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The Horizontal Effect of Social Rights in European Contract Law

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I. Introduction

The subject of this Chapter is the horizontal effect of 'social rights' in European contract law. I will address this subject in the following way. First, I will make a few general remarks on European contract law (II). Then, I will briefly address the general question whether and how fundamental rights may have a horizontal effect (III). After that, I will address horizontal effects in contract cases specifically (IV), after which I will come to my main topic the role that social rights may play in contract cases (V). Finally, I will conclude with some remarks on the politics of rights (VI).

II. European Contract Law

Today, many European legal scholars are involved in a debate on the future of contract law in Europe. This debate has been going on for some ten years, but it has gained specific momentum since last summer the European Commission published a Communication on the future of European Contract Law¹. In that Communication the Commission considers four possible courses of action: 1) no action, 2) to promote comparative law research aimed at finding common principles; 3) to enact a consolidated version of the *acquis communautaire*, especially in the area of consumer law², 4) to enact a European code of contracts, either as a an optional or as a mandatory code.

In each of these options fundamental rights can be of great relevance. They can be so especially in two ways. First, in the stage of drafting either a formally binding (classical) code or of 'soft law' device like 'principles'

¹ Communication from the Commission to the Council and the European Parliament, COM(2001) 398 final (11.07.2001), No. 52.

² See also the Green Paper on European Union Consumer Protection COM (2001) 531, October 2001.

they may prove to be an important source of normative inspiration. Indeed, in the European context which shows an overwhelming cultural diversity both between the various Member States and within them (multi-cultural society), and in an age which is characterised in many Member States by further going individualisation and fragmentation of society (secularisation, post-ideology after end of Cold War, post-modernism), it seems to make sense to base a common European private law on those common values which are generally recognised throughout the European Union.

Of special interest in this respect is the recent Charter of Fundamental Rights of the European Union which was adopted in Nice in December 2000³. The values contained in that Charter may be regarded as an interesting statement of common values of the European Union which could be used as a basis for a European Civil Code⁴. The Preamble to the Charter states⁵: 'Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity.' The Charter itself dedicates a Chapter - containing rights, freedoms and principles - to each of these values⁶.

However, European fundamental rights cannot only serve as a source of inspiration for the drafters of a European Civil Code or of Principles of European Contract Law⁷. Once such a code is formally enacted fundamental

³ See for the full text with comments <http://ue.eu.int/df/default.asp>. See also LUIGI FERRARI BRAVO & FRANCESCO M. DI MAJO & ALFREDO RIZZO, *Carta dei diritti fondamentali dell'Unione europea commentata con la giurisprudenza della Corte di giustizia CE e della Corte europea dei diritti dell'uomo e con i documenti rilevanti*, Milano 2001. The Charter is generally regarded as being non-binding because it has not been formally enacted as such. However, see *Corte d'appello di Roma*, 11 April 2002, which applied (among other provisions) art. 47 of the Charter (Right to an Effective Remedy and to a Fair Trial) in order to disapply an Act of Parliament, after having considered that 'la Carta dei diritti, anche se non ancora inserita nei trattati, è ormai considerata pienamente operante come punto di riferimento essenziale non solo per l'attività delle istituzioni comunitarie, ma anche per l'attività interpretativa dei giudici europei, tanto che è costantemente richiamata negli atti degli organi europei, ma anche invocata più volte nelle conclusioni dell'avvocato generale nei giudizi dinanzi alla Corte di giustizia europea'. The Court of First Instance has referred to the Charter (artt. 41(1) and 47) in its judgements of 30 January 2002 (Case T-54/99, *max.mobil Telekommunikation Service GmbH*) and of 3 May 2002 (Case T-177/01, *Jégo-Quéré et Cie SA*).

⁴ See VINCENZO ZENO-ZENCOVICH, 'Le basi costituzionali di un diritto privato europeo' (forthcoming; presented at the conference *Diritti fondamentali e formazione del diritto privato europeo* in Rome on June 28th, 2002).

⁵ P. 11.

⁶ Dignity (Chapter 1), Freedom (Chapter 2), Equality (Chapter 3), Solidarity (Chapter 4), Citizens' Rights (Chapter 5), and Justice (Chapter 6).

⁷ The Lando Commission does not say explicitly to have been inspired by European or national fundamental rights, like e.g. the ECHR or the ESC. However, it should be noted that they could not have taken the Nice Charter into account since the PECL were published posterior to the enactment of the Charter. See OLE LANDO, HUGH BEALE (eds.), *Principles of European Contract Law, Parts I and II, Prepared by The Commission on European Contract Law*, Den Haag 2000.

rights will probably continue to be highly relevant to private law. That brings us to the second way in which fundamental right can be of relevance for European contract law: they may have a horizontal effect.

III. The Horizontal Effect of Fundamental Rights

The issue of horizontal effect (*'Drittwirkung'*) is controversial. Initially, fundamental rights were perceived as a protection of individual citizens against the State (vertical relationship). However, in recent decades it has become increasingly clear that not only the State but also private parties may endanger the peaceful enjoyment of fundamental rights. Sometimes, for example in the case of powerful private companies, the risk is even stronger. An Italian example may illustrate this.

In this case, a private person, Mister Pedrazzoli, had a contract for life insurance with an insurance company called Mediolanum Vita. When the owner of that company, Mister Silvio Berlusconi, decided to enter politics he founded his own political party Forza Italia. The foundation of this party, which took him only two months, was so efficient in part because it was organised with the help of the acquisition network of the insurance company Mediolanum Vita.

Mister Pedrazzoli, who did not share Mister Berlusconi's political ideas, wanted to step out of the contract but the company indicated that according to the contract he would then lose all the premiums he had paid.

Then he invoked his freedom of association which is protected by article 18 of the Italian Constitution. He argued that as a result of the policy of Mediolanum he was now effectively contributing to the foundation of a political party that he did not want to be part of and that, as a result of the clause, he was effectively barred from stepping out of the contract. The case was decided in 1994 by the *Tribunale di Milano* which ruled in his favour. The court held that upholding the clause would lead to a violation of his freedom of association and that therefore invoking the clause against him would be contrary to good faith⁸.

This case clearly shows that not only the State but also private parties may endanger the enjoyment of fundamental rights. Cases like this one have raised the question in many European countries whether some or even all fundamental rights should not also have a horizontal effect, i.e. an effect between citizens⁹.

⁸ *Trib. Milano*, 30 March 1994, *Foro it.* 1994, I, 1572.

⁹ For the ECHR see P. VAN DIJK & G.J.H. VAN HOOFF, *Theory and Practice of the European Convention on Human Rights*, 3rd ed., The Hague, London, Boston 1998, p. 24: 'Precisely

In many European countries such a horizontal effect has indeed been accepted¹⁰, both of constitutional rights¹¹ and of rights which derive from international treaties, especially the European Convention on Human Rights and International Covenant on Civil and Political Rights¹². However, it is still controversial in many countries how this effect should operate, directly or indirectly. In the former case a citizen has, in his suit against another citizen, a claim or a defence which is directly based on the Constitution. In the latter situation, the claim or defence is based on a provision in the Civil Code, e.g. on a provision for liability in tort cases or on a general good faith clause in contract cases, which is interpreted (*Konkretisierung*) in the light of the Constitution.

The main arguments in favour of direct horizontal effect are: that it would provide the most effective protection of fundamental rights, and that if a right is fundamental, it should not make a difference, in principle, whether it is violated by the State or by a private party.

However, many arguments have been raised against direct horizontal effects. First, it has been argued that, whereas in vertical relationships only one party may have a fundamental right (since the State has no rights against citizens), in horizontal situations frequently both parties have conflicting right, and that these rights must be balanced, which would make direct effect impracticable. Secondly, it is argued that if constitutional rights would have direct effect in private law cases, this would raise much of private law to a constitutional level because not only the norm but also the remedies would gain a constitutional status, which is considered to be undesirable. Finally, it is argued that private law is an autonomous branch of

on account of the fundamental character of these rights it is difficult to appreciate why they should deserve protection in relation to the public authorities, but not in relation to private parties.'

¹⁰ It is generally recognised that if the State operates 'in private law' or 'as a private party' this still remains a case of vertical (and therefore direct) effect. See e.g. VAN DER POT/DONNER 2001, p. 247; PALANDT/HEINRICHS 2001, § 242, no. 11.

¹¹ The way in which constitutional review is organised differs considerably among the various European jurisdictions. For example, in France only the *Conseil constitutionnel* is allowed to review the constitutionality of acts of Parliament and only before their enactment and in an abstract way (no right of complaint for individual citizens) whereas in England and the Netherlands no court is allowed to declare a statute unconstitutional. See for an overview VON BAR, *op. cit.*, 562-564.

¹² In the Netherlands courts are prohibited from reviewing the constitutionality of acts of Parliament (art. 120 Constitution). Since the Netherlands do not have a Constitutional Court either the legislature itself is the sole 'judge' of the constitutionality of its own legislation. As a result the Dutch litigants and courts have taken a particular interest in international treaties since, as a consequence of the monistic system (art. 93 Constitution), self-executing provisions in such treaties have a direct effect. See further ARTHUR S. HARTKAMP, 'On European Freedoms and National Mandatory Rules: The Dutch Judiciary and the European Convention on Human Rights', 8 *ERPL* (2000), p. 111-124.

the law which has its own internal logic and is based on its own considerations of fairness.

The question has been much debated in many countries, especially in Germany. There, it has now been established that fundamental rights may have a horizontal effect, but only an indirect one, by way of the general clauses¹³. It is held that, although fundamental rights have a direct effect on private law, they only bind the legislator and the courts; individual citizens are not addressed by them. This means that the legislator and the courts are not allowed to make or develop private law rules that violate constitutional rights. However, a citizen cannot invoke a constitutional right directly against another citizen. Especially, it cannot invoke a fundamental right as a defence against a claim which is based on a rule of private law, e.g. a contractual claim or a claim in tort. The only thing a private citizen can do is to invoke one of the general clauses, especially good faith (*Treu und Glauben* (242 BGB) *bona fides*) and good morals (*gute Sitten* (138 BGB, 826 BGB), *boni mores*).

The same or similar solutions have been adopted in many other European countries¹⁴, including Italy. Indeed, in the example I gave a moment ago we saw that the freedom of association was protected by way of the general good faith clause¹⁵.

¹³ See BVerfG 7, 198 (*Liith Urteil*) (15 January 1958); CLAUD-WILHELM CANARIS, *Grundrechte und Privatrecht*, Berlin, New York 1999; SOERGEL/WOLF (1999), Vor § 145, 47.

¹⁴ Since horizontal effect is a relatively new issue most Constitutions and international Treaties are themselves silent on the matter. In the parliamentary debate before the reform of the Constitution in the Netherlands in 1983 the issue was addressed but it was explicitly left to the courts to be further developed. For the ECHR see VAN DIJK & VAN HOOFF, *op. cit.*, p. 24.

¹⁵ See further for Italy STEFANO RODOTÀ, *Le fonti di integrazione del contratto*, Milano 1969, pp. 167ff; GUIDO ALPA, *L'arte di giudicare*, Roma 1996, p. 89ff; ADOLFO DI MAJO, *Delle Obligazioni in Generale*, artt. 1173-1176, in: *Commentario del codice civile Scialoja-Branca*, Bologna/Roma 1988, pp. 65, 289 (however, see also p. 342); GIORGIO CIAN & ALBERTO TRABUCCHI, *Commentario breve al codice civile*, 5th ed., Padova, 1997, art. 1175, II, 2; MICHELE CANTILLO, *Le Obligazioni*, in: *Giurisprudenza sistematica di diritto civile e commerciale*, Torino 1992, I, pp. 203-282. See also PIETRO RESCIGNO, *Manuale di diritto privato*, 2000, p. 36. Sceptical RODOLFO SACCO, GIORGIO DE NOVA, *Il contratto*, in: *Trattato di diritto civile*, Torino 1993, I, p. 416. However, in other cases, outside contract law (e.g. the law of persons), direct horizontal effect is accepted. See especially the abundant case law on personality rights. Compare GUIDO ALPA, *Trattato di diritto civile, I Storia, fonti, interpretazione*, Milano 2000, p. 521 ff. Similarly, neither the Dutch constitutional legislator (at the occasion of the Constitutional reform in 1983) nor the Dutch courts are very dogmatic with regard to the issue of direct or indirect effect; they adopt a more pragmatic (and inconsistent) approach. See TK 1975-1976 13872 nr. 3, p. 16-17. Compare HARTKAMP, *loc. cit.*, p. 119 and MARTIJN VAN EMPEL & MARIANNE DE JONG, 'Constitution, International Treaties, Contracts and Torts', in: EWOUT HONDIUS & CARLA JOUSTRA (eds.), *Netherlands Reports to the Sixteenth International Congress of Comparative Law*, Antwerp, Oxford, New York, 2002, pp. 283-304, on p. 294: 'No coherent conclusions be drawn so far'.

IV. Horizontal Effects in Contract Cases

If a European Code of Contracts were to be enacted what would its relationship be to fundamental rights? A variety of sets of rights would be of relevance including the ones contained in the national Constitutions, the European Convention on Human Rights, the European Social Charter, the EC Treaty which contains a few fundamental rights (e.g. property, equality), the UN Conventions and probably, at that time, the European Constitution which will undoubtedly contain a chapter on fundamental rights¹⁶, probably quite similar to the Nice Charter¹⁷.

That Charter contains a large number of provisions which may be of direct relevance for relationships between citizens. A hint as to its horizontal effect is to be found in the preamble¹⁸: ‘Enjoyment of these rights entails *responsibilities and duties with regard to other persons (...)*’. However, it remains unclear whether ‘entails’ is meant to refer to a direct or an indirect effect.

There are many examples of horizontal effects of fundamental rights in contract law from various European jurisdictions¹⁹. The horizontal effects which are recognised are usually indirect, by way of one of the general clauses. The general clauses which are most frequently used in contract law are the ones on good morals²⁰ and on good faith²¹.

A clear example is the German case where a landlord refused his tenant the right to install a saucer antenna on the roof. The tenant and his family, who had the Turkish nationality, wished to receive Turkish television programmes, which were not available on the common antenna which only received five German channels. The German Constitutional Court held that article 5 of the German Constitution, which protects the freedom of speech which includes a freedom to receive information, has a horizontal effect on the contractual

¹⁶ See on its progress <http://european-convention.eu.int>.

¹⁷ This brings us to the issue of multi-level governance. I will not develop this further here. See below, Chapter 8, Section V. See on European private law and multi-level governance and on the constitutionalisation of European private law especially CHRISTIAN JOERGES, ‘The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective’, *ELJ* 1997, pp. 378-406.

¹⁸ P. 12 (emphasis added).

¹⁹ For a recent overviews in the Netherlands see HARTKAMP, *loc. cit.*, and VAN EMPEL & DE JONG, *loc. cit.*

²⁰ E.g. § 138 *BGB*. See VINCENT VAN DEN BRINK 2002, *De rechtshandeling in strijd met de goede zeden*, The Hague 2002 (diss. Amsterdam), pp. 38 ff.

²¹ In Germany e.g. §§ 137 *BGB*, 242 *BGB*, 9 *AGBG*. See e.g. PALANDT/HEINRICHS 2001, § 242, no. 7; WOLF/HORN/LINDACHER 1999, § 9 (WOLF), 113 (‘Eingangstor für die mittelbare Drittwirkung der Grundrechte im Privatrecht’). In the Netherlands e.g. artt. 3:40; 6:2, 6:162, 6:248. Compare HARTKAMP, *loc. cit.*, p. 117; VAN DEN BRINK, *op. cit.*, pp. 38 ff.. VAN EMPEL & DE JONG, *loc. cit.*

relationship between a landlord and a tenant, by way of the general obligation of the landlord (§ 536 *BGB*) and the good faith clause (§ 242 *BGB*)²². Therefore, since the tenant was dependant on a saucer antenna for receiving the information he wished, the landlord was under an obligation to give his permission to install one²³.

Other rights which have been granted horizontal effects in contract cases include the right to human dignity²⁴, the general personality right²⁵, the right to equality²⁶ and the freedom of conscience²⁷. It is frequently said by commentators that, in principle, all constitutional rights could have an indirect horizontal effect by way of the general good faith clause²⁸. They may thus provide the basis for a further ‘constitutionalisation’ of European contract law²⁹.

²² BVerfGE 90, 27 (9 February 1994).

²³ As said above, in horizontal relationships there frequently is a clash of rights. The same happened in this case, where the landlord invoked his property right (art. 14, Section 1 *GG*) which allowed him to maintain the aesthetic integrity of the building. However, in the view of the *BverfG*, in the specific circumstances of the present case the tenant’s right to be informed had to prevail.

²⁴ Art. 1 *GG*. See MÜNCHENER KOMMENTAR (ROTH) 2001, § 242, no. 54.

²⁵ See generally GIORGIO RESTA, ‘Diritti della personalità e limiti della libertà contrattuale nell’evoluzione del diritto europeo’ (forthcoming; presented at the conference *Diritti fondamentali e formazione del diritto privato europeo* in Rome on June 28th, 2002.) In Germany art. 2 *GG*. Compare MÜNCHENER KOMMENTAR 2001, § 242, no. 54. In the Netherlands a general personality right was unknown as such. Then it was developed by the civil courts, in HR, 15 April 1994, *NJ* 1994, 608 and HR, 1 July 1997, *NJ* 1997, 685. The latter was a contract case: [...]. See on this ‘judge-made fundamental right’ HARTKAMP, *loc. cit.*, p. 123.

²⁶ Art. 3 *GG*. See PALANDT/HEINRICHS 2001, § 242, no. 10; MÜNCHENER KOMMENTAR 2001, § 242, no. 56.

²⁷ Art. 4 *GG*. See PALANDT/HEINRICHS 2001, § 242, no. 9; MÜNCHENER KOMMENTAR (2001), § 242, no. 54.

²⁸ See e.g. PALANDT/HEINRICHS 2001, § 242, no. 12.

²⁹ On the ‘constitutionalisation of private law’ see BASIL MARKESINIS, ‘Comparative Law - A Subject in Search of an Audience, 53 *MLR* (1990), pp. 1-21, on p. 10, on the constitutionalisation of European tort law CHRISTIAN VON BAR, *Gemeineuropäisches Deliktsrecht*, München 1996’, Vol. I, nos. 553 ff (see p. 551: ‘Denn mehr und mehr wird das Deliktsrecht im heutigen Europa als eine Form der Konkretisierung der verfassungsrechtlich verbürgten Freiheitsrechte begriffen.’), and GUIDO ALPA, *Trattato di diritto civile, I Storia, fonti, interpretazione*, Milano 2000, who dedicates the first section of the chapter on the sources of private law to ‘La Costituzione e la costituzionalizzazione del diritto civile’.

V. Social Rights in Contract Cases

Not only the freedom rights, which are frequently referred to as ‘classical’, are given an indirect horizontal effect, but in many countries also the social rights, which frankly by now may be regarded as equally classical.

In Italy, for example, article 2 of the Constitution guarantees social solidarity³⁰. The article says: ‘La Repubblica (...) richiede l’adempimento dei doveri inderogabili di solidarietà politica, economica e sociale.’ It has been accepted by the Italian courts that this article has an indirect horizontal effect. For example, in 1994 the *Corte di Cassazione* held that the obligation of solidarity determines the content, effects, interpretation and performance of contracts by way of the general good faith clauses³¹.

In Germany it is generally accepted that the *Sozialstaatsklausel* (articles 20 and 28 GG)³², is the normative basis for policing the content of standard terms (*Inhaltskontrolle*) (art. 9 AGBG)³³. Moreover, that clause may, in a more general way, be the basis for the protection of weaker contracting parties, either through § 138 BGB (invalidity in case of immorality) or through § 242 BGB (the general good faith clause)³⁴.

³⁰ See on the history, the meaning and the importance (p. 604: ‘Nella Costituzione italiana del 1947-1948 la solidarietà è considerata un valore forte’) of the concept of solidarity GUIDO ALPA, *op. cit.*, p. 604 ff.

³¹ *Cass.*, 20 April 1994, no. 3775, *Corr. giur.* 1994, p. 566, note Carbone: ‘che l’ossequio alla legalità formale non si traduca in sacrificio della giustizia sostanziale e non risulti, quindi, disatteso quel dovere (inderogabile) di solidarietà, ormai costituzionalizzato (art. 2 Cost.), che, applicato ai contratti, ne determina integrativamente il contenuto o gli effetti (art. 1374 c.c.) e deve, ad un tempo, orientarne l’interpretazione (art. 1366 c.c.) e l’esecuzione (art. 1375).’ See earlier *Trib. Bologna*, 21 July 1970, *Riv. dir. comm.* 1971, II, 277, note Alpa, *Giur. it.* 1971, I, 2, 211 (= *Trib. Bologna*, 5 November 1970, *Foro it.* 1971, I, 1030). See for further for the obligation of solidarity, without explicit reference to art. 2 Cost.: *Cass.*, 5 January 1966, nr. 89, *Corr. giur.* 1994, p. 566, note Carbone, *Foro Pad.* 1966, I, 524; *Cass.*, 18 July 1989, no. 3362, *Foro it.* 1989, I, 2750, notes Di Majo and Mariconda; *Cass.*, 20 July 1989, no. 3386, *Foro it.* 1989, I, 3100, note Mariconda; *Cass.*, 9 March 1991, no. 2503, *Foro it.* 1991, I, 2077, note Bellantuono. Compare GUIDO ALPA, *L’arte di giudicare*, Roma 1996, p. 89f.

³² Art. 20 (1): ‘Die Bundesrepublik Deutschland ist ein demokratischer und sozialer Bundesstaat.’; Art. 28 (1): ‘Die verfassungsmäßige Ordnung in den Ländern muß den Grundsätzen des republikanischen, demokratischen und sozialen Rechtsstaates im Sinne dieses Grundgesetzes entsprechen. (...)’.

³³ See PALANDT/HEINRICHS 2001, § 242, no. 12.

³⁴ See PALANDT/HEINRICHS 2001, §138 no. 6: ‘Der in der Rechtsprechung seit langem anerkannte Grundsatz, dass mit Hilfe des § 138 dem Mißbrauch wirtschaftlicher Macht entgegenzuwirken ist, hat im Sozialstaatsprinzip seine Grundlage.’ However, MÜNCHENER KOMMENTAR 2001, § 242 (ROTH), no. 53 argues that this role should be rather limited: ‘dem Sozialstaatsprinzip kann wiederum nicht die Bedeutung beigemessen werden, daß es jedermann im Privatrechtsverkehr zu unbegrenzter Rücksichtnahme auf die Interessen des wirtschaftlich Schwächeren verpflichte (...) tendenziell [kommt] dem Sozialstaatsprinzip bei den im Rahmen des § 242 erforderlichen Abwägungen keine hervorragenden Bedeutung [zu].’ See on political claims of this type further below, VI.

A striking German example, which is based in part on the *Sozialstaatsklausel*, is the famous case which was decided in 1993 on the validity of a personal guaranty³⁵.

In that case a bank had offered a businessman a loan of 100.000 DM on condition that his daughter would accept to provide a personal guaranty. The daughter, who was 21, uneducated, unemployed and without any patrimony, accepted to be a guarantor for the whole debt of her father. Four years later the father's business got into financial difficulties and the bank claimed 100.000 DM plus interests from the daughter. After having been rejected by the court of appeal, the bank's claim was awarded by the highest civil court (*BGH*).

However, the daughter appealed to the constitutional court (*BverfG*). She claimed that the *BGH*, through its decision, had violated her rights to protection of her dignity (art. 1, Section 1 *GG*) and her party autonomy (art. 2, Section 1 *GG*) in connection with the *Sozialstaatsprinzip* (art. 20, Section 1, Art. 28, Section 1 *GG*). She was successful.

It is interesting to note that in its decision the court held, in very broad terms, that, although normally contracts must be upheld by the courts as the expression by both parties of their constitutionally protected autonomy, civil courts must nevertheless interfere, on the basis of the general clauses (§ 138 and 242 *BGB*), in cases where a structural imbalance of bargaining power has led to a contract which is exceptionally onerous for the weaker party. This obligation for the civil courts to interfere is based, according to the Constitutional Court,

³⁵ BverfGE 89, 214, *NJW* 1994, 36. Similar cases have occurred in other countries as well. However, there the solution was rather found in terms of precontractual obligations to inform. See for example *Barclays Bank plc v. O'Brien* [1994] 1AC 180. See on this case JOHN CARTWRIGHT, *Taking Stock of O'Brien* [1999] R.L.R. 1. See in the Netherlands *HR*, 1 June 1990, *NJ* 1991, 759, note Brunner, where the *Hoge Raad* held in a similar case (a lady had given a personal guarantee in order to enable her son to obtain additional credit for his business) that on a bank, as a professional credit supplier, is under a duty to generally inform a non-professional party on the risk concerned with giving a personal guarantee. Cf. on this case R.P.J.L. TJJTTS, *Bezwaarde verwanten* (inaugural lecture *VU*), Deventer 1996, p. 54 ff. Such solutions are clearly inspired by the classical idea of contract law as the agreement between two parties who are presumed to be equal and therefore responsible for their acts. This idea is linked to the idea of a market economy which in turn is based on the idea of rational agents. In that classical theory contract law only has the task to make promises enforceable and to correct market failures. In this theory most unbalanced contracts are explained as being a result of information dissymmetry. As a result, the obvious legal remedy is a duty to inform. However, everyday experience in contract cases (and in life at large) shows that the idea contracting parties as rational agents is highly unrealistic. A more realistic (and straightforward) approach to unbalanced contracts is therefore to directly police their content, as the German constitutional court does here, and to openly admit that contract law also has a re-distributionist function.

on their constitutional obligation to protect party autonomy in connection with the *Sozialstaatsprinzip*³⁶.

The Italian art. 2 and the German art. 20 are both post-WW II provisions. Many other European constitutions, especially the older ones, do not contain similar rules. However, many national Constitutions, and especially a number of international conventions - notably the European Social Charter - , contain other social rights, especially workers' rights. A typical example of a right which has gained constitutional protection in many European constitutions and also in the European Social Charter (art. 24) is the employee's right to protection against unjustified dismissal.

However, in some countries the courts have been reluctant to give such social any real effect, especially in horizontal relationships³⁷. And in any case, their effect is usually limited to labour contracts and is not extended to other contracts.

VI The Politics of Rights

This brings me to the politics of rights. In his book *L'età dei diritti* (1990) the famous Italian legal and political philosopher Norberto Bobbio says:

'i diritti dell'uomo, per fondamentali che siano, sono diritti storici, cioè nati in certe circostanze, contrassegnate da lotte per la difesa di

³⁶ See pp. 231-234. The *BverfG* held: 'Handelt es sich 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). (...) Heute besteht weitgehend Einigkeit darüber, daß die Vertragsfreiheit nur im Falle eines annähernd ausgewogenen Kräfteverhältnisses der Partner als Mittel eines angemessenen Interessenausgleichs taugt und daß der Ausgleich gestörter Vertragsparität zu den Hauptaufgaben des Zivilrechts gehört. (...) Für die Zivilgerichte folgt daraus die Pflicht, bei der Auslegung und Anwendung der Generalklauseln darauf zu achten, daß Verträge nicht als Mittel der Fremdbestimmung dienen. 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 geltende Zivilrechts korrigierend eingreifen.'

³⁷ Compare for the Netherlands VAN EMPEL & DE JONG, *loc. cit.*, p. 290. However, see HR, 30 May 1986, *NJ* 196, 688, where art. 6(4) ESC, which grants a right to strike, was held to be self-executing.

nuove libertà contro vecchi poteri, gradualmente, non tutti in una volta e non una volta per sempre.³⁸

In the case of the so-called first-generation 'classical' freedom rights this is obvious: they were affirmed with the American Independence and the French Revolution. Similarly, the social rights are clearly the result of worker's emancipation and their organisation in trade unions³⁹. In the same way, feminism and claims from ethnic minorities have now firmly established the right to equality. And consumer rights would not have been as strong as they currently are without the endeavours of consumer organisations and pressure groups.

Today, in Europe the situation is even more obvious since the European Convention chaired by Valéry Giscard D'Estaing which is currently preparing a European Constitution, is clearly and openly marked by political bargaining.

Therefore, Bobbio is right when he says that human rights, fundamental as they may be, are not 'natural' but the result of a political struggle. What then would be an acceptable outcome of that struggle for European contract law?

Today, it is quite broadly accepted that contract law is best understood as being based on two fundamental - and conflicting - ideas, i.e. autonomy and solidarity⁴⁰. The idea of autonomy is politically linked to liberalism ('the right') and its typical dogmas in contract law are the 'freedom of contract' and the 'binding force of contract'. The idea of solidarity, on the other hand, is politically linked to socialism ('the left') and its main dogmas in contract law are the 'duty of good faith' and the 'need for specific mandatory rules for the protection of weaker parties'.

The most important practical function of fundamental rights, not only in vertical but also in horizontal situations, is their rhetorical strength⁴¹. Private law rules and civil courts try to resolve conflicts between citizens by balancing their interests. The balance of interests is likely to tip in one party's favour if that party claims that its interest is constitutionally protected as a fundamental right⁴².

³⁸ NORBERTO BOBBIO, *L'età dei diritti*, Torino 1997, p. XIII. In the same sense TRABUCCHI 2001, § 43 (p. 97).

³⁹ Similarly, the Italian post-war Constitution was clearly marked (in part) by the communist partisans.

⁴⁰ See above Chapter 4, with further references.

⁴¹ Compare DUNCAN KENNEDY, *A Critique of Adjudication {fin de siècle}*, Cambridge Massachusetts 1997, p. 297 ff, esp. p. 311 and p. 331 ('Rights then function as no more than interests (perhaps with an exclamation point).')

⁴² Compare again BOBBIO, *op. cit.*, p. XX: 'Il linguaggio dei diritti ha indubbiamente una grande funzione pratica, che è quella di dar particolare forza alle rivendicazioni di quei movimenti che richiedono per sé e per gli altri soddisfazione di bisogni materiali e morali'.

Therefore, it is crucial that adequate constitutional protection is available for both types of rights which are fundamental to contract law: a general right of autonomy and other specific freedom rights on the one hand, and a general right to solidarity together with other specific social rights on the other⁴³.

Moreover, and even more importantly⁴⁴, both rights should be formulated in such a way that they can be made equally effective, also in private law cases, be it directly or indirectly (by way of general clauses)⁴⁵. Especially, should the right not be formulated as an open ended instruction to the legislator. In Germany scholars distinguish the fundamental rights in two categories, 1) ‘*Eingriffsverbote*’ which prohibit the State from interfering with personal freedom, and 2) ‘*Schutzgebote*’ which merely impose an obligation on the State to realise a certain value. In the former case constitutional review is intense (*Übermaßverbot*), in the later case control is only very marginal (*Untermaßverbot*). In this view classical freedom rights belong to the first category whereas the right to equality and, especially, social rights belong to the second. For private law the effect of the adoption of this distinction would be that interventions with party autonomy are severely scrutinised whereas the realisation of social rights is limited to ‘extreme cases’. This view is defended especially by Canaris⁴⁶. However, it is strongly - and convincingly - rejected by Brigitta Lurger as a

⁴³ In the same sense BRIGITTA LURGER, *Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union*, Wien, New York 2002, p. 242, who argues (on p. 294) for an even more specific right to a contractual relationships which are at least ‘somewhat fair’: ‘das “soziale” Grundrecht auf einigermaßen faire Vertragsbeziehungen, die eine einseitige schwerwiegende Verletzung der wirtschaftlichen Interessen einer der Parteien verhindern.’ A very powerful plea for a set of European social rights, not only on redistributionist but also on efficiency grounds, is made by MIGUEL POIARES MADURO, ‘Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU’, in: PHILIP ALSTON (ed.), *The EU and Human Rights*, Oxford 1999, pp. 449-472.

⁴⁴ Of great practical importance is also that courts should have the power - and indeed the obligation - to declare unconstitutionality of the contract *ex officio*.

⁴⁵ I would favour a direct horizontal effect. (In the same sense for the Netherlands EVERT VERHULP, *Vrijheid van meningsuiting van werknemers en ambtenaren*, The Hague 1996 (diss. Amsterdam), p. 32.) In my view, the arguments against direct horizontal effect (see above) are not very convincing. The argument that private law is autonomous and is based on its own considerations of fairness a *petitio principii*. The argument that direct horizontal effect would raise much of private law to a constitutional level (e.g. the rules on delictual an contractual liability, the rules on validity of contracts) is not convincing either since the same argument would apply to some provisions from the EC Treaty, like for example art. 85 on competition, which have a direct horizontal effect, which is generally accepted and does not seem to raise insurmountable problems. Ultimately, the choice is a political one (constitutional politics). BRIGITTA LURGER (*op. cit.* p. 228) quite rightly points out that the really important issue is not how fundamental rights operate in private relationships put how strong their impact is. Nevertheless, it should be kept in mind that this effect is most likely to be stronger when it is direct. Hence, the conservative strategy to limit horizontal effects to an indirect effect. Compare GUIDO ALPA, *op. cit.*, pp. 497 and 516.

⁴⁶ CANARIS, *op. cit.*, p. 41.

classical attempt to win a political battle by introducing a supposedly 'technical' dogmatic distinction⁴⁷: 'auch die am staatlichen Eingriff orientierte Differenzierung nach Schutzgebots- und Eingriffsverbotsfunktion (*Canaris*) [läuft] nur auf den Versuch hinaus, der formellen Vertragsfreiheit gegenüber sie einschränkendem zwingendem Schutzrecht größeren Raum einzuräumen, eine inhaltliche Argumentation, die sich natürlich auch auf einfachgesetzlicher Ebene findet.'⁴⁸ Neither should such a general social right be subject to many qualifications, since those legislative techniques are frequently held to be an impediment to direct (vertical and horizontal) effect since they leave the legislator with a (supposedly broad) margin of appreciation⁴⁹.

In the absence of social rights which are sufficiently enforceable in horizontal relationships - i.e. between private parties -, the whole 20th Century battle for the socialisation of contract law (good faith duties, workers', tenants' and consumer protection) would risk to start all over again, but now on a higher - i.e. the constitutional - level [where the stakes in the political debate are even higher]⁵⁰. (Note the parallel with the re-invention of crude capitalism in the guise of 'globalisation' where complete 'freedom of contract' is advocated as the central idea of a new global private law⁵¹.)

The European Charter contains an article, in Chapter II on 'Freedoms', which could provide a basis for constitutional protection of party autonomy in contract cases: art. 6 which is called the 'right to liberty and security'. However, a similarly general provision is lacking in Chapter IV on 'Solidarity'. Therefore, it would be advisable for the drafters of a European Constitution to add a rule similar to the German *Sozialstaatsklausel* and the Italian rule on *solidarietà politica, economica e sociale*. The argument that such a rule would necessarily be too vague is unacceptable. The rule should simply be drafted in such a way that it can be made operational by the courts, especially in horizontal relationships. I will once again quote Norberto Bobbio:

⁴⁷ See on the politics of 'technical' questions: DUNCAN KENNEDY, 'The Political Stakes in "Merely Technical" Issues of Contract Law', 10 *ERPL* (2002), pp. 7-28.

⁴⁸ LURGER, *op. cit.*, p. 238.

⁴⁹ Compare HARTKAMP, *loc. cit.*, p. 117.

⁵⁰ Compare the United States where the Supreme Court in *Lochner v. New York* (1905) stroke down a maximum-hours law for bakers and thus, effectively, constitutionalised freedom of contract, without guaranteeing any social counterpart on the constitutional level.

⁵¹ See for example KLAUS PETER BERGER, 'Transnational Commercial Law in the Age of Globalization', in: Centro di studi e ricerche di diritto comparato e straniero (directed by M.J. Bonell), *Saggi, conferenze e seminari*, no. 42, Rome 2001. On the social costs of globalisation compare NOAM CHOMSKY, *Profit over people; neoliberalism and global order*, New York 1999 and NAOMI KLEIN, *No Logo*, London 2000, especially pp. 195 ff. Strongly in favour of private law regulation of (European and global) markets UGO MATTEI, 'Hard Code Now!', *Global Jurist Frontiers* (2002): Vol. 2: No. 1, Article 1.

‘Si ricordi che il più forte argomento addotto dai reazionari di tutti i paesi contro (...) i diritti sociali, non è già la loro mancanza di fondamento, ma la loro inattuabilità. (...) Il problema di fondo relativo ai diritti dell’uomo è oggi non tanto quello di *giustificarli*, quanto quello di *proteggerli*. È un problema non filosofico ma politico.’⁵²

⁵² P. 15.