence of protective measures in today’s contract law, which may be considered to have put weaker party protection on the same level as the principle of autonomy,²⁷ freedom of contract is still seen as a central, characteristic feature of this field of law. Sometimes statutory provisions even state so explicitly, e.g. Article 1322 of the Italian *Codice civile*, which provides that ‘[t]he parties can freely determine the contents of the contract within the limits imposed by law’.²⁸ From this point of view, a discourse on the role of fundamental rights in contractual relationships begins by considering the relation of these rights to the principle of freedom of contract and its limitations.²⁹

However, what does this mean for the ever increasing attention to weaker party protection, as is apparent, for instance, in special rules protecting consumers, tenants and employees? As we

²² Hondius 1999; Lurger 2005, p. 447-448. See also Chapter 4 above.

²³ See, for instance, Social Justice Group 2004; Lurger 2004; Somma 2005; Colombi Ciacchi 2006; Hesselink 2006b.

²⁴ Chapter 4. On the political implications of choices between the conflicting principles of contractual freedom (autonomy) and regard and fairness (solidarity), see Lurger 2005, p. 453.

²⁵ Section 6.3.2.

²⁶ See also section 1.2, with further references.

²⁷ Hondius 1999. Compare Lurger 2002, p. 234-238 and 2005, p. 447-454, in particular p. 448; Hesselink 2002a, p. 188-189.

²⁸ Article 1322 *c.c.*: ‘Le parti possono liberamente determinare il contenuto del contratto nei limiti imposti dalla legge (...)’ (translation in English by Beltramo 2006). Compare also Article 1:102 PECL, which stipulates that ‘[p]arties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles’.

²⁹ Compare the Italian case law on the reduction of penalty clauses, in particular *Cass. civ.*, joint divisions, 13 September 2005, n. 18128, *Foro it.* 2005, I, 2985. See section 6.2.3.

have seen, the predominant wording of the court decisions does not always reveal everything.³⁰ As much as the German *Bundesverfassungsgericht*, for example, has stressed the protection of self-determination in contractual relationships, it based its famous *Bürgerschaft* decision also on the *Sozialstaatsprinzip*, which required the weaker party's freedom to be adequately protected.³¹

It has been submitted, in the previous Chapters, that the terminology chosen in the judgments reflects a political view the nature of contract law and the desirability of fundamental rights application in this field. Thus, a link is made to the discussion on the politics of direct and indirect effects: an emphasis on autonomy discourages the limitation of freedom of contract through solidarity-based fundamental rights argumentation, whilst a more balanced consideration of both autonomy-based and solidarity-based policies in the light of fundamental rights corresponds to more openness to community interests in contractual disputes. Focussing on freedom of contract and self-determination thus implies that courts seek to preserve the sovereignty of contract law with respect to constitutional law.³²

However, another not unlikely explanation for the manner in which the courts edit their judgments can be found in the idea that they remain, to some extent, in denial of the political stakes in the contract cases they adjudicate.³³ Emphasising autonomy, the courts may completely avoid expressing their views on the extent to which solidarity characterises the relationship between contract parties. At the same time, factually they might pursue various forms of social justice.³⁴

An example may serve to illustrate this explanation.³⁵ The Italian Supreme Court in its decisions regarding the *ex officio* reduction of contractual penalties has established a power/duty of the judge to review the amount of penalties and to reduce them if they are manifestly excessive.³⁶ In particular in its 2005 judgment, the Court's reasoning was based on the need to protect party autonomy and its limits as a general interest of the legal order. As I have argued earlier,³⁷ this line of reasoning seems to take inspiration from the interpretation of the principle of good faith in light of the constitutionally protected duty of solidarity on the part of contract parties towards each other.³⁸ Nevertheless, it fails to make explicit the goals of social justice that are pursued by the court, referring, for the most part, to the enforcement of party autonomy (formal equality), while not taking into account the fact that this might not serve the weaker contracting party (substantive equality). The possible policy choices that were available, in the shape of alternative case solutions, thus remained under the surface. Although fundamental rights argumentation touches upon the policy issues involved in contract cases, wording these mostly in terms of autonomy does not help to make the courts fully aware of the consequences of their judgments on

³⁰ See Chapter 6.

³¹ Section 6.3.2.c, with further references.

³² Compare Lurger 2002, p. 238, on the political reasons behind theories of giving (indirect) effect to fundamental rights in order to prevent restrictions on private autonomy based on protective rules.

³³ Compare Chapter 5.

³⁴ Section 6.3.3.

³⁵ Compare also the example of the Dutch dentist case, discussed in section 5.2.3.

³⁶ *Cass. civ.* 24 September 1999, n. 10511, *Foro it.* 2000, I, 1929; *Cass. civ.*, joint divisions, 13 September 2005, *Foro it.* 2005, I, 2985.

³⁷ Section 6.2.3. See also Mak 2007.

³⁸ Compare *Cass. civ.* 24 September 1999, n. 10511, *Foro it.* 2000, I, 1929, and *Cass. civ.* 20 April 1994, n. 3775, *Giust. civ.* 1994, p. 2159-2173. See section 2.4.2.

the level of social justice that is guaranteed in contract law.³⁹ The outcome might have been different if more attention had been paid to both arguments of autonomy and solidarity, especially given the fact that also the latter enjoys constitutional protection in Italy (Article 2 *Cost.*).⁴⁰

Does this mean that the fundamental rights hypothesis developed in section 5.3.2 has overestimated the impact of fundamental rights argumentation on contract law adjudication? Although the Italian penalty clause example underlines the importance of fully developing the argument, the reference to the general interest has served the discussion of policy issues in case comments.⁴¹ More importantly, the other case studies conducted in Chapter 6 have confirmed that fundamental rights are likely to expose the policy issues involved in contractual disputes. Thus, it has been possible to analyse such diverse topics as non-competition clauses, suretyships by relatives, post-contractual duties in doctor/patient relations and surrogate motherhood in terms of autonomy-based and solidarity-based policy choices. Moreover, it has been established that this type of reasoning often results in a shift on the imaginary continuum depicting the various possible rule-solutions.⁴² A substantive impact of fundamental rights has accordingly been identified.⁴³

Summarising, the role of fundamental rights in contract cases can be specified as follows. In the first place, the application of these rights to contractual disputes serves to make explicit the policy issues involved in these cases. Translating these into possible rule-solutions on a continuum between autonomy and solidarity, the political implications of a judgment can be evaluated and compared to other decisions. In the second place, therefore, the analysis of the case law in light of fundamental rights may clarify the manner in which courts have dealt with policy issues and may reveal the policies pursued through their judgments.

Coherence and legal certainty

What does the legal-political perspective on the application of fundamental rights in contract law tell us about the idea of a coherent legal system and about the assurance of legal certainty? If fundamental rights affect contract law adjudication to the extent that they identify the policy choices that are at stake in specific cases, they appear potentially to undermine both coherence and legal certainty. Then again, the coherence of contract law may be doubted in the first place and, consequently, it may be asked whether legal certainty would indeed decrease if fundamental rights argumentation were to occur more often. Furthermore, it can be argued that fundamental rights may even help to enhance the coherence of contract law.

As explained in Chapter 5, coherence implies that judicial decisions in ‘new’ cases are embedded in the existing system of rules, governed by the ideology of an imaginary ‘author of all laws’.⁴⁴ Judges thus in theory can be neutral, since they follow the political choices made within the system instead of their own ideology. Both the theories of direct and indirect effect seem to

³⁹ See also subsection c below.

⁴⁰ See section 6.2.3.

⁴¹ See section 6.2.3.b for further references.

⁴² Section 6.3.2.

⁴³ Compare section B of the Epilogue to Part I on the issue of ‘form and substance’.

⁴⁴ Dworkin 1986, p. 226. Compare MacCormick 1984, p. 39-42 and section 5.2.3 above.

presuppose the coherence of contract law, on the basis of which they prescribe the manner in which fundamental rights argumentation should be handled in contract cases.⁴⁵

From the legal-political analysis that has been made in Part II of this book, however, it follows that judicial reasoning in contract cases is not free from ideological influence, not even if based on a rights argument rather than a policy argument. This conclusion implies a threat to coherence or even the denial of its existence: On the basis of fundamental rights argumentation, the rationale behind a rule of contract law may be reconsidered and, eventually, a rule may even be changed. Moreover, it may be changed according to the policy choice advocated by the court, which means that rules may emerge that do not necessarily fit into the existing system.

A possible way out of this dilemma would be to try and bring 'new' rules under existing general clauses of contract law, such as good faith or public policy. In my opinion, however, this does however not solve the problem, but merely conceals it. Formal coherence would be achieved, but in substance the judges would still make policy choices.⁴⁶ *Fallgruppen* may be distinguished, collecting similar solutions in similar cases, but these are prone to the same risk. There is no problem as long as policy choices support similar solutions. However, if this is not or is no longer the case, *Fallgruppen* may at the same time induce and conceal ideologically influenced judicial behaviour, e.g. constrained activism.⁴⁷ Threats to the coherence of contract law would be covered up. The examples from case law that have been analysed in Chapter 6 confirm that such a formal systematisation of rules cannot prevent the substantive controversy between policies from emerging after all. Policy issues have arisen in all types of cases, whether these were regulated by specific rules (non-competition clauses), general clauses (suretyships by relatives) or no existing rules at all (surrogacy arrangements in some of the selected countries).

All of this does not seem promising for legal certainty. The openness of contract law adjudication to ideological influences implies that the predictability of the outcome of cases will not be very high.⁴⁸ The application of fundamental rights would aggravate the problem, seeing that this could make the courts more aware of their policy-making powers.

Though recognising these difficulties, they have to be seen in the right perspective. First of all, if it is accepted that systems of contract law in themselves are not coherent, then the application of fundamental rights does nothing more than confirm this. Legal certainty will neither be affected in a positive nor a negative way. Second, through the revelation of policy issues fundamental rights could actually help to enhance coherence and legal certainty: the justification for policy choices will become clearer and, consequently, future cases can build on that.⁴⁹ Third, the extent to which fundamental rights reasoning will pervade contract law adjudication – and therefore the extent to which the predictability of the outcomes will be at risk – depends on the cases in which this type of argumentation can and will be applied. If criteria for the application of fundamental rights can be formulated, this will make it easier to estimate their impact on contractual relations. Hence, the following question arises: on the basis of the analysis of case law, in which types of cases can fundamental rights be applied?

⁴⁵ Section 3.2.2.a.

⁴⁶ Compare section 5.2.3. On the use of the principle of good faith see also Hesselink 1999, p. 410-413.

⁴⁷ Compare section 5.3.1.

⁴⁸ See also the Epilogue to Part I.

b) *In which types of cases can fundamental rights be applied?*

Rather than focussing on the direct or indirect nature of the effect of fundamental rights, the analysis of the case law that has been made in this Part of the book has investigated the impact of the reasoning based on these rights on the limitation of freedom of contract. The shifting limits to the autonomy of contracting parties in the conclusion of a contract and the determination of its contents were depicted against a continuum between autonomy and solidarity. Conducting an analysis from this perspective, it was possible to compare case solutions in which fundamental rights have played a part to the outcomes of similar cases in which such rights have not been openly considered.⁵⁰ In the judgments involving fundamental rights arguments reference to policy issues seemed to occur more frequently and to depend less on coincidental factors than in those in which such reasoning was absent. The question now arises whether certain characteristics can be indicated concerning types of cases in which it is possible to apply fundamental rights in this manner.

Before describing some common features of the cases in which fundamental rights reasoning was found, I would like to underline that this enumeration does not necessarily promote the application of fundamental rights in all cases complying with these criteria, not even if they concern extremely similar factual situations. From a top-down perspective, looking at the guaranteeing of the protection of fundamental rights not only in State/citizen relations but also in interprivate dealings, generally speaking, it might be defended that fundamental rights should always be – directly – applied, because they are rights of the citizen that deserve protection on all levels.⁵¹ Only in a second phase is the question of how to adapt contract law reasoning to these rights dealt with. My analysis, looking from contractual disputes to the role of fundamental rights in their solutions (the bottom-up approach),⁵² on the other hand, recognises the contract law framework within which the judges in civil cases have to work from the beginning.⁵³ It presumes that case solutions should already comply with fundamental rights, even if the influence of these rights is not expressly considered. In cases in which an explicit evaluation is made, either ‘directly’ or ‘indirectly’, fundamental rights will be weighed against other interests, which may or may not be equally protected. In theory, the outcomes of similar cases should be the same, whether fundamental rights are explicitly taken into account or not.⁵⁴ But the interesting situations are those in which the outcomes deviate, especially if fundamental rights argumentation reveals the policy reasons underlying the differences.⁵⁵

With regard to the policy issues involved in contractual disputes, it should be admitted that recourse to fundamental rights argumentation is not always necessary to bring these issues to the surface. The case studies conducted in Chapter 6 have provided examples of judgments in which questions of policy were addressed in the absence of any reference to relevant fundamental rights

⁴⁹ See also Perfumi & Mak 2008.

⁵⁰ Sections 6.2 and 6.3.

⁵¹ Compare section 3.2.3.a. On this line of argument, see also Gerstenberg 2004, p. 773-774.

⁵² See section C of the Introduction.

⁵³ See also Colombi Ciacchi 2006, p. 178-180. Compare Gerstenberg 2004, p. 773.

⁵⁴ Compare the German, Dutch and English solutions to cases regarding sureties by relatives; section 6.2.2.

⁵⁵ Such as in the judgments of the *Bundesgerichtshof* and the *Bundesverfassungsgericht* in the *Bürgschaft* case; compare section 3.2.2.c.

that were applied in similar cases.⁵⁶ This confirms that also in a balancing of interests in the classical contract law meaning these issues may be openly dealt with.

According to the examples given in Chapter 6, however, the contemplation of policy in these cases occurs not only less often,⁵⁷ but also more ‘at random’ than in cases in which fundamental rights play a part. Some judges have even expressly considered that it was not within their competence to decide on such questions, but that these should be left to the legislature,⁵⁸ a type of judicial behaviour which could be deemed to be a form of denial.⁵⁹

An appeal to fundamental rights could thus considerably mitigate the factor of coincidence regarding the answers to policy questions in individual cases. Assuming that the consideration of these rights will involve the principles of autonomy and solidarity that underpin contract law, an appeal to fundamental rights will make explicit the reasoning⁶⁰ of the court for choosing a certain solution. Thus, the possibilities are higher than in similar cases, within a legal system or in different jurisdictions, will be solved in similar ways, given that the policy issues are highly similar in all systems, regardless of the differences there might be on a procedural level⁶¹ as well as within substantive contract law.⁶²

In which types of cases are such questions the most urgent? On the basis of the analysis made in this book, several elements may be enumerated that explain why fundamental rights argumentation has been introduced in and has affected the various case examples. These might be considered basic criteria for identifying cases in which an appeal to fundamental rights may help secure a justifiable, legitimate case solution.

- *Stronger and weaker parties in contractual relationships*

In the first place, examples of fundamental rights application in contract cases seem to share a preoccupation with the equilibrium of contractual relationships. German case law, for instance, has emphasised the task of private law to redress contractual imbalances (*gestörter Vertragsparität*),⁶³ while the judgments of the Italian Supreme Court have addressed the role of the judiciary in protecting the contractual equilibrium,⁶⁴ and in safeguarding substantive equality of the parties in determining the contents of the contract.⁶⁵ The Dutch courts in civil cases have taken into account the unequal bargaining positions of parties in, for instance, cases concerning non-competition agreements in employment relations⁶⁶ and an *hiv* test on behalf of the other contract party.

⁵⁶ For instance the Dutch *Kolkman/Cornelisse* case on non-competition; see section 6.2.1.

⁵⁷ At least for the examples that have been analysed in Chapter 6, it may be concluded that judgments including a fundamental rights argument have nearly always touched upon policy questions, whereas decisions following from considerations of contract law have only done so occasionally.

⁵⁸ On surrogacy contracts, see for instance, the English case *Re C (A Minor) (Ward: Surrogacy)*, also known as: *Re A Baby*, [1985] Fam Law 191, (1985) 135 NLJ 106; and the Dutch cases *Rb. Utrecht* 18 June 1997, *NJkort* 1997, 59, overruled in appeal by *Hof Amsterdam* 19 February 1998, *NJkort* 1998, 32; *Rb. Rotterdam* 23 March 1998, *NJkort* 1998, 33.

⁵⁹ Compare section 5.3.

⁶⁰ Compare Vranken 1995, p. 148-149.

⁶¹ Section 6.1.

⁶² Compare section 3.2.2.c.

⁶³ In particular in the *Handelsvertreter* (BVerfGE 81, 242) and *Bürgerschaft* judgments of the *Bundesverfassungsgericht*.

⁶⁴ *Cass. civ.* 24 September 1999, n. 10511, *Foro it.* 2000, I, 1929; *Cass. civ.*, joint divisions, 13 September 2005, no. 18128, *Foro it.* 2005, I, 2985.

⁶⁵ *Cass. civ.* 20 April 1994, n. 3775, *Giust. civ.* 1994, p. 2159-2173.

⁶⁶ Sections 2.3.2 and 6.2.1, with further references.

English judges, finally, though not applying fundamental rights in many cases, in the judgments in which they have taken these rights into account have also considered the protection of weaker parties.⁶⁷

Social policy aimed at protecting weaker contract parties affects many fields of law, as has emerged from the case studies involving such diverse topics as non-competition clauses in agency and employment contracts, suretyships by relatives, contractual penalties, post-contractual duties in doctor/patient relations (duties protecting both sides!) and surrogacy arrangements. The application of fundamental rights in these types of cases indicates that these rights are relevant to the protection of such goals of social policy, which is confirmed by the fact that the application of these rights brings to the fore the policy issues regarding weaker party protection attached to the cases. This, of course, does not exclude the relevance of the fundamental rights argument for the protection of autonomy-based policies,⁶⁸ but it shows that this type of argumentation is of particular importance for the demarcation of limits to party autonomy, especially when the protection of parties holding a weaker bargaining position is at stake.⁶⁹

- *Validity of the contract (clause)*

A second particular feature emerging from case-law analysis is the fact that most examples concern the validity of a contract or a contract clause, partly due to the focus on freedom of contract (autonomy) and solidarity. The contract in its entirety was at stake in the cases on suretyships by relatives and surrogacy arrangements, whereas the validity of certain clauses was questioned in the case law on non-competition agreements and (as a preliminary question) in cases concerning the reduction of contractual penalties. Only in the example of doctor/patient relations was the question confronted of how fundamental rights affected the determination of the duties of contract parties toward one another.

Without aspiring to draw general conclusions for the contract laws of all selected countries, it might be stated that in the cases taken from civil law systems (the Netherlands, Germany and Italy) the application of fundamental rights related to questions of the annulment of the contract or contract clauses on the basis of requirements of 'good morals' or 'good faith'.⁷⁰ Tortious liability⁷¹ played a supporting role in the determination of the duties of the parties in post-contractual relations, such as in the Dutch dentist case, in which a limitation of a fundamental right (physical integrity) could be justified on the basis of a duty derived from tort law (refusal to co-operate in a blood test constituting a tort) or the requirements of good faith (the duty of care towards the other party). This corresponds to the technique based on *Wechselwirkung* of fundamental rights and contract law that was described in the first Part of the book.

For English common law it is more difficult to make general statements, given the relatively few post-HRA judgments involving fundamental rights arguments that are available. From a comparative point of view, it might be expected that this type of argumentation could become

⁶⁷ E.g. *Wilson v. First County Trust Ltd*, (CA) [2001] EWCA Civ 663, no. 39 and [2003] UKHL 40, nos. 68 and 138.

⁶⁸ Compare Mak 2003a, p. 174.

⁶⁹ This is, for instance, of prominent importance in the case law regarding surrogacy contracts, in which not only the interests of the desired child are at stake, but also those of the surrogate mother and the intended parents, all of whom are vulnerable because of the emotional aspects related to parenthood.

⁷⁰ Compare sections 1.2.2.a and c.

⁷¹ Section 1.2.2.c.

relevant in cases addressing issues of public policy.⁷² Concerning developments in the law of torts, for instance regarding the protection of privacy, it may however be doubted to what extent judges will take up the argument of how fundamental rights should be given effect in interprivate relationships.⁷³

- *Differentiation according to legal relationships, fundamental rights and legal actors*

In the third place, finally, a differentiation according to legal actors, the nature of the fundamental rights involved, and legal relationships is highly important. Where the theories of direct and indirect effects could not explain by themselves to what extent certain rights might affect certain contractual relationships, the legal-political analysis illustrates the manner in which these questions are decided, by disclosing the political undercurrents of contract law adjudication. Moreover, it has revealed that the direct/indirect effect distinction itself depends on legal-political views.⁷⁴ Even if rejecting the analysis of case law in terms of direct and indirect effects, however, the differentiating factors that were named in relation to these concepts retain their importance for the discourse on fundamental rights application in contract cases.

As far as *legal relationships* are concerned, the emphasis on weaker party protection in case law may be considered a distinguishing criterion.⁷⁵ It explains why fundamental rights argumentation has relatively often arisen in classic examples of contracts involving stronger and weaker parties, such as employment relations, medical treatment contracts, bank/client relations and surrogacy arrangements. For contractual relationships answering this profile, therefore, a differentiation might be made according to fundamental rights in order to see whether their application could serve the solution of disputes.

Not all *fundamental rights* affect contract law adjudication in a similar manner and to a similar extent.⁷⁶ What is more, the same fundamental right or principle may have different applications within a jurisdiction, such as Article 2 of the Italian Constitution in the case law on surrogate motherhood.⁷⁷ In section 3.2.2.b it has been argued that general theories on the way in which effect should be given to certain rights, for instance Canaris' theory of *Eingriffsverbote* and *Schutzgebote*, cannot explain this case law practice nor give guidelines for future cases. On the basis of the analysis made in Chapters 4 to 6, this conclusion has been given substance by relating it to legal-political factors: the technical justification for allowing a certain effect of a certain right covers up the political choices made regarding the extent to which fundamental rights might limit party autonomy.⁷⁸ Consequently, the potential effect of a fundamental right not only depends on the framework of contract law and on the circumstances of the case, but also on the policy pursued by the legal actors involved (the legislature, the parties and the judiciary).

From this point of view, no general theoretical limits can be given for all fundamental rights, such as in a general theory of indirect effect. Specific criteria should be formulated for each

⁷² Section 1.2.2.a.

⁷³ Compare section 2.5.2.

⁷⁴ Section 7.a above.

⁷⁵ See again section 7.a.

⁷⁶ Compare section 3.1, where cases have been categorised according to the various forms of direct and indirect effects that were distinguished in Part I.

⁷⁷ Section 6.2.5.b.: the Monza court used Article 2 to justify the nullity of the surrogacy contract, whereas the Rome court applied it to argue in favour of upholding a surrogacy agreement.

⁷⁸ See section 7.a above.

right depending on various factors, such as its interpretation in case law (e.g. by a Constitutional Court, or by the ECtHR), its implementation in legislation, and the rules of private law governing the case in which its application is foreseen (in light of the previous subsection, often rules on validity, general clauses). On the basis of the case studies conducted in Chapter 6, for instance, it can be said that the German right to respect for human dignity (Article 1 GG) and the Italian principle of solidarity (Article 2 *Cost.*) are of relevance for the application of the general clauses of good morals and good faith. Moreover, freedom of profession (Article 12 GG; Article 19(3) *Gm*; Articles 4 and 35 *Cost.*) is of specific importance for the evaluation of non-competition clauses in commercial agency and employment contracts. And fundamental rights protecting the child and protecting the family are likely to affect cases concerning the validity of surrogacy arrangements and cases regarding the transfer of parental authority over a child born out of such arrangements.

As regards the *legal actors*, it has already been submitted that the role of the judiciary, in relation to both the legislature and contract parties, seems to be a complex one.⁷⁹ Judges in civil cases play a key role in guaranteeing the compliance of the conduct of contract parties with fundamental rights and, at the same time, might be inclined to consider the policies underlying legislation on the topics they have to deal with, if available. If there is no legislation, judges will have to find a solution on the basis of general contract law, a solution which should also comply with fundamental rights.

The legal-political analysis of case law has demonstrated how the courts thus play a leading role in the protection of fundamental rights in contract law. At the same time, it has been argued that the application of these rights may make the judges more aware of the policy issues addressed in the cases presented to them and, consequently, of their influence on the policy that is pursued. In this sense, the application of fundamental rights in case law turns out to be more controversial than their role in the legislative process, in which, after all, it is clear that the legislature will make policy choices. For the judges, this aspect of fundamental rights application opens a new perspective to the task they, arguably, have already been fulfilling for years.⁸⁰

In order to say something more specific on the consequences of this awareness for the solution of cases, we should take a look at the other legal actors involved in contract law adjudication: the parties. Since their ways of developing their argument before the courts strongly affect the procedure in the case, the role which fundamental rights will play in the eventual judgment also very much depends on them. This interaction between judges and parties will be further discussed in the following subsection, which addresses the questions whether the courts could be required to consider fundamental rights explicitly in contract cases and, on the other hand, whether fundamental rights argumentation could require them to interfere in contractual relationships *ex officio*.

c) *What does the explicit consideration of fundamental rights add to contract law adjudication?*

The previous subsections have considered the questions of the relationship between fundamental rights and contract law (a) and the formulation of guidelines for cases in which fundamental rights argumentation could play a part (b). They have focused on the explanation of current trends in contract law adjudication. In this subsection, finally, the impact of fundamental rights on

⁷⁹ Section 5.1. Compare Gerstenberg 2004, p. 771-772.

⁸⁰ See further section 5.3, with references.

contractual relationships will be looked at, in order to find out to what extent the argumentation based on these rights may result in further-reaching judicial interventions in contractual relations than those based on traditional contract law reasoning.⁸¹

Explicit consideration of fundamental rights?

As a preliminary remark, it should be observed that the introduction of the fundamental rights argument in contract cases to a certain extent depends on procedural factors.⁸² In most countries, the scope of legal reasoning in case law will be determined by the grounds on which parties base their claims.⁸³ Moreover, the higher courts in the hierarchy of civil procedure will usually deal with questions of law only and no longer adjudicate questions of fact,⁸⁴ which means that the decisions of these courts are based on the translation that has been established of the factual situation in legal terms. The development of case law, thus, partly depends on the (in)activity of the parties and the legal arguments they have adduced. Although this is important to keep in mind when reading case law, it does not fully account for the final demarcation of the judges' playing field. In the context of fundamental rights application, it may be seen to what extent judges can include these rights in their judgments if the parties have not explicitly referred to them.

In the analysis of case law, in both Parts of the book, it has become clear that fundamental rights often – though not exclusively⁸⁵ – enter private law discourse through the interpretation of norms of private law. For contract law, the most relevant provisions are the general clauses of 'good morals'/public policy and 'good faith',⁸⁶ as well as the *leges specialis* of these, such as provisions regarding the voidability of non-competition clauses or unfair standard terms, or the reduction of manifestly excessive contractual penalties. The wording of relevant provisions of law (e.g. Article 3:12 of the Dutch *BW*)⁸⁷ and court judgments including general observations (such as the German *Lüth* decision, or the Italian case *Cass. 1994, n. 3775*) suggests that judges even have a duty to dip their brushes into the fundamental rights argument when colouring the general clauses of private law.

However, it is not said that this results in the explicit contemplation of the protection of fundamental rights in the contractual relationship. Judges often limit their reasoning to a rather abstract assertion that 'the contract infringes good morals' or 'the clause does not comply with the requirements of good faith'.⁸⁸ In light of the interaction between fundamental rights and contract law, this implies that the contents of the contract have been tested as to their compliance with

⁸¹ Compare section B of the Epilogue to Part I, regarding the 'real' effects of fundamental rights in contract law.

⁸² See section 6.1. See also Vranken 1995, p. 151-152.

⁸³ Compare Articles 111(2), 129, 130, 343, 348, 407, 419 of the Dutch *Wetboek van Burgerlijke Rechtsvordering (Rv)*; § 253(2), 513, 520 of the German *Zivilprozessordnung (ZPO)*; Articles 112, 163(3) and (4), 342, 345 of the Italian *Codice di Procedura Civile (c.p.r.)*; s 16.2, 52.1, 52.11(3) of the English Civil Procedure Rules.

⁸⁴ See, for the Netherlands: Article 419(2) and (3) *Rv*; Article 79 *Wet op de Rechterlijke Organisatie (RO)*. For Germany: § 543(2) *Gerichtsverfassungsgesetz (GVG)* and § 545 *ZPO* (for the *Bundesgerichtshof*), and Article 93(1)(4a) *GG* and §§ 13(8a) and 90(1) *Bundesverfassungsgerichtsgesetz (BVerfGG)* (for the *Bundesverfassungsgericht*). For Italy: Article 360 *c.p.r.* (for the *Corte di Cassazione*). For England: Article 54.1 ff. Civil Procedure Rules; see also the Access to Justice Act 1999 (Destination of Appeals) Order 2000, regarding the competence of the courts of appeal.

⁸⁵ Compare the examples of direct effect referred to in section 3.1.2.

⁸⁶ For brief descriptions of the relevant provisions in Dutch, German, Italian and English law, see section 1.2.2.

⁸⁷ See section 1.2.2.b, the Netherlands.

⁸⁸ Compare Hesselink 1999, p. 409-410.

relevant fundamental rights. However, without explicit grounds, it is difficult to tell what has really been going on in the minds of the judges.⁸⁹

At this point, the link may be made to the distinction between types of judicial behaviour as has been made by Kennedy,⁹⁰ which represent different methods of denying the ideological stakes in contract law adjudication. On the basis of this distinction it may be argued that judges have different ways of developing their reasoning so as to apparently exclude their own ideological opinions from influencing their judgments. Normally, these processes will not be visible in the actual decisions of the courts, especially because the judges may be considered to be in denial of their decisions containing policy choices.

My aim in this Part II has been to analyse the relation between these two observations in connection with the judicial handling of the fundamental rights argument. In the first place, the five cases studies presented in Chapter 6 have illustrated how this type of argumentation has stimulated the more explicit reference to policy issues in contractual disputes. A mere reference to ‘good morals’, ‘public policy’ or ‘the requirements of good faith’ is then no longer possible, since the judges have to state how, in their opinion, fundamental rights colour these concepts and how these rights, at the same time, may be limited through these general clauses. From this perspective, fundamental rights reasoning is complementary to the application of the general clauses of contract law: it makes explicit what, in principle, should already be implicit in legislation and adjudication.⁹¹

In the second place, the case-law analysis has shown that the rule-solutions chosen by the courts in various cases depict relative positions on a – also relative – continuum between autonomy and solidarity.⁹² This has confirmed that the judgments of the courts portray a certain view of the way in which the judges conceive the ‘community’s ideology’⁹³ (the third dimension of the continuum),⁹⁴ for instance coming to the fore in the German *Bundesverfassungsgericht*’s observations on the tasks of the legislature and judiciary in protecting weaker contracting parties.⁹⁵ Moreover, the analysis has illustrated the difference between decisions in which the judges deny the policy consequences of their rulings, in which cases fundamental rights were often not explicitly considered, and judgments in which the judges acknowledge their policy choices, often in the light of fundamental rights argumentation (the second dimension of the continuum).⁹⁶ A striking example of this contrast can be found in the English and Dutch judgments on surrogacy that ‘leave it up to the legislature’ to decide on the topic, as compared to the strong positions taken by the Italian courts, either against (Monza) or in favour of contracts facilitating surrogate motherhood (Rome). From this point of view, fundamental rights reasoning has the potential to surpass traditional contract law adjudication: it makes judges aware of the political side of their

⁸⁹ For an analysis of the transparency and legitimacy of the judicial deliberations of the US Supreme Court, the French *Cour de Cassation* and the European Court of Justice, see Lasser 2004, who argues that the transparency of judgments is not always a necessary requirement for their legitimacy.

⁹⁰ Kennedy 1997, p. 194-198; see section 5.3.1 above for a brief description of Kennedy’s distinction between ‘constrained activism’, ‘difference splitting’ and ‘bipolarism’.

⁹¹ See also Perfumi & Mak 2008, section V.3.

⁹² In particular section 6.3 above.

⁹³ See section 5.3.1.

⁹⁴ Section 4.3.4.

⁹⁵ Compare the case law discussed in section 2.2.2, which has also been analysed in sections 6.2.1 and 6.2.2.

⁹⁶ Section 4.3.2.

decisions and, thus, of the effects their ideological views have on the rule-solution that is chosen for specific cases.

Does this mean that fundamental rights argumentation will put an end to constrained activism, difference splitting and bipolarism in European contract law adjudication? Although the intermediary role of fundamental rights between law and politics could raise awareness of the political processes underlying contract law adjudication, it is difficult to imagine judges actually admitting that they follow their own ideological views.⁹⁷ Judges might still try to adhere to the ideology of an ‘author of all laws’, or the legislature. That is, even if they are aware of policy questions, they may still deny their own influence on the choice of a rule-solution. Awareness of policies pursued through certain rules of contract law does not mean that judges will openly admit to making a choice for a specific rule because of the political choice it implies. They might even choose a rule supporting another policy, if they feel that they cannot go further within the framework of the existing rules (constrained activism), if they find the latter rule to represent a more ‘moderate’ ideology than their own (difference splitting) or if they try to find a balance in the ideological views emerging from a range of their decisions (bipolarism). In that sense, judges will remain in denial of the extent to which their judgments are influenced by their own ideology and, as such, are acting in bad faith.⁹⁸

Notwithstanding these limits to the potential influence of fundamental rights on contract law adjudication, it should not be forgotten that important developments in case law have already taken place on the basis of these rights, as has been illustrated in Chapters 2 and 6. The political-legal perspective on the subject justifies the conclusion that fundamental rights refer to policy issues involved in questions of contract law. The explicit consideration of these rights can, therefore, bring these policy issues out into the open in the adjudication of the specific cases. As we have seen in Chapter 6, this may result in noticeable changes in the rule-solution that is eventually chosen. Moreover, since fundamental rights clarify the policies pursued in case law, they may require a more extensive reasoning for the decisions,⁹⁹ providing parties and others studying the judgments with a deeper insight into the reasons that underlie a certain case solution.

Ex officio intervention on the basis of fundamental rights?

Finally, given their role in raising the judicial awareness of political stakes in contractual disputes, could fundamental rights justify an *ex officio* judicial intervention in a contractual relationship, aimed at the protection of a certain general interest? This question has been touched upon in several cases involving a fundamental rights argument, such as the German *Handelsvertreter* decision (regarding a non-competition clause that complied with applicable legislation)¹⁰⁰, the *Bürgerschaft* decision (dealing with the question whether an exception should be made for relatives standing surety when considering the validity of the suretyship) and, more recently, the Italian cases on the reduction of contractual penalties (challenging the existing rule which stated that a reduction could only be granted at the request of the parties)¹⁰¹.

⁹⁷ Compare Hesselink 1999, p. 411-413.

⁹⁸ Section 5.3.1.

⁹⁹ Compare Vranken 1995, p. 141-144, on the importance of judicial reasoning for the decision for evaluating the judgment.

¹⁰⁰ See sections 2.2.2 and 6.2.1.

¹⁰¹ See sections 2.4.2 and 6.2.3. See also Mak 2007.

A judicial decision that deviates from legislation or established case law will not be made lightly. It needs a justification. From the legal-political perspective, the application of fundamental rights in contract cases may provide such a basis for judges to legitimate new case-law developments.¹⁰² Moreover, it has been recognised, for instance in German law, that judges may even be obliged to intervene in contractual relations on the basis of fundamental rights, if upholding the contract would imply a breach of these rights. In that case, interests safeguarded by fundamental rights may outweigh interests that only find protection in rules of contract law.¹⁰³ This became clear, for instance, in the case law of the *Bundesverfassungsgericht*, which obliged the courts in civil cases to take an active part in assuring the compliance of existing rules with values protected by the *Grundgesetz*.¹⁰⁴

A constitutional reading of cases could, moreover, make it easier to follow, and possibly to criticise the reasoning of the courts on the question of *ex officio* powers.¹⁰⁵ As has become clear in the mentioned examples, especially in the Italian penalty cases, the exercise of balancing the rationale of established rules against the arguments for change is a delicate one. In particular, this is so because, as we have seen, the cases concern the question of to what extent the rules of contract law will interfere in the relationship between contract parties. Fundamental rights argumentation may here serve the purpose of sketching the legal-political background to the case, in order to explain the reasons why the court chooses a certain rule-solution. The Italian *Corte di Cassazione*, for instance, has justified its decisions by referring to the stakes of autonomy and solidarity present in the question whether an *ex officio* reduction of a contractual penalty should be possible.¹⁰⁶ As we have seen in section 6.2.3.b, the Court's policy reasoning, however, remained underdeveloped, because it did not further specify its understanding of the principles of autonomy and solidarity. It is interesting to see that comments on the decision have questioned the new orientation towards a judicial reduction of contractual penalties in particular in light of the policy issues involved.¹⁰⁷

On the basis of the analysis made in Part II of this book, it might thus be said that fundamental rights argumentation can have an added value for judicial activism in contract cases, while it may at the same time provide ammunition for criticising *ex officio* interventions. Fundamental rights can provide a formal as well as a substantive justification for a deviation from existing rules of contract law at the initiative of the judges. They, however, require an accurate translation of policy to contract law; otherwise the application of fundamental rights is in danger of allowing the rhetorical strength of these rights to eclipse the substantive argument they refer to.

¹⁰² Compare Colombi Ciacchi 2006, p. 179, who observes that: '[T]he judicial power of making value choices is formally limited. When legislation does not make a clear choice and the precedents are unsatisfactory, courts need strong arguments to legitimate a new case-law development. A judgment, referring to a constitutional or Convention norm or value to explain why the legal instrument X should be given the interpretation A, maintains a higher formal and substantive legitimacy and coherence than a judgment which simply justifies the result A by referring to X, which however had always led to result B in the past.'

¹⁰³ Compare section 3.2.2.b.

¹⁰⁴ See section 2.2.2.

¹⁰⁵ In this sense see already Scholten 1974, p. 131.

¹⁰⁶ *Cass. civ.* 24 September 1999, n. 10511, *Foro it.* 2000, I, 1929; *Cass. civ.*, joint divisions, 13 September 2005, no. 18128, *Foro it.* 2005, I, 2985.

¹⁰⁷ For example Palmieri 2000 and 2006. See also Mak 2007, with further references.

d) Conclusion

What has the comparative legal-political analysis of case law explained with regard to the application of fundamental rights in contractual relationships? It has not provided ready-made answers to questions concerning specific fundamental rights or specific contract law cases, nor has it spoken in favour of either always taking into account these rights or principally discouraging this type of legal reasoning. In fact, in contrast to the analysis based on the distinction between the theories of direct and indirect effect, this analysis has taken an external point of view, in order to explain why fundamental rights have been applied in contract law and for what reasons theories of either direct or indirect effect have been promoted. Taking this approach, it has been aspired to open up the discourse on this subject to the real issues it engages, which relate to the legitimacy of judicial decisions and to the policies pursued in contract law adjudication.

In respect of the analysis made in Part I, the study developed in this Part has given more guidance as to the intensity which the fundamental rights argument may have in case law. It has explained the choice for general theories from the legal-political perspective: someone speaking in favour of indirect effect, will usually want to preserve the sovereign status of contract law – or private law in general – with respect to public, constitutional law; someone supporting direct effect, on the other hand, emphasises the protection of fundamental rights in all fields of law, including contract law. Continuing this line of thought, solutions to contract law cases could be placed on a continuum depicting their relative political nature in terms of autonomy and solidarity. Fundamental rights were found to have an important meaning in this analysis, given their ability to reveal the policy stakes underlying choices of rule-solutions: the intermediary role of fundamental rights in European contract law adjudication. Through the application of these rights, awareness may thus be raised concerning the way in which policies are pursued in contract law cases.

On the basis of the case studies conducted in Chapter 6, furthermore, several common features of contractual disputes in which fundamental rights could play a part have been identified. Given the protection that these rights, individually and in their collectivity, give to both principles of autonomy and solidarity in contractual relations, they are of special relevance for situations in which the bargaining strength of parties shows disparities. Fundamental rights may emphasise the autonomy of both parties (e.g. freedom of expression, free choice of profession, free development of one's personality, and sometimes even freedom of contract), while at the same time introducing arguments of solidarity or social justice aimed at weaker party protection (ensuring that the party occupying the weaker bargaining position is able to fully enjoy his or her fundamental rights). These considerations are of particular importance for the formation phase (validity of the contract), although several examples have illustrated that they may also arise at a later stage (e.g. post-contractual duties in doctor/patient relations). Of course, it will depend on the specific fundamental right involved and on the nature of the legal relationship how the adjudication of a specific case will develop, but it is clear that the judiciary plays a key role in assuring the compliance of rules of contract law with values that enjoy fundamental rights protection.

In light of the intermediary role of fundamental rights in the dichotomy of law and politics, several arguments have been given for the explicit consideration of fundamental rights by the courts. These may be summarised in the thesis that judges will become more aware of the policy issues involved in the cases presented to them and, consequently, of their possible influence on the policies pursued. On the one hand, this might induce them to take more liberty or discretion

in deciding on a rule-solution. On the other hand, even if judges remain in denial of their influence on the politics of contract law, the explicit reference to fundamental rights will require substantive grounds for the case solution – whether implying a change of the rules or not – and will thus contribute to the legitimacy of the solution chosen.

Epilogue to Part II

Before drawing overall conclusions on the research described in the separate Parts of the book, some loose ends need to be tied up regarding the analysis made in Part II. These concern, respectively: the three dimensions of the autonomy/solidarity continuum that were described in section 4.3 (section A below); the question how to define social justice (B); and, finally, the institutional setting against which the argument has been developed (C).

A. Dimensions of the autonomy/solidarity continuum

In Chapter 4, Duncan Kennedy's continuum portraying relatively 'autonomy-based' and 'solidarity-based' rule-solutions was introduced as a model for the comparative legal-political analysis of German, Dutch, Italian and English case law in the field of fundamental rights and contract law. Several modifications were, however, suggested in order to make the model suitable for the analysis of the cases. In the first place, the definition of 'altruism' or 'solidarity' was narrowed so as to encompass only cases of solidarity of stronger parties towards weaker parties, excluding cases in which solidarity was required from the weaker party towards the stronger party.¹ In the second place, several dimensions of the continuum were distinguished.² A double relativity of the continuum was seen in the fact that different adjudicators may hold relatively different views on the political nature of a rule-solution. A third dimension was added in light of the context within which such views were expressed, that is the background provided by the legal system.

In Chapter 6, five case studies have been conducted using this model. This analysis avoided the problem of having to draw all three dimensions into one picture by roughly sketching a comparative perspective (third dimension) and depicting the deviations by domestic courts on a parallel continuum (second dimension). In this way it was possible to compare the effect of fundamental rights on the definition of political stakes in the various judgments.

At this point, it should however be admitted that the sketch of a comparative perspective to some extent simplifies the real picture. For one thing, it absorbs part of the continuum's second dimension, in the sense that it is partly based on the decisions of the courts themselves. Only to the extent that these decisions represent the view of the national legal system on autonomy and solidarity, therefore, can they be considered expressions of the third dimension. Furthermore, the picture of the relative positions of the courts in certain cases does not allow for general conclusions to be drawn on the political activity of these courts, while the comparative perspective should say something about the background against which case law develops. A broader analysis of the case law of specific courts (or better: judges) should be made in order to be able to better evaluate the influence of ideology on their decision-making, in the context of the development of European contract law as a whole.

These further-reaching analyses, however, fall outside the scope of this book. Here it has only been attempted to explain the manner in which the fundamental rights argument affects

¹ Section 4.2.

² Sections 4.3.2 and 4.3.4.

contract law adjudication. Further research on the role of the judiciary with regard to the politics of contract law should be, and has already been,³ carried out elsewhere.

B. *Social justice in European contract law*

In Chapter 6, especially in section 6.3.3, it has been argued that fundamental rights may relate to various forms of social justice in contract law. In the context of that Chapter, the observations that were made mostly regarded the rule-solutions found in the case law of the selected legal systems, that is Germany, the Netherlands, Italy and England. It may be asked to what extent these remarks could serve the discussion on social justice on the development of European contract law at the EU level.

Earlier,⁴ reference has been made to claims stating that the current agenda of the European Commission regarding the development of ‘a more coherent European contract law’ ignores the political aspects of drafting a uniform contract law for the EU.⁵ It has been argued that social justice should play a part in this process, alongside goals of market integration, and that this means that the rules of contract law should be aligned with constitutional principles.⁶ This poses the question how existing case law on this topic could inspire the drafting of a European contract law, for instance in relation to the drafting of a ‘common frame of reference’ (CFR).⁷

It would be my view that the analysis of domestic case law on the impact of fundamental rights in contract law could provide starting points for a discussion of the topic on the EU level.⁸ The case law examples have clarified how fundamental rights relate to policies of autonomy as well as solidarity and social justice, mediating the translation of these policies into rules of contract law. Moreover, they have illustrated how a variety of forms of social justice can be given shape in contract law regulation.⁹ Once thought has been given to the aims of social justice that a European contract law, or even a European Civil Code, should pursue, fundamental rights argumentation might therefore be applied to make sure that the rules comply with the constitutional traditions of the EU member states and other relevant fundamental rights documents, such as the EU Charter of Fundamental Rights and the ECHR.

C. *Institutional imagination*

Last but not least, the question may be asked how the development of fundamental rights argumentation in contract cases affects the institutional framework for the protection of autonomy and its limits. This question refers to Roberto Mangabeira Unger’s work on ‘legal analysis as institutional imagination’.¹⁰ Unger has argued, to put it briefly, that contemporary legal

³ I refer to the work of Dworkin and Kennedy that has been described in Chapter 5 and, more in general, to the schools of thought mentioned in section 4.1. See also Lucy 1999.

⁴ Section 4.1.2.

⁵ See, in particular, Social Justice Group 2004.

⁶ Social Justice Group 2004, p. 667-668.

⁷ On the CFR, see the European Commission’s Action Plan, ‘A More Coherent European Contract Law’, Brussels, 12 February 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.

⁸ For instance regarding the interpretation of ‘human dignity’, as in Case C-36/02, ECJ 14 October 2004 (*Omega Spielballen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*).

⁹ Section 6.3.3, referring to Wilhelmsson’s classification of varieties of social justice in European contract law; see Wilhelmsson 2004.

¹⁰ Unger 1996.

thought has the commitment to ‘shape a free political and economic order by combining rights of choice with rules designed to ensure the effective enjoyment of these rights’.¹¹ In practice, the realisation of this idea is often twofold: on the one hand, rights of choice are guaranteed, while, on the other, certain arrangements are withdrawn from the scope of choice for the purpose of making the exercise of choice real and effective.¹² This idea is very much present in the case law that has been analysed in the previous Chapters, which was concerned with the protection of party autonomy, also through limiting the possibilities for parties to (partly) waive their (fundamental) rights. However, as Unger has said, this insistence on the effectiveness of the enjoyment of rights of choice should only be the first step in a two-step movement.¹³

The second step should be the imagination of legal ways to enforce these rights of choice.¹⁴ For every right, there may be a variety of conditions and ways to assure its realisation. The recognition of a right of choice should thus be followed by an inventarisation of the institutional structure required to effectively realise the right. This could imply institutional change. According to Unger, however, this second step was hardly ever taken in law and legal theory as it stood a decade ago, since its scope was often limited to existing institutional structures.¹⁵

In today’s European contract law institutional imagination seems to occur on two levels. On the level of the EU, reference has already been made to the efforts being made to harmonise the contract laws of the member states.¹⁶ On the level of national contract laws, examples include the implementation of EU Directives,¹⁷ which have also had an impact on the reform of domestic laws of obligations,¹⁸ and the reform of the judicial organisation,¹⁹ which of course also affects civil procedure. In my opinion, the application of fundamental rights in contract cases could be considered as another instance of institutional imagination.

Reference to fundamental rights in contract law adjudication, it has been argued in this Part II, reveals the policy questions involved in the cases. As such, it may induce judges to reconsider the rationale of the rule-solution to be chosen, which often regards the protection of party autonomy and freedom of contract, within the limits set by policies of autonomy (protection of the parties’ freedom) and solidarity (weaker party protection). This would be the first step in Unger’s theory. Fundamental rights argumentation does however not stop here. In itself, it provides an institutional framework for the solution of contractual disputes that differs from the traditional private law balance of interests. It thus fits Unger’s understanding of legal analysis as institutional imagination, since it aims at mapping the legal definitions of institutional structures of society, whilst simultaneously criticising these definitions by revealing the political projects underlying them.²⁰

¹¹ Unger 1996, p. 1.

¹² Unger 1996, p. 1-3. Compare the idea of having to protect contract parties against themselves; Schwabe 1998.

¹³ Unger 1996, p. 3 and p. 6.

¹⁴ Unger 1996, p. 3.

¹⁵ Unger 1996, p. 3. There are explanations for this ‘arrested development’ of legal thought, such as the limits to the political legitimacy of the judiciary; Unger 1996, p. 5-6. Note, furthermore, that Unger’s observations mostly concerned the United States.

¹⁶ Compare section A of the Introduction as well as section A of this Epilogue.

¹⁷ See, for instance, Teubner 1998 on the introduction of the concept of ‘good faith’ in English law.

¹⁸ As in Germany; see Medicus 2004, p. 17-18.

¹⁹ Kwak 2005, p. 5-6.

²⁰ Unger 1996, p. 20-21.

Through this process of mapping and criticism, legal analysis may indicate how and where ideal policies and principles encounter institutional obstacles to their fulfilment.²¹ In my analysis, the ‘awareness thesis’ linked to fundamental rights application in contract cases could be included in this conception of criticism. From this perspective, the impact of fundamental rights in European contract law may be seen not only in case law, but also in legal analysis. An awareness of the legal-political background of rules of contract law does not only regard the courts, but also the legal scholars who in their turn ‘adjudicate’ the decisions made in contract cases. For as Unger has elegantly put it: ‘We cannot realise our interests and ideals more fully, nor redefine them more deeply, until we have learned to remake and to reimagine our arrangements more freely.’²²

²¹ Unger 1996, p. 22: ‘Affirmatively, the view we want is the view serving the purposes of the second moment of this analytic practice: the moment of criticism, when we focus on the disharmonies of the law and on the way in which the ideal conceptions, expressed in policies and principles, or the group interests represented by programmes and strategies, get truncated in their fulfilment and impoverished in their meaning by their received institutional forms.’

²² Unger 1996, p. 23.

Summary and conclusion

The application of fundamental rights in contractual disputes brings together questions of constitutional law and private law. What is the relation between these rights, originally protecting citizens against the State, and the contractual ties that bind private parties to each other, in a realm in which State intervention traditionally has been limited to setting the framework within which parties are free to arrange their interrelations? Under which circumstances can contractual disputes be resolved on the basis of fundamental rights argumentation? And what would be the added value of this method in comparison to the traditional contract law balancing of interests?

In this study, the subject has been approached from the perspective of contract law, in order to find out how the introduction of issues of public interest in this field can be justified from there and what are the dynamics of fundamental rights integration into the contract law balance of interests. Attention has been paid to both constitutionally protected rights and rights safeguarded by international human rights treaties, such as the European Convention on Human Rights (ECHR). A comparison has been made between four European legal systems, viz. Germany, the Netherlands, Italy and England, so as to contribute to the current debate on the development of contract law in Europe.

Chapters 1 and 2: freedom of contract and fundamental rights in European contract law cases

Case law examples illustrate the main problems related to the theme. A central issue is the limitation of freedom of contract through fundamental rights argumentation. From the opposite perspective the question arises to what extent parties are allowed to use their freedom of contract to agree on waivers or restrictions of their fundamental rights.

German law 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 protected by the Constitution (*BVerfGE* 7, 198, *Lüth*). In case law, this could be realised especially through the interpretation of the general clauses of private law. In the 1990s the Court extended this doctrine to include the judicial review of the contents of contracts, based on the interpretation of ‘good 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 (*BVerfGE* 81, 242, *Handelsvertreter*). And a surety agreement signed by a non-pecunious daughter on behalf of her father could be annulled with an eye on the protection of private autonomy and the principle of the social state (*BVerfGE* 89, 214, *Bürgerschaft*).

In Dutch law, similar rules have been developed in case law determining the impact of fundamental rights on the colouring of general clauses of private law. Examples have been found of the *Hoge Raad* indicating the role of the fundamental right to teach in the adjudication of the legality of a contract stipulating the waiver of the right to teach mensendieck exercises in the case of a failed examination (*NJ* 1970, 57, *Mensendieck I*; and *NJ* 1971, 407, *Mensendieck II*). Moreover, co-operation in an hiv test for the benefit of another, and accordingly an infringement of the right to physical integrity, could be justified not only on the basis of tortious liability against that person (*NJ* 1994, 347, *Aids-test* or *hiv-test I*), but also on the basis of a duty of care resulting from

contractual good faith (NJ 2004, 117, *biv-test II* or *dentist*). 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.

Using Italian and English law as touchstones, representing a Romanistic and a Common Law perspective respectively, it has been confirmed that fundamental rights have affected the development of private law doctrines. An impact can be felt through the judicial review of the contents of contracts with requirements of good faith (Italy), while at the very least fundamental rights may stimulate the extension of doctrines of private law to new cases (England). At the same time, Italian case law has demonstrated a greater emphasis on fundamental rights protection than German and Dutch examples, since Italian judges have applied fundamental rights to interpret rules of contract law, while paying relatively less attention to the reverse effect of contract law norms on the interpretation of the fundamental rights of contract parties. English common law, on the other hand, has not yet elaborated the role of fundamental rights, protected by the ECHR and given effect through the Human Rights Act 1998. It has, accordingly, sought to remain within recognised doctrines of private law, for instance breach of confidence, rather than introduce fundamental rights, such as a right to privacy.

Chapter 3: from direct/indirect effect theories to a legal-political perspective

The questions raised in the case law have often been analysed in terms of direct and indirect effects of fundamental rights. A direct effect implies that a fundamental right is applied to a case between private parties in the same way as it would be applied to a case involving the State. Indeed, it is held that fundamental rights may be infringed by private parties in a similar way as by the State and should therefore be given effect in contract law as in public law. The theory of indirect effect rejects this view, arguing that private parties in principle are not addressees of fundamental rights and cannot be requested to take into account matters of public interest in their interprivate relations. Fundamental rights, from that perspective, can at most serve as an inspiration for the solution of contractual disputes in which values protected by these rights are at stake. Case solutions should, however, always be embedded in norms of contract law.

Building on Chapters 1 and 2, it has been argued that a systematisation of case law according to the distinction between direct and indirect effects cannot fully explain the role of fundamental rights in European contract law. Even though a differentiation may be made between forms of direct and indirect effects, these do not prescribe the manner in which judges should handle fundamental rights arguments in specific cases. In particular, the theoretical framework does not provide clear guidelines for establishing the intensity of the impact of these rights. The reason for the fact that the direct/indirect effects distinction cannot clarify the relationship between constitutional law and contract law, it has been submitted, is that it is defined by this relationship itself: someone who considers constitutional law to be superior to contract law will favour a direct effect of fundamental rights, whereas someone who seeks to preserve the autonomous nature of contract law will prefer an indirect manner of giving effect to these rights. Trying to distill more general rules on the application of fundamental rights in contract cases from the specific case examples showing these varying effects thus unintentionally brings to mind Baron von Münchhausen pulling himself out of the swamp.

In order to overcome this impasse, a new perspective of analysis has been proposed, suggesting a comparative exploration of the legal-political aspects of the topic. The choice for this point of view is based on the characteristics of fundamental rights application in contract cases. Often, it seems that judges in civil cases balance *interests* rather than *rights* of the parties and, consequently, the values and interests protected by fundamental rights are included in this process. An essential difference between interests secured by fundamental rights and interests safeguarded through private law rules and principles, however, is that the former bear a relation which is much closer to issues of public policy than the latter. After all, they represent the views of society on values that are so fundamental that they should be guaranteed on all levels of public law as well as private law. From this presumption, it follows that the intensity of the impact of fundamental rights in contract law depends on considerations of a legal-political nature. Consequently, the analysis of case law developments from a comparative legal-political perspective raised the expectation that it could clarify the mediating role of fundamental rights between contract law and its politics and could thus define more specific criteria for the application of these rights in contractual disputes.

Chapters 4 and 5: judicial denial of the stakes of autonomy and solidarity hypothesised

In Chapter 4 the framework for the legal-political analysis has been further elaborated. Taking Duncan Kennedy's work on political stakes in contract law issues as a starting point, it has been argued that rule-solutions for contractual problems represent the sums of balances struck between principles of autonomy and solidarity in contract law. Autonomy here refers to self-determination, within the boundaries defined by the autonomy of others. Solidarity is understood as implying sacrifices made on behalf of others and, other than in Kennedy's definition, in particular the sacrifices required from a stronger party towards a weaker party aimed at restoring the equilibrium in their relationship.

Rule-solutions represent the sum of subcomponents of an autonomous and solidarity-based nature and can be depicted as relative points on a continuum between (non-existent) extremes of egotism and selflessness (see figure 1 in section 4.3.1). In order to illustrate the views of judges and legal scholars on specific cases, moreover, a double dimension may be given to the continuum model, indicating how they have classified the possible rule-solutions in a case. This has been demonstrated on the basis of the example of duties of care in bank/client relations, in which the prohibition of transactions is usually considered as tending to lean more towards solidarity than the imposition of information duties on the bank, while at the same time some people find that information duties emphasise autonomy, while others consider these to be solidarity-based (figure 2 in section 4.3.2). A third dimension may even be added, taking into account the background of the legal system within which cases are adjudicated (figure 3 in section 4.3.4).

An explanation for the fact that these political stakes are far from obvious in most case decisions can be found in the idea that judges often remain in denial of these stakes. The idea of denial is closely related to the theoretical view that is taken on adjudication. Chapter 5 has illustrated this on the basis of the work of Ronald Dworkin and Duncan Kennedy. While the former has promoted the solution of legal disputes on the basis of principle argument, which would be less susceptible to ideological influences than policy argument, the latter has criticised this assumption, submitting that principle is equally open to political views as policy. Policy here

refers to collective goals of the community, whereas principle refers to individual and group rights. Dworkin claims that judges are acting in bad faith if they allow their ideological convictions to affect their decision-making and argues that the threat of this occurring is less imminent in principle-based adjudication than in policy-based judgment. Kennedy, on the other hand, submits that judges may be influenced by their own ideologies in both cases and considers them to be acting in bad faith because they – unintentionally – deny that they are affected by these convictions.

Coming back to the role of fundamental rights in contract law adjudication, the hypothesis has been developed that these rights can clarify what is actually happening in the adjudicative process. Fundamental rights may be seen as representing political choices for the protection of certain values in society, but at the same time they are enacted rules of the legal system, which may be invoked to enforce the protection of the interests they represent. As such they mediate in the dichotomy of politics and law. In public law cases this is apparent from the arguments of both principle (protecting the rights of the citizen against the State, for example freedom of expression) and policy (protecting the interest of society as a whole, for instance regarding the assurance of free speech) that these rights introduce. In contract law, given the emphasis on interests rather than rights, the distinction between arguments of principle and policy seems to dissolve when fundamental rights are invoked. Given that both lines of argument may be open to political influences, the hypothesis has been formulated that the application of fundamental rights can reveal the policies and political stakes involved in contract cases. Thus, it might be possible to pierce through the judicial denial of the stakes of autonomy and solidarity.

Chapter 6: testing the hypothesis

The hypothesis that fundamental rights application might raise awareness of the political stakes in contractual disputes has been tested on five case examples, each engaging different policies: 1) non-competition clauses in employment and commercial agency contracts (weaker party protection v. market positions); 2) sureties provided by relatives (weaker party protection v. protection of economic interests and suretyships); 3) reduction of contractual penalties (weaker party protection v. protection of sureties and general interest); 4) post-contractual duties in doctor/patient relations (weaker party protection and health interests v. data protection and patient protection); and 5) surrogate motherhood (best interest of the child, interests of the intended parents and the surrogate mother, protection of the biological family). An investigation was made of the policies worded in legislation governing these problems, as well as of the solutions given in case law and the policy choices these represented. The various rule-solutions for each case study have been analysed against the model of the autonomy/solidarity continuum. In particular, the relative deviations of the solutions chosen by national courts have been determined with respect to a European view of the dilemma.

From this analysis, it follows that fundamental rights argumentation does indeed bring out into the open the policies involved in contract cases. Furthermore, it appears that courts in decisions containing this type of reasoning especially tend to underline the importance of party autonomy, in the sense that the weaker contracting party's possibilities for self-determination should find effective protection. What is more, the application of fundamental rights regularly seems to induce a shift on the autonomy/solidarity continuum – for instance a shift from holding

non-competition clauses and suretyships to be valid, irrespective of the position of the actual agent or surety, (a relatively autonomy-based solution) towards a possible annulment of such clauses or agreements in light of the structural inequality of the contract partners (a relatively solidarity-based solution). Though the motivation for such movements on the continuum may focus on the shifting limits to party autonomy, it follows that the pursuit of solidarity-based policies may determine the new boundaries of this autonomy. The case studies, moreover, show that the solidarity-based argument may refer to a variety of forms of social justice in European contract law, which complement the model of the continuum.

Chapter 7: explanations and conclusions

Finally, the results of the legal-political case law analysis have been translated to the general questions on the impact of fundamental rights in European contract law. In the first place, an explanation for the preferences for either a theory of direct effect or one of indirect effect can be related to the political views of the supporters of the theories: ‘technical’, dogmatic reasoning promoting a general theory may be revealed to cover up a political preference for either having public interests taken into account in private relations to a considerable extent (direct effect) or not (indirect effect).

Furthermore, the role of fundamental rights in contract law adjudication can be given a twofold explanation. Not only does the application of these rights make explicit the policy issues involved in contract cases. It may also help to clarify the manner in which courts have dealt with these policy issues and, consequently, reveal the policies pursued through their judgments. This double function of fundamental rights supports Kennedy’s critique of the claim that principle argument would be less susceptible to ideological influences than policy argument. Indeed, it undermines Dworkin’s rights thesis by showing that, actually, (fundamental) rights themselves incorporate policy choices and may thus translate these to the level of contract law adjudication.

The second question, concerning the formulation of criteria for fundamental rights application, cannot at first sight be given a clear-cut answer. In fact, more clearly than the general theories of direct and indirect effect, the legal-political analysis accepts that the intensity of the impact of these rights in contract cases may vary according to the fundamental rights involved, the nature of the contractual relationship and the activity of the various legal actors (the legislature, the judiciary, and the parties). Nevertheless, on the basis of the cases found, several factors may be enumerated, the presence of which seems to heighten the possibility of fundamental rights application being of use: first, an imbalance of bargaining power requires the demarcation of limits of party autonomy in the light of solidarity-based policies; second, such issues often seem to arise in relation to the validity of the contract or contract clause, in which context fundamental rights may be of relevance for colouring the general clauses of ‘good morals’ and ‘good faith’.

A third and final question is what the explicit consideration of fundamental rights adds to traditional contract law adjudication. Given that fundamental rights argumentation can bring to the fore the policy issues involved in contractual disputes, they are likely to inspire judges to reconsider the rationale behind the case solutions from which they may choose. An added value of this type of argumentation is thus that it will bring into view solutions that otherwise would not have been taken into account. This does not fully guarantee that judges will recognise the extent to which they are in denial of their own influence on policy choices, but at least it makes visible the

various policies that may be pursued. Related to that, the explicit contemplation of policies implied in legislative rules or preceding case law sketches the framework within which judges have to make their decision. Since decisions deviating from legislation or established case law will not be lightly made, the application of fundamental rights could thus require the judges to more extensively justify their rulings, especially insofar as they diverge from established rules. This would also serve legal certainty.

These conclusions could form the basis for a further discussion of the topic also on the level of the European Union. The examples from case law have clarified how fundamental rights relate to policies of autonomy and solidarity, mediating the translation of these policies into rules of contract law. Moreover, they have illustrated how a variety of forms of social justice can be given shape in contract law regulation. Once thought has been given to the aims of social justice that a unified or harmonised European contract law should pursue, fundamental rights argumentation might therefore be applied to ensure that the rules comply with the constitutional traditions of the EU member states and other relevant fundamental rights charters and treaties.

Samenvatting en conclusie

De toepassing van grondrechten in contractuele geschillen roept vragen op van zowel staatsrechtelijke als privaatrechtelijke aard. Hoe verhouden zich deze rechten, die van oorsprong burgers tegen de Staat beschermen, tot de contractsbanden tussen private partijen, waarvoor staatsbemoeienis in beginsel beperkt is tot het vaststellen van het kader waarbinnen partijen vrij zijn hun onderlinge verhoudingen vorm te geven? Onder welke omstandigheden kunnen contractuele geschillen worden beslecht op basis van argumenten gerelateerd aan grondrechten? En wat zou de toegevoegde waarde zijn van deze methode ten opzichte van de privaatrechtelijke belangenafweging?

In dit onderzoek is het thema van doorwerking van grondrechten benaderd vanuit contractenrechtelijk perspectief. Doelstelling was om uit te vinden hoe de introductie van publieke belangen in het contractenrecht vanuit dat rechtsgebied zelf kan worden gerechtvaardigd en op welke manier grondrechten daarbij in de contractenrechtelijke belangenafweging kunnen worden betrokken. Hierbij is gekeken naar zowel grondrechten die zijn gewaarborgd in nationale constituties als rechten die worden beschermd door internationale verdragen, zoals het Europees Verdrag voor de Rechten van de Mens (EVRM). Een vergelijking is gemaakt tussen vier Europese rechtsstelsels, te weten Duitsland, Nederland, Italië en Engeland, om een bijdrage te kunnen leveren aan het huidige debat over de ontwikkeling van het contractenrecht in Europa.

Hoofdstukken 1 en 2: contractsvrijheid en grondrechten in Europese rechtspraak op het gebied van het contractenrecht

Voorbeelden uit de rechtspraak geven een beeld van de belangrijkste problemen met betrekking tot het onderzoeksthema. Een centrale vraag betreft die naar de mogelijkheden om contractsvrijheid te beperken op basis van aan grondrechten ontleende argumenten. Daartegenover staat de vraag in hoeverre partijen juist gebruik mogen maken van contractsvrijheid om overeenkomsten te sluiten die afstand van een grondrecht of beperking van een dergelijk recht inhouden.

In het Duitse recht is in dit kader al in de jaren '50 een zogenaamde theorie van *Wechselwirkung* aanvaard door het *Bundesverfassungsgericht*, het Duitse Constitutionele Hof. Deze theorie gaat ervan uit dat het gehele privaatrecht in beginsel moet worden uitgelegd en toegepast in overeenstemming met het objectieve waardenstelsel dat wordt beschermd door de Constitutie, het *Grundgesetz* (BVerfGE 7, 198). In de rechtspraak zou dit met name bewerkstelligd kunnen worden via de uitleg van open normen. In de jaren '90 heeft het *Bundesverfassungsgericht* deze lijn doorgetrokken naar de rechterlijke beoordeling van de inhoud van contracten, overwegende dat rechters de normen van 'goede zeden' en 'goede trouw' in contractuele geschillen in overeenstemming met grondrechten dienen te interpreteren en toe te passen. Een non-concurrentiebeding in een agentuurovereenkomst kon bijvoorbeeld worden aangevochten vanwege de ernstige beperkingen die het stelde aan de vrijheid van beroepskeuze van de handelsagent (BVerfGE 81, 242, *Handelsvertreter*). En een borgtochtovereenkomst die een niet-vermogende dochter was aangegaan voor een lening van haar vader kon worden vernietigd met het oog op de inbreuk die bij de uitvoering ervan zou worden gemaakt op de menselijke waardigheid en het zogenaamde *Sozialstaatsprinzip* (BVerfGE 89, 214, *Bürgerschaft*).

In het Nederlandse recht zijn in de rechtspraak soortgelijke regels ontwikkeld met betrekking tot de invloed van grondrechten op de inkleuring van open normen in het contractenrecht. Een voorbeeld is het belang dat de Hoge Raad heeft gegeven aan het grondrecht om onderwijs te geven bij de beoordeling van de geldigheid van een overeenkomst waarin afstand werd gedaan van het recht om mensendieckoefeningen te onderrichten in geval een kwalificatie-examen niet zou worden gehaald (NJ 1970, 57, *Mensendieck I*; en NJ 1971, 407, *Mensendieck II*). Verder heeft de Hoge Raad bepaald dat een verplichting tot medewerking aan een hiv-test ten behoeve van een andere partij, en derhalve een geringe inbreuk op de lichamelijke integriteit van de persoon die de test dient te ondergaan, niet alleen kan worden gerechtvaardigd op grond van aansprakelijkheid uit onrechtmatige daad jegens de ander (NJ 1994, 347, *Aids-test of hiv-test I*), maar ook op basis van een uit de vereisten van redelijkheid en billijkheid voortvloeiende zorgplicht jegens een contractuele wederpartij (NJ 2004, 117, *hiv-test II* of *tandarts-arrest*). Hoewel de Nederlandse gerechten een minder dogmatische aanpak lijken te kiezen dan hun Duitse tegenhangers, komen de door hen ontwikkelde regels dicht in de buurt van de Duitse *Wechselwirkung* benadering.

Voorbeelden uit het Italiaanse en Engelse recht, representatief voor respectievelijk een Romanistisch en een Common Law perspectief, bevestigen dat ook in deze stelsels grondrechten de ontwikkeling van privaatrechtelijke leerstukken hebben beïnvloed. Deze invloed kan worden waargenomen in de rechterlijke toetsing van de inhoud van contracten aan de vereisten van goede trouw (Italië), of op zijn minst in de verruiming van het toepassingsbereik van privaatrechtelijke leerstukken naar nieuwe gevallen (Engeland). Tegelijkertijd lijkt het dat de Italiaanse rechtspraak een grotere nadruk heeft gelegd op de verwezenlijking van grondrechten dan in Duitse en Nederlandse uitspraken is gebeurd, aangezien de Italiaanse rechters uitgaan van die rechten bij het uitleggen van contractenrechtelijke normen en minder aandacht besteden aan de daartegenover staande invloed van het contractenrecht op de interpretatie van grondrechten van contractspartijen. De Engelse *common law*, daarentegen, is nog niet uitgekristalliseerd op het gebied van de toepassing in contractenrechtelijke casus van door het EVRM beschermde rechten, die in het Engelse recht doorwerken op basis van de *Human Rights Act 1998*.

Hoofdstuk 3: van theorieën over directe en indirecte werking naar een rechtspolietiek perspectief

De vragen die in de rechtspraak naar voren komen, zijn vaak geanalyseerd op basis van theorieën van directe en indirecte werking van grondrechten. Directe werking betekent dat een grondrecht op een zaak tussen private partijen wordt toegepast op dezelfde wijze als dat het zou worden aangewend in een geschil tussen burger en Staat. Voorstanders van deze opvatting betogen dat grondrechten door private partijen op eenzelfde wijze kunnen worden geschonden als door de Staat en daarom in het contractenrecht toepassing moeten vinden zoals in het staatsrecht. De theorie van indirecte werking verwerpt deze visie, ervan uitgaand dat grondrechten niet tot private partijen zijn gericht en dat van deze partijen dan ook niet kan worden verlangd dat zij publieke belangen betrekken in hun onderlinge relaties. Grondrechten kunnen, in dat geval, hoogstens als inspiratie dienen voor de beslechting van contractuele geschillen waarin waarden die grondrechtelijke bescherming genieten op het spel staan. Uitspraken dienen echter altijd te worden ingebed in normen van contractenrecht.

Uit de rechtspraakanalyse van Hoofdstukken 1 en 2 blijkt dat een systematisering van uitspraken naar deze theorieën over directe en indirecte werking geen volledige verklaring kan geven voor de rol van grondrechten in het Europese contractenrecht. Zelfs al kan worden gedifferentieerd tussen verschillende vormen van directe en indirecte werking, dan geeft deze indeling nog geen duidelijkheid over de manier waarop rechters met grondrechtelijke argumentatie omgaan. In het bijzonder geeft dit theoretisch kader geen heldere richtlijnen voor het bepalen van de intensiteit van de doorwerking van grondrechten. De reden voor het feit dat het onderscheid tussen directe en indirecte werking de verhouding tussen constitutioneel recht en contractenrecht niet kan verduidelijken, zo is verdedigd in Hoofdstuk 3, is dat dit onderscheid wordt bepaald door die verhouding zelf: iemand die constitutioneel recht van hogere rang acht dan contractenrecht zal een voorkeur hebben voor directe werking, terwijl iemand die de autonomie van het contractenrecht hoog in het vaandel heeft staan liever indirecte werking van grondrechten zal zien. Een poging om meer algemene regels voor de toepassing van grondrechten in contractenrecht uit een systematisering van zaken volgens dit onderscheid te destilleren roept daardoor onbedoeld associaties op met Baron von Münchhausen die zichzelf aan zijn haren uit het moeras trok.

Om uit deze impasse te komen is in Hoofdstuk 3 een perspectiefwisseling voorgesteld, van directe/indirecte werking naar een vergelijkende studie van de rechtspolitieke aspecten van het thema. De keuze voor deze invalshoek is ingegeven door het bijzondere karakter van grondrechten in de contractenrechtelijke context. Rechters in civiele zaken lijken veelal eerder *belangen* dan *rechten* van partijen af te wegen en zullen, dientengevolge, vaak niet de grondrechten zelf maar de door deze rechten beschermde waarden en belangen een rol spelen in de beoordeling van contractenrechtelijke zaken. Een wezenlijk verschil tussen door grondrechten gewaarborgde belangen en door privaatrechtelijke regels beschermde belangen is echter dat de eerstgenoemde in een veel hechter verband staan tot kwesties die het algemeen belang raken. Zij geven immers uitdrukking aan maatschappelijke opvattingen over de waarden die zo fundamenteel worden geacht dat zij gewaarborgd dienen te worden op alle niveaus van zowel publiekrecht als privaatrecht. Uit dit verband tussen grondrechten en publiek belang kan worden afgeleid dat de intensiteit van de doorwerking van grondrechten in het contractenrecht voor een belangrijk deel berust op overwegingen van rechtspolitieke aard. De verwachting wordt daarmee gewekt dat een rechtspolitieke analyse van de rechtspraak op dit gebied kan verhelderen hoe grondrechten tussen contractenrecht en de rechtspolitieke dimensie daarvan bemiddelen. Op die manier zouden meer specifieke criteria voor de toepassing van grondrechten in contractuele geschillen kunnen worden vastgesteld.

Hoofdstukken 4 en 5: hypothesering van de rechterlijke ontkenning van de politieke inzet in contractenrechtelijke zaken

In Hoofdstuk 4 is het kader voor de rechtspolitieke analyse verder uitgewerkt. Uitgaand van het werk van Duncan Kennedy op het gebied van de politieke inzet in contractenrechtelijke vraagstukken is verdedigd dat oplossingen voor deze vragen uitdrukking geven aan de som van een afweging van beginselen van autonomie en solidariteit in het contractenrecht. Autonomie duidt hier op zelfbeschikking door het individu, binnen de grenzen die worden bepaald door de autonomie van anderen. Onder solidariteit wordt verstaan het brengen van offers ten behoeve van anderen en, anders dan in Kennedy's definitie, in het bijzonder het brengen van offers door een

sterkere partij ten behoeve van een zwakkere partij, met als doel het evenwicht in hun contractuele verhouding te herstellen.

Mogelijke oplossingen voor contractuele geschillen zijn de som van subcomponenten die hun basis hebben in respectievelijk autonomie en solidariteit. Ze kunnen worden weergegeven als relatieve punten op een continuüm tussen (niet-bestaande) polen van egotisme en onbaatzuchtigheid (figuur 1 in paragraaf 4.3.1). Ter illustratie van de verschillende opvattingen van rechters en rechtswetenschappers over specifieke voorbeelden kan bovendien een tweede dimensie worden toegevoegd aan dit model, waarin wordt aangegeven hoe verschillende beoordelaars oplossingen hebben geïnclassificeerd. Een voorbeeld vormt de zorgplicht in de verhouding tussen een bank en haar cliënt, waarin het verbod een bepaalde transactie uit te voeren meestal meer richting solidariteit wordt ingedeeld dan de het opleggen van een informatieplicht aan de bank, terwijl deze informatieplichten tegelijkertijd door sommige auteurs of rechters als uitdrukking van de autonomiegedachte en door anderen als expressie van solidariteit worden gezien (figuur 2 in paragraaf 4.3.2). Een derde dimensie kan zelfs worden onderscheiden, wanneer rekening wordt gehouden met de verschillen tussen rechtssystemen (figuur 3 in paragraaf 4.3.4).

Een verklaring voor het feit dat deze rechtspolitieke inzet in de meeste uitspraken niet naar voren komt, kan worden gevonden in de veronderstelling dat rechters veelal de politieke dimensie van contractenrechtelijke vragen (onbewust) ontkennen. Het idee van ontkenning hangt nauw samen met het theoretische standpunt dat wordt ingenomen over rechtspraak. In Hoofdstuk 5 is dit verduidelijkt aan de hand van het werk van Ronald Dworkin en Duncan Kennedy. Terwijl eerstgenoemde geschillenbeslechting op basis van beginselen voorstaat, die minder gevoelig zouden zijn voor ideologische invloeden dan beleidsargumenten, bekritiseert laatstgenoemde deze visie, omdat beginselen naar zijn mening niet minder zouden openstaan voor politieke invloeden dan beleidsargumenten. Beleidsargumenten zien in dit verband op het verwezenlijken van collectieve doelen van een gemeenschap. Beginselen, daarentegen, rechtvaardigen een beslissing door aan te tonen dat deze een bepaald recht, van een individu of van een groep, waarborgen. Dworkin stelt dat rechters 'te kwader trouw' handelen als ze hun beslissingen laten beïnvloeden door hun ideologische opvattingen en betoogt dat de kans hierop kleiner is in geval beslissingen worden gebaseerd op beginselen dan in geval beleidsargumenten een rol spelen. Kennedy brengt daartegenin dat rechters in beide gevallen door hun ideologische denkbeelden beïnvloed kunnen worden en veronderstelt 'kwade trouw' wanneer zij ontkennen zulke invloed te ondervinden.

Terugkomend op de rol van grondrechten in de beoordeling van contractenrechtelijke geschillen kan op basis van het voorgaande de hypothese worden gesteld dat de toepassing van deze rechten kan verduidelijken hoe rechterlijke beslissingen tot stand komen. Grondrechten kunnen worden verondersteld politieke keuzes te belichamen voor de bescherming van bepaalde maatschappelijke waarden. Tegelijkertijd hebben grondrechten het karakter van regels die zijn uitgevaardigd in een rechtssysteem, die kunnen worden ingeroepen ter bescherming van de belangen die ze vertegenwoordigen. Vanuit dit perspectief bemiddelen grondrechten in de dichotomie van politiek en recht. In publiekrechtelijke zaken komt dit naar voren in de argumenten die uit deze rechten kunnen worden afgeleid op zowel beginselniveau (bescherming van de rechten van de burger tegen de Staat, bijvoorbeeld vrijheid van meningsuiting) als op beleidsniveau (bescherming van de samenleving als geheel, bijvoorbeeld met betrekking tot het garanderen van uitingsvrijheid). Gezien de nadruk die wordt gelegd op belangen veeleer dan op

rechten, lijkt in het contractenrecht het onderscheid tussen beginselen en beleid te vervagen wanneer grondrechten worden ingeroepen. Wanneer dan, in navolging van Kennedy, wordt aangenomen dat beide lijnen van argumentatie openstaan voor politieke invloeden, kan de hypothese worden geformuleerd dat de toepassing van grondrechten de beleidsvragen en politieke inzet in contractenrechtelijke zaken kan onthullen. Daarmee zou het mogelijk zijn om door de rechterlijke ontkenning van de invloed van op autonomie en solidariteit gestoelde argumenten heen te prikken.

Hoofdstuk 6: het toetsen van de hypothese

De veronderstelling dat de toepassing van grondrechten een grotere bewustheid van de politieke inzet in contractuele geschillen zou kunnen bewerkstelligen is getoetst aan de hand van vijf voorbeelden, die elk andere beleidsvragen betreffen: 1) non-concurrentiebedingen in arbeidsovereenkomsten en agentuurovereenkomsten (bescherming van de zwakkere partij v. bescherming van marktposities); 2) 'bezwaarde verwanten' (bescherming van de zwakkere partij v. bescherming van economische belangen en zekerheden); 3) matiging van contractuele boetes (bescherming van de zwakkere partij v. bescherming van zekerheden en algemeen belang); 4) post-contractuele verplichtingen in arts/patiëntverhoudingen (bescherming van de zwakkere partij en gezondheidsbelangen); en 5) draagmoederschap (belang van het kind, belangen van de wensouders en van de draagmoeder). Een inventarisatie is gemaakt van de beleidsdoelen die worden genoemd in regelgeving op het gebied van deze gevallen, evenals van de oplossingen die in rechtspraak worden gegeven en de beleidskeuzes die deze oplossingen belichamen. De verschillende mogelijke oplossingen voor ieder voorbeeld zijn geanalyseerd op basis van het model van het autonomie/solidariteit-continuüm. Daarbij is in het bijzonder aandacht besteed aan de relatieve afwijkingen van oplossingen gekozen door nationale gerechten ten opzichte van een vergelijkend, *common core* perspectief.

Uit deze analyse volgt dat grondrechtelijke argumentatie inderdaad frequent beleidsvragen in contractenrechtelijke zaken naar de voorgrond haalt. Verder blijkt dat rechters in beslissingen waarin deze vorm van argumentatie voorkomt in het bijzonder het belang van partijautonomie benadrukken, met het oog op de effectieve bescherming van de mogelijkheden tot zelfbeschikking van de zwakkere contractspartij. Bovendien lijkt de toepassing van grondrechten regelmatig aanleiding te zijn voor een verschuiving op het autonomie/solidariteit-continuüm – bijvoorbeeld een verschuiving van het instandhouden van non-concurrentiebedingen en borgtochtovereenkomsten, ongeacht de situatie waarin de handelsagent of borg daadwerkelijk verkeert, (relatief op autonomie gebaseerde oplossing) naar een mogelijke vernietiging van dergelijke bedingen of overeenkomsten in het licht van de structurele ongelijkheid van contractspartijen (relatief op solidariteit gebaseerde oplossing). Hoewel de motivering voor zulke bewegingen langs het continuüm de nadruk mag leggen op de verschuivende beperkingen van partijautonomie, volgt uit de rechtspraakanalyse dat het streven naar de verwezenlijking van op solidariteit gebaseerde beleidsdoelstellingen bepalend kan zijn voor het vaststellen van de nieuwe grenzen van deze autonomie. De genoemde voorbeelden maken bovendien duidelijk dat op solidariteit geïnspireerde argumentatie kan verwijzen naar een scala aan vormen van '*social justice*' (sociale rechtvaardigheid), dat het model van het continuüm aanvult.

Hoofdstuk 7: verklaringen en conclusies

Tot besluit zijn de resultaten van de rechtspolitieke analyse vertaald naar de algemene vragen met betrekking tot het effect van grondrechten in het Europese contractenrecht. In de eerste plaats is het vanuit dit perspectief mogelijk een verklaring te vinden voor de voorkeur voor een theorie van directe doorwerking dan wel een theorie van indirecte werking van grondrechten, op basis van de rechtspolitieke opvattingen van de aanhangers van beide leren: gesteld kan worden dat ‘technische’, dogmatische argumentatie die de keuze voor een algemene theorie ondersteunt een ideologische voorkeur verhult voor het betrekken van publieke belangen in private verhoudingen (directe werking) dan wel voor het vermijden daarvan (indirecte werking).

Daarnaast kunnen twee redenen worden gegeven voor de toepassing van grondrechten in contractenrechtelijke rechtspraak. Niet alleen expliciteert een dergelijke toepassing van deze rechten de beleidsvragen die aan de orde zijn in contractuele geschillen. Zij kan ook verduidelijken op welke manier rechters zijn omgegaan met deze vragen en, derhalve, aan het licht brengen welke beleidskeuzes worden ondersteund door hun oordelen. Deze tweeledige functie van grondrechten biedt steun aan Kennedy’s kritiek op de stelling dat argumenten ontleend aan beginselen minder ontvankelijk zouden zijn voor ideologische beïnvloeding dan beleidsargumenten. Zelfs kan gezegd worden dat zij Dworkin’s *rights thesis* ondermijnt door aan te tonen dat (grond)rechten in feite zelf beleidskeuzes belichamen, die zij door hun toepassing in het contractenrecht kunnen vertalen naar het niveau van de rechtspraak op dat gebied.

Op de tweede vraag, die de formulering van criteria voor de toepassing van grondrechten betreft, kan op het eerste gezicht geen welomlijnd antwoord worden gegeven. In wezen gaat het rechtspolitieke perspectief, meer dan het onderscheid tussen algemene theorieën van direct of indirect effect, ervan uit dat de intensiteit van de werking van grondrechten in contractuele zaken kan verschillen naar gelang van de grondrechten die aan de orde zijn, het karakter van de rechtsverhouding en het handelen van de verschillende spelers (wetgever, rechter, en partijen). Op basis van de gevonden voorbeelden uit de rechtspraak kunnen niettemin bepaalde factoren worden genoemd waarvan de aanwezigheid de kans op een succesvolle toepassing van grondrechten verhoogt: ten eerste doet een ongelijke onderhandelingsverhouding tussen partijen de vraag rijzen naar een afbakening van de beperkingen op partijautonomie in het licht van op solidariteitsgedachten gebaseerd beleid; ten tweede lijken dergelijke vragen veelal op te komen waar de geldigheid van een contract of een contractueel beding aan de orde is, en grondrechten van belang kunnen zijn voor het inkleuren van open normen als ‘goede zeden’ en ‘goed trouw’.

Een derde en laatste vraag is wat het uitdrukkelijke in acht nemen van grondrechten toevoegt aan de traditionele wijze van beslechting van contractuele geschillen. Het antwoord op deze vraag kan luiden dat het, gezien het feit dat grondrechten de beleidsvragen in dergelijke geschillen naar voren kunnen brengen, waarschijnlijk is dat deze rechten de rechter kunnen bewegen tot een heroverweging van de ratio die ten grondslag ligt aan de mogelijke oplossingen waaruit moet worden gekozen. Een toegevoegde waarde van deze toepassing van grondrechten is dus dat zij oplossingen naar voren kan schuiven die anders mogelijk buiten beeld zouden zijn gebleven. Dit biedt geen volledige garantie dat rechters zullen (h)erkennen in hoeverre zij in ontkenning verkeren van hun invloed op de beleidskeuzes in contractenrechtelijke zaken, maar op zijn minst wordt zichtbaar gemaakt welke keuzes tot de mogelijkheden behoren. In samenhang daarmee schetst de expliciete overweging van beleidslijnen die zijn uitgezet in wetgeving en

eerdere rechtspraak het kader waarbinnen de rechters tot een keuze zullen moeten komen. Aangezien niet licht zal worden afgeweken van wetgeving of vaste rechtspraak, kan de toepassing van grondrechten rechters motiveren tot een uitgebreidere toelichting op hun uitspraken, in het bijzonder in zoverre deze afwijken van bestaande regels. Hiermee wordt het bezwaar weerlegd dat de toepassing van grondrechten een gevaar zou opleveren voor de rechtszekerheid: het aanmoedigen van een uitgebreidere rechterlijke motivatie kan de rechtszekerheid juist ten goede komen.

Deze conclusies zouden het uitgangspunt kunnen vormen voor een verdergaande discussie over het onderwerp op het niveau van de Europese Unie. De voorbeelden uit de rechtspraak hebben duidelijk gemaakt hoe grondrechten zich verhouden tot beleidsdoelen gebaseerd op autonomie en solidariteit, als bemiddelaars in de vertaling van deze beleidsdoelen naar regels van contractenrecht. Bovendien hebben ze geïllustreerd hoe verschillende vormen van sociale rechtvaardigheid vorm kunnen krijgen in contractenrechtelijke regelgeving. Wanneer is nagedacht over de doelstellingen van sociale rechtvaardigheid die in een geünificeerd of geharmoniseerd Europees contractenrecht zouden moeten worden nagestreefd, kunnen grondrechten worden toegepast om te verzekeren dat de contractenrechtelijke regels overeenstemmen met de constitutionele tradities van de EU lidstaten en de grondrechten die zijn opgenomen in andere relevante handvesten en verdragen.

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