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HARMONISING EFFECTS OF FUNDAMENTAL RIGHTS IN EUROPEAN CONTRACT LAW

Chantal Mak[*]

Abstract

This paper addresses the question of whether and how the application of fundamental rights in national contract law cases may facilitate the harmonisation of contract law within the European Union. Presenting examples from Dutch, German, English and Italian case law, it is argued that fundamental rights bridge the gap between public policy and private interests. This point of view is based on the idea that these rights, on the one hand, are enacted rules of the legal system, which may be invoked to enforce the protection of the interests they represent. On the other hand, however, they represent the views of society on values that are so fundamental that they should be guaranteed on all levels of public as well as private law. The application of fundamental rights in contract cases can thus bring to the fore policy issues that in traditional contract law reasoning remain under the surface, while at the same time it connects policy choices to specific rule-solutions. In a comparison between the selected legal systems, it then appears that similar policy issues underlie similar problems in the different countries (e.g. in cases concerning surrogate motherhood or suretyships by relatives). In particular, these cases deal with the question of striking the balance between self-reliance and protection of contract parties. The application of fundamental rights in such cases could stimulate harmonisation in two interrelated ways: firstly, the application of domestic as well as international fundamental rights could make judges more aware of the policy issues addressed in case law and induce them to align their case solutions with the standards set by these rights; secondly, the application of

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fundamental rights could have a harmonising effect insofar as these rights direct the national courts to certain case solutions in contract law.

1 Introduction

The case law of several of the higher national courts in Europe demonstrates a tendency to guarantee the compliance of provisions of contract law with fundamental rights.[1] At the same time, proposals for a Common Frame of Reference (CFR) for contract law on the level of the European Union (EU)[2] also explicitly require the provisions of this CFR to be read in the light of fundamental rights[3] and to establish the nullity of a contract to the extent that it infringes a fundamental right.[4] These developments raise the question of whether and how the application of fundamental rights in national contract laws may affect and possibly facilitate the harmonisation of contract law within the EU.

'Fundamental rights' in this context refer to all rights and freedoms that are safeguarded by national constitutions or international human rights documents. Since these rights in principle protect citizens against the state, it is not self-evident that they apply equally to interprivate relationships. In fact, national legal systems have developed different manners of giving effect to fundamental rights in contract law. Usually, the legislature is obliged to take these rights into account when drafting legislation, also in the field of private law (e.g. freedom of profession affects the regulation of non-competition clauses; the rights of the child affect the regulation of surrogate

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[1] See also C. Mak, *Fundamental Rights in European Contract Law. A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (thesis UvA, Amsterdam). Compare A. Colombi Ciacchi, 'The Constitutionalization of European Contract Law. Judicial Convergence and Social Justice' (2006) 2 *European Review of Contract Law* 167.

[2] The development of a CFR was first proposed by the European Commission in its Action Plan on 'A More Coherent European Contract Law' of 2003, COM (2003) 68 final. Expectations are that the Commission will adopt the final version of the CFR in 2009; see Communication 'European Contract Law and the Revision of the Acquis: The Way Forward' of 2004, COM (2004) 651 final, 13.

[3] Article I.-1:102(2) provides that the CFR 'is to be read in the light of any applicable instruments guaranteeing human rights and fundamental freedoms and any applicable constitutional laws'.

[4] Article II.-7:301, recalling article 15:101 of the Lando Principles, stipulates: 'A contract is void to the extent that it infringes a principle recognised as fundamental in the laws of the Member States of the European Union; and nullity is required to give effect to that principle.'

motherhood).[5] As for the judiciary, sometimes it is held that it has to give effect to fundamental rights in contractual relationships in the same way as is done in state/citizen relationships (direct effect), while at other times it is said that judges can and should not do more than take inspiration from fundamental rights when interpreting the rules of contract law (indirect effect).[6] If it is accepted that fundamental rights have at least some influence on the development of national contract laws in Europe, the question arises as to what extent their application leads to similar results for similar cases in different legal systems. In other words, do fundamental rights represent a 'common core' of European principles and values that could further the harmonisation of the contract laws of EU member states?

In this paper, it will be argued that the nature of fundamental rights and their position on the borderline between *ordre public*[7] and private interests enables them to connect to the policy questions underlying contractual disputes. In particular, they may affect the balance that is struck between self-reliance and the protection of weaker parties in contract law. In order to obtain a more specific idea with regard to this phenomenon, a brief sketch of the approaches taken in the case law of several EU member states (England,[8] Germany, Italy and the Netherlands) will first be made (section 2). The manner in which fundamental rights affect contract law cases will then be further analysed, focusing on their mediation between policy and law (section 3). It will be submitted that through the intermediary role of

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[5] See for Germany, *BVerfG* 15 January 1958, *BVerfGE* 7, 198 (*Lüth*); for Italy, articles 134-137 *Costituzione*, which regulate the Constitutional Court's review of laws; for England, section 19 HRA 1998. In the Netherlands, the fact that Parliament has to consider the constitutionality of legislation during the drafting process is one of the reasons judicial review of legislation is prohibited (article 120 *Grondwet*).

[6] On the distinction between direct and indirect effects, see, for instance, O. Cherednychenko, 'Constitutional Human Rights and Private Law', in D. Friedmann & D. Barak-Erez (eds.), *Human Rights in Private Law* (Oxford/Portland Oregon: Hart Publishing 2001), 13.

[7] *Ordre public* is considered here in a broad sense, referring to standards of morality and the general interest, which govern the question of validity of contracts. Compare § 138 of the German *Bürgerliches Gesetzbuch* (*BGB*), on which Palandt/Heinrichs, BGB, 64. Aufl, 2005, § 138, n. 3; article 1343 of the Italian *Codice civile* (*c.c.*), on which G. Alpa, *Manuale di diritto privato*, 4th de. (Padova: Cedam 2005), 134-135; article 3:40 of the Dutch *Burgerlijk Wetboek* (*BW*), on which A.S. Hartkamp, *Mr. C. Asser's Handleiding tot de beoefening van het Nederlands burgerlijkrecht. 4. Verbintenissenrecht. Deel II. Algemene leer der overeenkomsten* (Deventer: Kluwer 2005), (4-II), no. 243; and the concept of illegality used in English common law, on which E. McKendrick, *Contract Law. Text, Cases and Materials* (Oxford: Oxford University Press 2003), 805-811.

[8] All subsequent references to 'England' will naturally mean the law in force in England and Wales.

fundamental rights it is possible to trace shifting policy choices in the contract laws of the various EU legal systems selected for this analysis. Moreover, this application of fundamental rights in contract cases can have certain harmonising effects within European contract law (section 4). A plea will be made for the judiciary to become more aware of this means of non-legislative harmonisation and thus for serving the adequate protection of fundamental values in national contract laws (section 5).

2 The rise of fundamental rights in European contract law

The success of fundamental rights application in European contract law adjudication can be partly explained in the light of the strong general emphasis on entrenchment of these rights in the aftermath of the Second World War. In the early post-war years initiatives were taken to establish a legal framework that provided sufficient protection against a reoccurrence of the atrocities that had taken place during wartime. On the international level, several important human 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 (ECvHR, 1950), the European Social Charter (1961), the International Covenant on Civil and Political Rights (ICCPR, 1966) and the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966). Moreover, on the national level a number of fundamental rights were strongly entrenched by the documents constituting the Federal Republic of Germany (the *Grundgesetz* (GG) of 1949), the Republic of Italy (the *Costituzione* of 1948) and the Fifth French Republic (the *Constitution* of 1958,[9] which referred to the Preamble to the 'social' *Constitution* of the Fourth French Republic that was founded in 1946). It did not take long for the question to arise as to 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 of fundamental rights were considered to have taken place.

On the basis of a comparison of several Western European legal systems, a distinction may now be made between several ways in which fundamental rights argumentation has been integrated into the solution of contract law cases. The states whose legal systems are taken into account are: Germany, because of the paramount role it plays in this area and its influence on other legal systems; Italy, because of its extensive catalogue of constitutionally protected fundamental rights and the strong impact of these

[9] 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.

rights in various fields of private law; the Netherlands, because of developments in case law, the relatively young recodification of contract law in the Dutch Civil Code of 1992, and the active participation of Dutch legal academics in the debate on European contract law; and England, because of its common law approach and the developments in case law and legal literature following the enactment of the Human Rights Act 1998 (HRA). Generalising to a certain extent, the approaches taken may be characterised as shown in the following sections.

2.1 Germany: centralised systematic approach

In Germany, the driving force behind the judicial development of the application of fundamental rights in private law is the German Federal Constitutional Court, the *Bundesverfassungsgericht*. The court has developed a steady line of case law affirming the impact of these rights on private law, beginning with its famous *Lüth* decision of 1958[10] and continuing with several high-profile judgments in contract cases such as *Handelsvertreter* (1991)[11] and *Bürgschaft* (1993)[12] and, recently, two cases on life insurance contracts (2005).[13] The *Bundesverfassungsgericht* has elaborated its view on the manner in which fundamental rights should be applied in a systematic way, committing itself to the theory of indirect influence of fundamental rights through the general clauses of private law, rather than proclaiming the direct applicability of these rights in cases between private parties.[14] The German approach may thus be characterised as 'centralised', insofar as the Constitutional Court has a pivotal role in determining the relationship between fundamental rights and contract law, and 'systematic', in the sense that a general approach is promoted for the entire field of contract law, and even private law.[15]

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[10] *BVerfG* 15 January 1958, *BVerfGE* 7, 198 (*Lüth*).
[11] *BVerfG* 7 January 1990, *BVerfGE* 81, 242 (*Handelsvertreter*).
[12] *BVerfG* 19 October 1993, *BVerfGE* 89, 214 (*Bürgschaft*).
[13] *BVerfG* 26 July 2005, *NJW* 2005, 2363 and 2376.
[14] *BVerfGE* 7, 198 (*Lüth*), 205-206.
[15] Although the *Bundesarbeitsgericht*, the German Federal Labour Court, has applied fundamental rights in a more direct manner for a considerable time, and has never explicitly turned away from this approach, its current manner of addressing the compliance of labour contracts with fundamental rights is more indirect. C. Starck, 'Human Rights and Private Law in German Constitutional Development and in the Jurisdiction of the Federal Constitutional Court', in Friedmann and Barak-Erez (eds.), above n. 6, at 99, where the author aserts: '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.'

2.2 Italy: centralised problem-specific approach

The Italian Constitutional Court (*Corte costituzionale*) and Supreme Court (*Corte di Cassazione*), after a tentative start,[16] have also established a steady practice of reading provisions of private law in the light of constitutionally protected rights. In Germany, the influence of the Constitutional Court is a more indirect one, given that the *Corte costituzionale* does not handle individual complaints of unconstitutionality, but adjudicates the compliance of laws with the Constitution in cases that are referred to it by the civil courts. Nevertheless, its judgments have also had an impact on certain areas of private law: for instance, on the recognition of non-pecuniary damages.[17] The court has developed a method of reading specific provisions of law, mostly general clauses, in the light of constitutionally protected rights.[18] In contract law, the Italian Supreme Court has applied this method to the general clause of 'good faith', determining that the principle of solidarity, safeguarded by article 2 of the *Costituzione*,[19] requires the civil courts to make sure that contract parties have been able to contribute substantively to the content of their contract.[20] Furthermore, also on the basis of article 2 of the Italian Constitution, the *Corte di Cassazione* has established an *ex officio* power of the civil court to reduce manifestly excessive contractual penalties.[21] The Italian approach may thus be called 'centralised', because the highest courts have determined in what manner fundamental rights can affect the application of civil code provisions. However, a general theory of

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[16] Early cases go back to the 1950s: for instance, *Cass. civ.* 10 August 1953, *Giust. civ.* 1953, 2687. The impact of fundamental rights, however, seems to have expanded mostly from the 1970s and 1980s onwards. Compare F.D. Busnelli, 'Diritti umani e civiltà giuridica. Riflessioni di un civilista' (1991) 12 *Rassegna di diritto civile*, 243; M.L. Chiarella, 'La tutela dei diritti fondamentali nei rapporti interprivati: elaborazioni teoriche e stato dell'arte', in G. Comandé (ed.), *Diritto privato europeo e diritti fondamentali* (Torino: G. Giappichelli Editore 2004), 39.

[17] *Corte cost.* 14 July 1986, n. 184 and *Corte cost.* 11 July 2003, n. 233. The latter judgment affirms the Italian Supreme Court's decisions *Cass. civ.* 31 May 2003, n. 8827 and 8828, *Foro it*. 2003, I, 2273. See also A. Colombi Ciacchi, above n. 1.

[18] The '*combinato disposto*'; S. Morelli, 'L'applicazione diretta della Costituzione nei rapporti interindividuali' (1996) 46 *Giustizia civile* 1996, 539.

[19] 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.'

[20] *Cass. civ*. 20 April 1994, n. 3775, 44 *Giustizia civile* 1994, 2159.

[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; *Cass. civ.* 28 September 2006, n. 21066.

giving effect to fundamental rights does not appear to have been adopted; the approach is a case-by-case, or 'problem-specific' one.

2.3 The Netherlands: fragmented approach

In the Netherlands, possibly because of less dramatic post-war constitutional changes and the prohibition of judicial review of laws (article 120 of the Dutch Constitution), effects of fundamental rights have been more fragmented than in Germany and Italy. Nevertheless, Dutch courts increasingly often handle argumentation based on national as well as European fundamental rights when dealing with cases on, for example, implied contractual duties in doctor/patient relationships,[22] contractual non-competition clauses[23] and questions of parental authority in surrogate motherhood cases.[24] Although the Dutch Supreme Court, the *Hoge Raad*, has dealt with questions of limitation of fundamental rights through general clauses of private law[25] in several cases, it has not formulated a general view on the manner in which fundamental rights have to be given effect in private law.[26] Case law of the Dutch civil courts thus shows a somewhat fragmented picture: no explicit choice is made for giving direct or indirect effect to fundamental rights, but the approach taken seems to be determined for each case separately. Nevertheless, the prevailing tendency seems to be towards a more indirect interaction of fundamental rights with general clauses, as in Germany (*Wechselwirkung*).

2.4 England: in search of an approach

English judges, finally, still seem to be in search of an approach to the application of fundamental rights in private law cases. The coming into force

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[22] HR 12 December 2003, *Nederlandse Jurisprudentie* (NJ) 2004, 117 (hiv-test II; dentist).

[23] HR 1 July 1997, NJ 1997, 685 (Kolkman/Cornelisse). On this topic, see also F.B.J. Grapperhaus, *Werknemersconcurrentie. Beperkingen aan concurrerende activiteiten van de ex-werknemer ten opzichte van zijn voormalig werkgever* (Deventer: Kluwer 1995).

[24] For instance: *Hof Amsterdam* 19 February 1998, *NJkort* 1998, 32; *Rb. Rotterdam* 23 March 1998, *NJkort* 1998, 33; *Hof 's-Gravenhage* 21 August 1998, NJ 1998, 865; *Hof Leeuwarden* 6 October 2004, LJN: AR3391, www.rechtspraak.nl (consulted on 17 November 2006); Rb. Utrecht 26 October 2005, LJN: AU4934, www.rechtspraak.nl (consulted on 17 November 2006).

[25] HR 18 June 1993, NJ 1994, 347 (Aids-test; hiv-test I); and HR 12 December 2003, NJ 2004, 117 (hiv-test II; dentist).

[26] A possible exception is the *Valkenhorst* case, HR 15 April 1994, NJ 1994, 608 (Valkenhorst), in which the Hoge Raad acknowledged a general personality right, inspired by the German allgemeines Persönlichkeitsrecht.

of the Human Rights Act 1998 as of 2 October 2000 was expected to enhance the protection of ECvHR rights in relations between private parties as well. Although legal academics have fervently debated about the role of the HRA in private disputes,[27] the courts in civil cases have so far not dealt with the question of 'horizontal effect issues'. In some cases, courts have given a certain effect to Convention rights, but rather than elaborating on the role of fundamental rights in the further development of private law, judges tend to bring cases under existing doctrines of private law.[28] The protection of privacy, for example, appears to have been affected by articles 8 and 10

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[27] M. Hunt, 'The 'Horizontal Effect' of the Human Rights Act' (1998) *Public Law* 1998, 422; W. Wade, 'The United Kingdom's Bill of Rights', in J. Beatson, C. Forsyth, I. Hare (eds.), *Constitutional Reform in the United Kingdom: Practice and Principles* (Oxford: Hart Publishing 1998), 61; G. Phillipson, 'The Human Rights Act, 'Horizontal Effect' and the Common Law: a Bang or a Whimper?' (1999) 62 *Modern Law Review*, 824; J. Cooper, 'Horizontality: The Application of Human Rights Standards in Private Disputes', in R. English and P. Havers (eds.), *An Introduction to Human Rights and the Common Law* (Oxford: Hart Publishing 2000), 53; R. Buxton, 'The Human Rights Act and Private Law' (2000) 116 *Law Quarterly Review* 48; H.W.R. Wade, 'Horizons of Horizontality' (2000) 116 *Law Quarterly Review*, 217; J. Beatson and S. Grosz, 'The Impact of the Human Rights Act on Private Law: the Knight's Move' (2000) 116 *Law Quarterly Review*, 380; T. Raphael, 'The problem of horizontal effect' (2000) 5 *European Human Rights Law Review*, 493; H. Beale & N. Pittam, 'The Impact of the Human Rights Act 1998 on English Tort and Contract Law', in Friedmann and Barak-Erez (eds.), above n. 6., 131; N. Bamforth, 'The True 'Horizontal Effect' of the Human Rights Act 1998' (2001) 117 *Law Quarterly Review* 34; B.S. Markesinis, 'Der wachsende Einfluß der Menschenrechte auf das englische Deliktsrecht', in B.S. Markesinis, *Always on the Same Path. Essays on Foreign Law and Comparative Methodology. Volume II* (Oxford: Hart Publishing 2001) 111 and by the same author, 'Privacy, Freedom of Expression, and the Horizontal Effect of the Human Rights Bill: Lessons from Germany', in Markesinis *id*., 131; N. Bamforth, 'Human Rights and Consumer Credit' (2002) 118 *Law Quarterly Review* 203; D. Beyleveld and S.D. Pattison, 'Horizontal applicability and horizontal effect' (2002) 118 *Law Quarterly Review*, 623; G. Taylor, 'The horizontal effect of human rights provisions, the German model and its applicability to common-law jurisdictions' (2002) 13 *King's College Law Journal*, 187. See also A. Clapham, 'Opinion: The Privatisation of Human Rights' (1995) (launch issue) *European Human Rights Law Review*, 20 and S.K. Martens, 'Opinion: Incorporating the European Convention: The Role of the Judiciary' (1998) 3 *European Human Rights Law Review* 5.

[28] J. Morgan, 'Privacy in the House of Lords, again' (2004) 120 *Law Quarterly Review* 564. See also G. Phillipson, 'Judicial Reasoning in Breach of Confidence Cases under the Human Rights Act: Not Taking Privacy Seriously' (2003) 8 *European Human Rights Law Review*, Special issue on privacy, 54; and the same author 'Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act' (2003) 66 *Modern Law Review* 726.

ECvHR (respect for privacy and freedom of expression, respectively).[29] However, instead of considering the duties of the legislature and the judiciary to safeguard these rights in private disputes, the courts have resolved the cases on the basis of an extended interpretation of the doctrine of breach of confidence, which allowed them to remain within the sphere of a balance of private law interests.[30] In contract law, examples are even fewer,[31] which means that it remains unclear what is or will be the role of fundamental rights in English contract law.

In summary, a brief comparison of four Western European legal systems shows different approaches and different stages in the development of case law on the effects of fundamental rights in contractual relationships. This raises several questions. Firstly, it may be asked why so much emphasis is on the judicial development of the topic rather than on legislative protection of fundamental rights. Secondly, the tendency to have fundamental rights interact with general clauses of private law poses the question as to how the relationship between these rights and clauses should be perceived. Thirdly, the question arises as to how the role of fundamental rights in contract law adjudication can be explained. These questions will be dealt with in the next section of this article.

3 The intermediary role of fundamental rights in contract law adjudication

3.1 The role of the judiciary

Looking at the four legal systems that were described in the previous section, it appears that the main developments concerning fundamental rights and private law have taken place in case law. Although the legislature is obliged to take into account these rights when drafting provisions of law,[32] it turns out that it can only do so to a certain extent. In cases in which either 1) no

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

[30] Phillipson (Transforming Breach of Confidence?), above n. 28, at 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, above n. 28 at 565.

[31] *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.

[32] See also the Introduction to this paper, with further references.

answer is available in legislation or 2) the compliance of legislation with fundamental rights is put into question, the word goes to the judiciary.[33]

An example of the first category is the case law on surrogate motherhood in the Netherlands and Italy.[34] In Dutch law, no legislation on the topic is available,[35] as a consequence of which the judiciary has had to deal with the determination of the legal relationships between the surrogate mother, the intended parents and the child.[36] Cases on this subject have occasionally made reference to fundamental rights. In particular, it appears that rights protecting the interests of the child, such as article 7 of the Convention on the Rights of the Child (right to know and be cared for by one's parents), have had a strong impact on court decisions rejecting the transfer of parental authority from the surrogate mother to the intended parents.[37] Court decisions in which no reference was made to fundamental rights seem more lenient towards surrogacy arrangements.[38] In Italy, however, courts have applied fundamental rights (articles 2 and 32 of the Italian Constitution) both to protect the interests of the child and to protect the interests of the intended parents, respectively. In the first case, the surrogacy contract was held invalid,[39] while in the latter it was deemed

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[33] Note that with regard to English law this statement also rings true for situations that have been regulated in case law rather than in statutory provisions. Given the rule of precedent, judges cannot lightly deviate from rules established in earlier case law. Fundamental rights may give judges a means to solve cases for which no answer is available in previous case law or in which the compliance of the earlier rules with fundamental rights is put into question.

[34] On this topic, see also C. Perfumi and C. Mak, 'The impact of fundamental rights on the content of contracts. Determining limits to freedom of contract in family and employment relations', in G. Brüggemeier, A. Colombi Ciacchi and G. Comandé (eds.), *Fundamental Rights and Private Law in Europe. Comparative Analyses of Selected Case Patterns* (forthcoming), with further references.

[35] Given the lack of political consensus on the matter, the Dutch legislature has so far not enacted any rules on surrogate motherhood. Compare *Rb. Utrecht* 18 June 1997, *NJkort* 1997, 59.

[36] The question of validity of surrogacy contracts is not a prominent issue in Dutch law, given the fact that the existing practice of surrogacy is condoned and has even been approved by the Minister of Health.

[37] *Rb. Rotterdam* 23 March 1998, *NJkort* 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, *NJkort* 1997, 59, which was overruled on appeal by *Hof Amsterdam* 19 February 1998, *NJkort* 1998, 32.

[38] *Rb. Amsterdam* 26 April 1995, *NJ* 1995, 589; *Hof Amsterdam* 19 February 1998, *NJkort* 1998, 32; *Hof 's-Gravenhage* 21 August 1998, *NJ* 1998, 865.

[39] *Trib. Monza* 27 October 1989, *Foro it.* 1990, I, 298, with a comment by Ponzanelli. See also *Trib. Napoli* 20 July 1988, *Dir. fam. e pers.* 1988, 1728; and

admissible and legitimate.[40] The judiciary thus took an active part in the regulation of surrogacy, until the Italian legislature intervened: law n. 40 of 2004 overruled preceding case law by expressly forbidding surrogacy contracts.[41]

An example of the second category of judicial intervention (conformity of legislation with fundamental rights) is the German *Handelsvertreter* case.[42] Although a non-competition clause in a commercial agency contract was in compliance with the legislation that was in force at the time: namely, § 90a(2) of the Commercial Code, its consequences were so far-reaching that the commercial agent's economic basis of existence (*Existenzgrundlage*) was at risk. The clause effectively prohibited the agent from working in his line of business for a period of two years after the termination of the commercial agency contract, relieving the principal from any duty to pay compensation if the agent was to blame for his dismissal. The *Bundesverfassungsgericht* ruled that such a general exclusion of a claim for compensation in the case of an exceptional dismissal was incompatible with article 12(1) *Grundgesetz*, which safeguarded the right to freely choose one's profession. Therefore, § 90a(2) of the Commercial Code was declared unconstitutional and the judgments that had enforced it were set aside.[43] Fundamental rights argumentation in this case provided the judges with a means to adapt the rules of contract law to social values.[44]

While a starring role is thus played by the judges, it should be observed that in both situations discussed here the stage is set by the legislature. In the form of general rules of private law, a framework has been given within which the judiciary has to legitimise new case solutions.[45] In civil law systems,[46] general clauses such as 'good faith' and 'good morals

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App. minorenni Salerno 25 February 1992, *Nuova giur. civ.* 1994, I, 177, *Repertorio Foro it.* 1994, Adozione [0160], n. 46.

[40] *Trib. Roma* 17 February 2000, *Foro it.* 2000, I, 972; *Giust. civ.* 2000, I, 1157, with a comment by Giacobbe; (2000) *Nuova Giurisprudenza Civivle Commentata* (*NGCC*), I, 310, with a comment by Argentesi.

[41] The law prohibits both heterologous artificial insemination and '*utero in affitto*' ('rent of the womb'), thus effectively forbidding any form of surrogacy. In June 2005 a referendum took place regarding the possible change to this law, but this referendum remained without effect because the required quorum of voters was not reached.

[42] *BVerfG* 7 January 1990, *BVerfGE* 81, 242 (*Handelsvertreter*).

[43] *BVerfG* 7 January 1990, *BVerfGE* 81, 242 (*Handelsvertreter*), in particular 258-263.

[44] Compare Colombi Ciacchi, above n. 1, at 180.

[45] *Id.* at 179.

[46] English common 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. In sections 3.2

and public order' are of great relevance in this context. Since the legislature has not been able to foresee all cases in which the compliance of contracts and the conduct of contract parties with fundamental rights may be at stake, judges often refer to these general clauses in order to translate the values protected by these rights into solutions for contractual disputes.[47] In the first category discussed here, in which no legislation or previous case law is available, the general clauses thus provide the framework for case solutions. In the second category, in which the compliance of contract law rules with fundamental rights is at stake, the general clauses appear to make it possible for the judges to consider the doubts regarding these rules. This raises the question as to what exactly is the relationship between fundamental rights, *ordre public* and the general clauses of private law.

3.2 Fundamental rights, *ordre public* and general clauses

Case law in various European countries early on established a link between the effect to be given to fundamental rights in private law cases and the role of the general clauses. Taking inspiration from legal literature,[48] the German Constitutional Court in its judgment in the *Lüth* case of 1958 considered:

> 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

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and 4 attention will be devoted to the differences and similarities between the English and the continental European concepts of *ordre public*.

[47] Examples include the aforementioned German cases *BVerfG* 7 January 1990, *BVerfGE* 81, 242 (*Handelsvertreter*) and *BVerfG* 19 October 1993, *BVerfGE* 89, 214 (*Bürgschaft*); the Dutch case *HR* 12 December 2003, *NJ* 2004, 117 (*hiv-test II; dentist*); and the Italian case law on surrogacy contracts.

[48] The Court referred to the work of the German scholar Dürig, who debated on the subject with Nipperdey, the latter arguing for a more direct application of fundamental rights in private law. See H.C. Nipperdey, 'Gleicher Lohn der Frau für gleiche Leistung' (1950) *Recht der Arbeit*, 121; and, by the same author, *Grundrechte und Privatrecht* (Krefeld: Im Scherpe Verlag 1961). And see G. Dürig, 'Grundrechte und Zivilrechtsprechung', in Th. Maunz (ed.), *Vom Bonner Grundgesetz zur gesamtdeutschen Verfassung* (Festschrift zum 75. Geburtstag von Hans Nawiasky), (München: Isar Verlag 1956), 157.

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].[49]

The Dutch Supreme Court in its judgments in the *Mensendieck* case (1969, 1971)[50] established a similar relationship between fundamental rights and the general clause of 'good morals and public order' (article 3:40 of the Dutch Civil Code, the *Burgerlijk Wetboek*). It held that the contractual waiver of a fundamental right (here, the freedom to teach exercises based on the Mensendieck method for the improvement of posture) did not infringe article 3:40 *BW*, if the interest protected by the contract (providing a guarantee for the practice of the paramedical profession of a Mensendieck teacher) was of such importance that it justified the restriction of the right.[51]

The Dutch legislator, furthermore, has determined that for the application of the general clause of 'reasonableness and equity' (objective good faith; articles 6:2 and 6:248 *BW*) 'reference must be made to generally accepted principles of law, to current juridical views in the Netherlands, and

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[49] D.P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham: Duke University Press 2nd ed. 1997) 363-364. *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 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)

[50] *HR* 31 October 1969, *NJ* 1970, 57 (*Mensendieck I*); *HR* 18 June 1971, 407 (*Mensendieck II*). See also V. van den Brink, *De rechtshandeling in strijd met de goede zeden* (thesis Amsterdam UvA), (Den Haag: Boom Juridische Uitgevers 2002), 42-44.

[51] Compare the commentary on the case by G.J. Scholten, published along with the case in *NJ* 1970, 57.

to the particular societal and private interests involved' (article 3:12 *BW*). In this context, generally accepted principles of law and juridical views can be considered to include fundamental rights.[52]

More recent German and Italian case law has elaborated the interaction between fundamental rights and general clauses so as to impose stronger obligations on judges in civil cases. In light of the constitutionally protected principles of private autonomy (article 2 *GG*) and the social state (*Sozialstaatsprinzip*, articles 20 and 28 *GG*), the German Federal Constitutional Court ruled that the courts in civil cases must intervene in cases in which a structural imbalance of power between the contracting parties had resulted in a contract that weighed extraordinarily heavily on the weaker party.[53] On the basis of the general clauses (§ 138 *BGB*, good morals, and § 242 *BGB*, good faith), the imbalance should be redressed.

The Italian Supreme Court has also applied fundamental rights reasoning in order to justify a judicial check of the contents of contracts. In its judgment of 20 April 1994,[54] the *Corte di Cassazione* ruled that the courts in civil cases should make sure that the principle of solidarity (article 2 *Costituzione*) is also respected in contractual relationships. Applying the principle of good faith and fair dealing (*correttezza*, article 1175 *Codice Civile*), judges must ensure that formal equality of contract partners does not result in substantive inequality: that is, the stronger party predominating the contractual relationship to the detriment of the weaker party's interests.[55]

In summary, fundamental rights may be said to have gained an important position in contract law adjudication in several continental European legal systems. This development has[56] taken place primarily

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[52] A.S. Hartkamp, 'On European Freedoms and National Mandatory Rules: The Dutch Judiciary and the European Convention on Human Rights' (2000) 8 *European Review of Private Law*, 118.

[53] *BVerfGE* 89, 214 (*Bürgschaft*), 234. See also *BVerfG* 26 July 2005, *NJW* 2005, 2363 and 2376.

[54] *Cass. civ.* 20 April 1994, n. 3775, *Giust. civ.* 1994, 2159-2173.

[55] *Cass. civ.* 20 April 1994, n. 3775, *Giust. civ.* 1994, 2159-2173. Case law on the *ex officio* judicial reduction of contractual penalties appears to award less importance to the balance of power between contract parties. Its reading of the principle of solidarity seems to be indifferent to the question of whether a contract party is weaker or stronger; both have to take into account the interests of the other party. See *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; and *Cass. civ.* 28 September 2006, n. 21066.

[56] Though not exclusively, examples of a more direct review of the content of contracts against fundamental rights include the German case *Bundesarbeitsgericht* 10 May 1957, *BAGE* 4, 274 (non-marriage clause infringing the right to marry, human dignity and the right to freely develop one's personality) and the Italian cases

through the interpretation of the general clauses of private law, such as good morals and good faith. The application of fundamental rights through the general clauses relates to the idea of these clauses representing the standards of general welfare that are set by the legal system.[57] Since fundamental rights express values deemed worthy of protection in society, they are a source for defining and updating the notion of 'general welfare' that is also pursued through contract law. As such, they help demarcate the national *ordres publics*.

3.3 The Janus head of fundamental rights

The successful application of fundamental rights in contract cases can be explained on the basis of their double-faced nature.[58] On the one hand, they are enacted rules of the legal system. On the other hand, however, they represent the views of society on values that are so fundamental that they should be guaranteed on all levels of public as well as private law. While fundamental rights reasoning is aimed at guaranteeing the respect for legally enacted rules, it thus also has a strong normative or political component: it has the form of an assertion about the translation of a pre-existing, 'outside' right into law.[59]

Let me briefly illustrate this view on the basis of the aforementioned *Handelsvertreter* case.[60] By holding unconstitutional the relevant provisions of the German Commercial Code, the *Bundesverfassungsgericht* first sought to give adequate effect to the right to freely choose one's profession, which is codified in article 12 *GG*. At the same time, however, the decision implied a political choice for the protection of the weaker contracting party against the consequences of a far-reaching non-competition clause, even though the party had in principle agreed to the partial waiver of freedom of profession that this clause implied.

Cass. civ. 10 August 1953, n. 1696, *Giust. civ.* 1953, 2687 and *Cass. civ.* 4 December 1997, n. 12334, *Foro it.* Lavoro (rapporto) [3890], n. 983 (right to a fair salary, article 36 *Cost.*).

[57] Compare the aforementioned *Lüth* case above n. 5.

[58] Compare D. Kennedy, *A Critique of Adjudication {fin de siècle}* (Cambridge, Massachusetts: Harvard University Press 1997), at 305 and 308. See also my thesis above n. 1, in particular Chapter 5.

[59] D. Kennedy above n. 58, 308. He defines an 'outside right' as 'something that a person has even if the legal order does not 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 ECvHR).

[60] *BVerfG* 7 January 1990, *BVerfGE* 81, 242 (*Handelsvertreter*). See section 3.1 above.

From this perspective, fundamental rights add something to judicial reasoning in contract cases. They place the legal question in a broader context, considering the possible solutions of a case in terms of the policy choices they imply.[61] Generally speaking, such policy choices range from the optimisation of the market to the protection of weaker contracting parties.[62] The application of fundamental rights in contract law adjudication can bring to the fore policy issues that in traditional contract law reasoning remain under the surface. At the same time, it connects policy choices to specific rule-solutions.[63]

4 Harmonising effects of fundamental rights in European contract law

4.1 Fundamental rights in European contract law

Harmonisation of contract laws in the European Union usually takes place by means of legislation: that is, through regulations and directives. EU institutions should respect fundamental rights when drafting such instruments.[64] Nevertheless, on the national level the alignment of contract law with fundamental rights has also required judicial intervention. Against this background, the question is to what extent does this practice either impede or stimulate the harmonisation of contract laws in Europe. Two scenarios may be envisaged.

4.2 Harmonisation of the conception of *ordre public* through fundamental rights

In the first instance, the hypothesis could be that similar fundamental rights in national legal systems refer to similar values. Thus, their application should lead to similar outcomes. In an ideal scenario, the national demarcation of the *ordre public* in light of fundamental rights in one legal

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[61] Compare D. Kennedy, 'The Political Stakes in 'Merely Technical' Issues of Contract Law' (2002) 10 *European Review of Private Law*, 7; M.W. Hesselink, 'The Principles of European Contract Law: Some Choices Made by the Lando Commission', in M.W. Hesselink and G.J.P. de Vries, *Principles of European Contract Law. Preadviezen uitgebracht voor de Vereniging voor Burgerlijk Recht* (Deventer: Kluwer 2001), 48-52.

[62] Compare D. Kennedy, 'Form and Substance in Private Law Adjudication' (1976) 89 *Harvard Law Review*, 1685 and the references in the previous footnote.

[63] See also my forthcoming thesis above n. 1, in particular Chapter 5.

[64] Article 6 of the EU Treaty and S. Weatherill, *Cases and Materials on EU Law* (Oxford: Oxford University Press 2006), 66-77, with references to the case law of the ECJ.

system would then largely overlap with that in another system. Moreover, it would also correspond to the conception of *ordre public* and good morals on the European level.

Currently, however, this scenario does not find support in European case law and will, therefore, be difficult to pursue on the national level of the member states. In the *Omega* case of 2004,[65] the European Court of Justice (ECJ) was asked to assess the possibility of limiting freedom to provide services in the light of national constitutional values. The case concerned the operation of a 'laserdrome', in which people could 'play at killing' others using laser guns.[66] This activity had been forbidden by the Bonn police authority on the ground that it would constitute a danger to public order, since it was contrary to the constitutionally principle of human dignity.[67] The ECJ determined that the respect for fundamental rights could indeed justify a restriction on the freedom to provide services.[68] Nevertheless, as to the concretisation of protective measures on the domestic level, the ECJ considered:

> It is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected.[69]

Even though the court validated the German authorities' understanding and application of the fundamental right of human dignity, it did not push towards a common conception of 'public policy' in light of this right in all member states.[70] As a consequence, a real incentive for harmonising the domestic conceptions of 'public policy' or *ordre public* is missing, since

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[65] C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I -09609.

[66] The EU freedom to provide services (articles 49 and 55 EC) came into play because the German organiser bought the equipment from a British company.

[67] Above n. 65, paras. 7 and 11.

[68] Above n. 65, paras. 35-36. Compare C-112/00, *Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich* [2003] ECR I-05659 on the free movement of goods.

[69] Above n. 65, para. 37.

[70] See also above n. 65, para. 31: 'The fact remains, however, that the specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty (…).'

there is no final judicial authority that ensures a harmonised interpretation on the basis of fundamental rights.[71]

4.3 Harmonisation of contract law on the level of policy

In a second, alternative scenario, one could consider non-legislative harmonisation on a deeper level of private law.[72] The assumption then is that fundamental rights address similar policy questions in different legal systems, even if these rights themselves do not necessarily overlap in substance. Because of their intermediary role between law and policy, fundamental rights argumentation will bring to the fore these policy issues in the reasoning of the courts in civil cases. Consequently, it becomes clear which policy is pursued through the rule-solution that is eventually given to the case at hand. If similar policy choices are made for similar cases in different legal systems, then this could be a substantive basis for the harmonisation of contract law among EU member states.

In fact, this type of non-legislative harmonising effect can already be traced in several areas of contract law. In the case of surrogate motherhood, for instance, Dutch and Italian[73] courts that have considered the problem in light of the fundamental rights of the child have mostly taken a cautious approach towards these contracts.[74] While non-commercial contracts can be

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[71] M.W. Hesselink, 'European Contract Law: a Matter of Consumer Protection, Citizenship, or Justice?' (2007) 15 *European Review of Private Law* 2007, 323, at 335 points out that, furthermore, as yet there is no legal basis for this authority to be given to the ECJ: '[t]he reality is that whereas contract law legislation based on the policy of consumer protection has a secure legal basis, none of the articles in the Part on Citizenship in the Treaty [establishing a Constitution for Europe; CM] nor any other Treaty provision (nor indeed the Nice Charter) seems to provide a legal basis for enacting provisions (let alone a code) of European contract law as a matter of European citizenship.'

[72] Compare my forthcoming thesis above n. 1, in particular Chapters 5 and 6.

[73] Before the coming into force of law n. 40 of 2004, which forbids surrogacy arrangements. See also section 3.1 above.

[74] With the exception of *Trib. Roma* 17 February 2000, *Foro it.* 2000, I, 972, which, however, focussed very much on the fundamental rights to procreation and self-determination of the intended parents and the surrogate mother, respectively. This judgment has been severely criticised, among other things for not giving adequate protection to the interests of the child. See, for instance, L. D'Avack, 'Nascere per contratto: un'ordinanza del Tribunale civile di Roma da ignorare' (2000) 2 *Dirito famiglia*, 706; V. Fineschi, P. Frati, E. Turillazzi, 'L'ordinanza capitolina sul contratto di maternità surrogata: problematiche etico-deontologiche' (2000) *Rivista Italiana di Medicina Legale* 603; M. Sesta, 'Norme imperative, ordine pubblico e buon costume: sono leciti gli accordi di surrogazione?', (2000) *NGCC* 203; E.

valid in some legal systems,[75] the overall tendency seems to be to at least hold as immoral surrogacy contracts having a commercial nature.[76] For these contracts, it may be said that their regulation in countries in which no legislation is available on the matter is subject to harmonising effects of fundamental rights argumentation: the available policy choices come to the fore, which makes it easier to compare and possibly align the solutions in different countries.

The most striking example, however, is probably the *Bürgschaft* decision of the German *Bundesverfassungsgericht* of 1993.[77] Courts in other legal systems had already developed protective rules for vulnerable sureties (wives, next of kin) on the basis of private law doctrines, such as mistake (the Netherlands)[78], duties of care[79] or undue influence (England).[80] In civil cases, however, the German courts provided no special protection for these sureties, but stuck to the principle of *pacta sunt servanda*.[81] Only when fundamental rights were invoked did policy questions emerge regarding the imbalance of power between the bank and the potential surety and the need for judicial intervention aimed at redressing this imbalance.[82] This eventually resulted in the annulment of the suretyship contract for breach of good morals (§ 138 *BGB*).[83] Without pretending to say anything about the desirability of a far-reaching judicial duty to review the contents of

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Trerotola, 'Bioetica e diritto private. Crepuscolo del '*mater semper certa est*' nella prospettiva della maternità surrogata?' (2003) *Studi di giurisprudenza*, 403.

[75] For instance, 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; *TK* 1996-1997, 25 000 XVI, nr. 51. See also J.H. Nieuwenhuis, 'Promises, promises. Over contracten en andere afspraken', 201 *Nederlands Juristenblad*, 1797. English law also allows non-commercial surrogacy contracts, albeit under strict conditions; see the Surrogacy Arrangements Act of 1985, as partly amended and supplemented by the Human Fertilisation and Embryology Act 1990.

[76] For instance, in Germany, the *Embryoschutzgesetz* (Embryo Protection Act) of 13 December 1990, *BGBl. I* 1990, 2746 (amended by the law of 23 October 2001, *BGBl. I* 2001, 2702) and the *Adoptionsvermittlungsgesetz* (Adoption Agency Act) of 2 July 1976, *BGBl. I* 1976, 1762 (newly proclaimed on 22 December 2001, *BGBl. I* 2002, 354). For Italy, see law n. 40 of 2004.

[77] *BVerfG* 19 October 1993, *BVerfGE* 89, 214 (*Bürgschaft*).

[78] *HR* 1 June 1990, *NJ* 1991, 759 (*Van Lanschot/Bink*).

[79] *Lloyds Bank Ltd v. Bundy* [1975] QB 326.

[80] *Barclays Bank v. O'Brien* [1994] 1 AC 180.

[81] See, for instance, the *Bundesgerichtshof*'s first decision in the *Bürgschaft* case; *BGH* 16 March 1989, *NJW* 1989, 1605-1606.

[82] *BVerfG* 19 October 1993, *BVerfGE* 89, 214 (*Bürgschaft*), in particular 230-235.

[83] *BGH* 24 February 1994, *NJW* 1994, 1341-1344.

contracts,[84] it may be pointed out that the application of fundamental rights in this case was essential for the policy choice for weaker party protection to occur. Given the similar case-solutions in other countries, fundamental rights can thus be said to have had a harmonising effect on this topic in European contract law.

In light of these examples, the application of fundamental rights in contract cases could further stimulate harmonisation in two interrelated ways. Firstly, the application of domestic as well as international fundamental rights could make judges more aware of the policy issues addressed in case law and induce them to align their case solutions with the standards set by these rights. Looking at the *Bürgschaft* case, for example, it seems possible for fundamental rights argumentation to convince judges to enhance the protection of weaker parties instead of promoting autonomy and self-reliance. Secondly, the application of fundamental rights could have a harmonising effect insofar as these rights direct the national courts to certain case solutions in contract law. In the *Bürgschaft* example, this appears to have taken place insofar as considerations based on fundamental rights led the judges of the Federal Supreme Court to annul the suretyship agreement.

5 Conclusion

If the concept of *ordre public* is broadly understood as including norms referring to morality and public interests, then fundamental rights can and must play a part in the demarcation of this public order. Their double-faced nature (enacted rules, representing normative choices) provides a means for translating values shared in society into rules of contract law in cases in which no legislation is available. Furthermore, these rights can be invoked when the compliance of legislation with the standards of the *ordre public* is at stake. In both cases, traditional contract law reasoning gains an extra dimension: namely, the possibility for judges to explicitly consider the ratio or policy choice underlying a rule.

Case law examples taken from German, Italian, Dutch and English contract law have shown that this type of fundamental rights argumentation may have harmonising effects on the rules governing specific topics, such as surrogacy contracts and suretyships by relatives. Though these examples have been singled out, the policies pursued in these cases govern many other matters of contract law. In general, it may be submitted that they belong to a

[84] On this topic, see briefly section 3.2 above.

constantly growing trend of protecting weaker parties.[85] In the context of the current debate on social justice in European contract law, fundamental rights could thus play an important role in defining the balance between self-reliance and protection that has to be struck in forthcoming European instruments, such as the CFR.[86] As has been shown in this article, the courts in civil cases have an important function in this context. In particular, they are the ones to define how, in the light of changing societal insights, fundamental rights may affect the way in which the balance between self-reliance and protection is struck. Though the national and European legislature has placed the rules of contract law within the framework of the *ordre public*, it is the task of the judiciary to give colour to this concept in specific cases.

[85] Compare Colombi Ciacchi, above n. 1, at 177. See also Perfumi and Mak, above n. 34.

[86] Compare Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: a Manifesto' (2004) 10 *European Law Journal*, 653; M.W. Hesselink, above n. 71 at 333-335.