Fundamental Rights, Constitutional Principles, and the Law of Torts: Tortfeasors v. Tort Victims

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A. The horizontal effect of fundamental rights and the law of torts

According to some authors, 'private law has always been concerned with human rights, though without actually using this term, even in the context of such mundane topics as assault, nuisance, libel and negligence'.¹ *Professor Gert Brüggenmeier* has since long been well aware of this, as he reminds us that '[t]he closed system and autonomous rationality of private law proved to be a myth'.² Accordingly, *Brüggenmeier* has not hesitated in valuably contributing to this relationship between human rights and private law, more specifically the law of torts. My contribution to this *Liber Amicorum* addresses precisely a field to which *Brüggenmeier* has dedicated considerable attention and in relation to which he has produced remarkable legal scholarship. Hence, I hope with this text, to pay due homage to the work developed by *Brüggenmeier* in this particular legal field.

A process of privatisation of fundamental rights has been in existence, meaning that there is an increasing effect of fundamental rights outside of the citizen-state relationship, invading domains such as labour law,³ contract law,⁴ family law,⁵ and property

1 *D. Friedmann/D. Barak-Erez*, Introduction, in: *D. Friedmann/D. Barak-Erez* (eds), *Human Rights in Private Law*, Oxford et al., 2001, 1, 3.

2 *G. Brüggenmeier*, Constitutionalisation of Private Law – The German Perspective, in: *T. Barkhuysen/S. Lindenbergh* (eds), *Constitutionalisation of Private Law*, Leiden, 2006, 59, 61.

3 This is the legal field where this effect has showed its utmost importance, since it is here that the horizontal effect of fundamental rights was first acknowledged and developed in jurisdictions such as Germany and Italy. See, for example, in Germany, BAGE 1, 185 (on advertisement of political parties at the workplace), and BAGE 4, 274 (on celibacy clauses in labour contracts). Cf. *P. Beckmann/A. Colombi Ciachini/N. Ferreira/J. Krzeminski/C. Moulin-Doos/P. O'Callaghan/T. Russo/J. Turner*, Germany, in: *G. Brüggenmeier/A. Colombi Ciachini/G. Comandé* (eds), *Fundamental Rights and Private Law in the European Union*, vol. 1, A Comparative Overview, Cambridge, 2008 (forthcoming), Part 2, § 2, A; Part 3, § 2, A I and B I in Italy, see *G. Comandé*, *Diritto privato europeo e diritti fondamentali*, in: *G. Comandé* (ed.), *Diritto Privato Europeo e Diritti Fondamentali*: Saggi e Ricerche, Turin, 2004, 21, 27, and *M. L. Chiarella*, *La tutela dei diritti fondamentali nei rapporti interpretati: elaborazioni teoriche e stato dell'arte*, in: *G. Comandé* (ed.), *Diritto Privato Europeo e Diritti Fondamentali*: Saggi e Ricerche, Turin, 2004, 39, 66.

4 See, for example, on the protection of the weaker party, BVerfGE 89, 214 ('Bürgschaft'), discussed in more detail below; *Barclays Bank v. O'Brien*, House of Lords (HL) [1993] 3 WLR 786, [1994] 1 AC 180; *Williams v. Walker Thomas Furniture Company*, 350 F.2d 445 (D.C. Cir. 1965). See, also, *O. Cherdronchenco*, *Fundamental Rights, Contract Law and the Protection of the Weaker Party: A Comparative Analysis of the Constitutionalisation of Contract Law*, with Emphasis on Risky Financial Transactions, Munich, 2007.

5 See, for example, the line of cases of the Tribunal Constitucional Português (Portuguese Constitutional Court) deciding that the interpretation of norms of the Civil Code has to be such as to guarantee the fundamental right to equal treatment of children born out of wedlock: Tribunal Constitucional 359/91 (DR, I-A série, 9/7/1991) and 1221/96 (Acórdão do TC, 35. vol., 1996, 557; DR, II série, 8/12/1997). For further discussion of these cases, see *C. Favilli/N. Ferreira*, *Different Treatment of Married and Unmarried Couples in the European Union*, in: *G. Brüggenmeier/A. Colombi Ciachini/G. Comandé* (eds), *Fundamental Rights and Private Law in the European Union*, vol. II, Comparative Analyses of Selected Fact Patterns, Cambridge, 2008 (forthcoming). See, also, in Germany, BVerfGE 92, 158, regarding the right of parents to care for and upbringing their children; BGHZ 6, 360, regarding a husband who brought the 'adulteress' to live at the family household; and *K. M. Lewan*, *The Significance of Constitutional Rights for Private Law: Theory and Practice in*

law.⁶ These rights and principles have often served as much more than mere interpretive aids and have become actual substantive rules of law, independent of whether their invocation resulted in a successful or unsuccessful claim.⁷ This debate, commonly referred to as the horizontal effect of fundamental rights, has also undoubtedly affected the law of torts. The development of the debate surrounding the horizontal effect of fundamental rights and the readiness of several courts to permit basic rights to influence the outcome of a case, have led to an increasingly decisive role for constitutional texts in the field of torts. Simultaneously, the scope of interests protected by the law of torts has been broadened with the intention of securing reparation in cases which involve not only a violation of 'absolute subjective rights' but also of other interests (for example, the environment and consumers interests, non-absolute patrimony rights, and other existential rights of the individual).⁸ The horizontal effect of fundamental rights has been no stranger to this process. This has led authors to argue that damages have become the most commonly used, and sometimes abused, remedy, creating a tendency to link the law of torts to any interest somehow protected by constitutional texts.⁹

The effect of fundamental rights in the field of the law of torts is undoubtedly more often felt in regard to the position of the tort victim, and the entitlement of the victim to damages, rather than in regard to the position of the tortfeasor *strictu sensu*. By this it is implied that, despite judges sometimes balancing the fundamental rights of both tort victims and tortfeasors, the influence of fundamental rights in the law of torts impacts, most often, *directly* the position of tort victims, either by strengthening or weakening their position, always concentrating *more intensively* on their interests. The position of tortfeasors is commonly only affected indirectly, as a consequence of the consideration of the fundamental rights of tort victims. This is indicated quite remarkably by *Brüggenmeier*, when he argues that

[t]ort law thus developed over the course of the twentieth century (...) into a law of judicial policies for the creation and protection of personal rights (...) subject of con-

West Germany, ICLQ 17 (1968), 571, 588. See, also, in Italy, *L. Paladin*, *Costituzione, Preleggi e Codice Civile*, Riv. dir. civ. 1993, 1, 19.

6 See, for example, in Germany, BVerfGE 89, 1; BVerfGE 14, 263, 279; BVerfGE 7, 230; *C. Starck*, *Human Rights and Private Law in German Constitutional Development* and in the Jurisdiction of the Federal Constitutional Court, in: *D. Friedmann/D. Barak-Erez* (eds) (n. 1 above), 97, 108 ff. Also in Germany, see the series of 'antenna cases', where the right of the tenant to install an antenna on the rented property was assessed in light of the fundamental right to property of the landlord and the right to information of the tenant: BVerfGE 90, 27 = NJW 1994, 1147; BGHZ 157, 322 = NJW 2004, 937; LG Amsberg, *Siedlung und Eigentum* 2/2005, 40. See, as well, regarding the UK, *Appleby and Others v. United Kingdom*, European Court of Human Rights (ECtHR), Application no. 44306/98 [2003]; and *O. Gersienberg*, *Private Law and the New European Constitutional Settlement*, EUJ 2004, 766. More generally, see *A. Reichman*, *Property Rights, Public Policy and the Limits of the Legal Power to Discriminate*, in: *D. Friedmann/D. Barak-Erez* (eds) (n. 1 above) 245.

7 *M. L. Chiarella* (n. 3 above) 66.

8 *E. Briganti*, *Tradizione e novità nella responsabilità civile*, in: *F. Lucarelli* (ed.), *Diritti Civili e Istituti Privatistici*, Padova, 1983, 277, 280 ff., 293 and 299.

9 *G. Comandé* (n. 3 above) 31 and *C. Starck*, *State Duties of Protection and Fundamental Rights*, 1 PER (2000), 27, on the decision BVerfGE 49, 304, 323.

stant judicial and legislative lawmaking [which] resulted in the reallocation of risks and the redefinition of legitimate protected interests.¹⁰

A striking illustration of this preponderance of the interests of tort victims in court decisions is the German case law which has developed 'safety duties' ('*Verkehrssicherungspflichten*') and 'new rights', mostly based on fundamental rights, to provide more protection to individuals than that traditionally allowed by the *Bürgerliches Gesetzbuch* (German Civil Code, BGB).¹¹ An example thereof is the tort of (violation of) privacy committed through the press.¹² It suffices to mention landmark decisions such as the *Caroline of Monaco/Von Hannover* cases.¹³ Another relevant line of cases regards the fundamental right to freedom of expression, among which the German *Blink-fier* case can be mentioned.¹⁴ Other cases concern the claim for damages for violation of the right to dignity and personal development, in cases regarding the press,¹⁵ the advertisement industry,¹⁶ and denunciation leading to damages,¹⁷ among others.¹⁸ Accordingly, the general right of personality derived from Articles 1 and 2 *Grundgesetz* (German Basic Law, GG), concerning human dignity and the right to free development of personality, broadened the initial scope of § 823 (1) BGB, claiming protection from the law of torts through the concept of '*sonstiges Recht*'.¹⁹

In England, the effect of human rights on torts has primarily also been the strengthening of the position of the tort victim, through the creation of new torts, and has taken place, for the most part, since the Human Rights Act (HRA) came into force in 2000.²⁰

- 10 G. Brüggenmeier, Common Principles of Tort Law: A Pre-Statement of Law, London, 2004, 10 f.
- 11 G. Brüggenmeier (n. 10 above) 7 ff.; C. van Dam, European Tort Law, Oxford, 2006, 72 ff.; and M. Fuchs, I caratteri fondamentali del sistema della responsabilità civile tedesca, Danno resp. 2001, 1133, 1136 f.
- 12 A. Beater, Zivilrechtlicher Schutz vor der Presse als konkretisiertes Verfassungsrecht – Grundstrukturen im Vergleich von englischem, US-amerikanischem und deutschem Recht, Tübingen, 1996. Similarly in the Netherlands, Hoge Raad (HR), 1/11/1988, NJ 1988, 1000.
- 13 BGH, NJW 1999, 2893; BGH, NJW 1996, 984; BGHZ 128, 1.
- 14 BVerfGE 25, 256 ('Blinkfrier'); See, also, *New York Times v. Sullivan* 376 US 254, 84, S. Ct. 710 (1968) in the US.
- 15 BVerfGE 12, 113 ('Schmid-Spiegel'); BGHZ 35, 363 ('Ginsengwurzel'); BGHZ 39, 124 ('Fernsehaussagen / 'ausgemolkene Ziege'); BVerfGE 34, 269 ('Soraya').
- 16 BGHZ 26, 349 = NJW 1958, 827 ('Herrenreiter'). See, on this case, G. Brüggenmeier (n. 2 above) 59, 66 f.; K. M. Lewan (n. 5 above) 582 f.
- 17 For example, BGHZ 127, 195; see, also, decision of the Court of Appeal of Celle discussed in A. Heldrich/G. M. Rehm, Importing Constitutional Values through Blanket Clauses, in: D. Friedmann/D. Barak-Erez (eds) (n. 1 above) 113 f. An equally relevant case occurred in the Netherlands: HR 9/1/1987, NJ 1987, 928.
- 18 BGHZ 24, 72; BVerfGE 30, 173 ('Mephisto'); and BVerfGE 54, 208 ('Böll'). See also Hill v. Church of Scientology of Toronto [1995] 2 SCR 1130.
- 19 BGHZ 13, 334 ('Schacht'), further discussed below; G. Brüggenmeier (n. 2 above) 63 ff.; M. Fuchs (n. 11 above) 1135 f.; and E. Jayme, Precedente e Rechtsfortbildung nel sistema tedesco dell'illiceto civile: influenza del diritto comparato, in: G. Visentini (ed.), La giurisprudenza per massime e il valore del precedente, con particolare riguardo alla responsabilità civile, Padova, 1988, 125 f.
- 20 It has been asserted by the Lord Chancellor that the HRA did not allow courts to create new causes of action or remedies, as judges should not replace the legislator in its functions. However, as Palmer rightly points out, 'there may be a fine line between the creation of new causes of action and

Examples of this development include corporal punishment of children,²¹ invasions of privacy and abuse of confidential information, protection against harassment and publication of private information,²² free speech and defamation.²³ Italy represents another iconic case of this legal trend in the European law of torts.²⁴ In fact, in the Italian legal system, constitutional norms have played the role of concretising the content of general clauses, contributing to the interpretation of private law norms and identification of *lacunae* in the law of torts, as well as giving a legal base for an application per *analogia iuris*.²⁵ The most relevant example, though, concerns the case law surrounding the creation of the '*danno biologico*', that is, a legal category that allowed Italian courts to award damages for non patrimonial damage, according to the reading of the general liability provision, Article 2043 *Codice Civile Italiano* (Italian Civil Code, CCI), in light of the right to health protected by Article 32 *Costituzione Italiana* (Italian Constitution, CI).²⁶ Finally, it is imperative to underline that the effect at stake in the above mentioned case law does not refer exclusively to the award of damages. In fact, there have been cases where the horizontal effect of fundamental rights on the position of a tort victim has been observed through the imposition of an injunction. Examples thereof are the cases that involved media publications that violate the right to privacy,²⁷ as well as the 'AIDS test' cases, that took place in the Netherlands and concerned the right to respect for private life and the right to inviolability of the human body.²⁸

All of the above illustrate very well that it is the position of the tortfeasor that has, so far, remained least directly influenced by the potential effect of fundamental rights.

- the development of new common law rights and remedies'; S. Palmer, Human Rights: Implications for Labour Law, CLJ 2000, 168, 178.
- 21 ECHR Judgements in A v. UK, 23/9/1998, (1999) 27 EHRR 611; and in Costello-Roberts v. UK, 25/3/1993, (1993) 25 EHRR 112, Series A, No. 247C (1993).
- 22 Douglas v. Hello! (No. 3) [2003] 3 All ER 996, Ch D; Campbell v. MGN [2003] 2 WLR 80; Fenables v. News Group [2001] 1 All ER 908. Instead of creating a free-standing tort of privacy, UK judges have restrained their impact on this legal field and have merely re-shaped the action in breach of confidence to accommodate privacy claims. See, also, H. Beale/N. Pitman, The Impact of the Human Rights Act 1998 on English Tort and Contract Law, in: D. Friedmann/D. Barak-Erez (eds) (n. 1 above) 131, 140 f., especially n. 49, 53 and 54.
- 23 See, for example, Ranzani v. Mirror Group Newspapers [1993] 4 All ER 975; Middlebrook Mushrooms v. IGWU [1993] ICR 612; both discussed in S. Palmer (n. 20 above) 178. See, also, Reynolds v. Times Newspapers Ltd [2001] 2 AC 127, HL; and W. v. H. Rogers, Tort Law and Human Rights: A New Experience, in: H. Kozio/B. Steinhilber (eds), European Tort Law, Vienna et al., 2003, 35, 57 ff., especially n. 92 and 93.
- 24 See, in general, A. Guarnieri, Valori costituzionali e sistemi giuridici contemporanei, Riv. dir. civ. 1983, II, 823-835.
- 25 E. Navarra, Diritti inviolabili e risarcimento del danno, Turin, 1996, 77 ff.
- 26 G. Comandè (n. 3 above) 31; M. F. Chiarella (n. 3 above) 70 ff.; J. Ferranti, L'interpretazione costituzionale della norma civile, in: A. Giuliani/A. Palazzo/I. Ferranti (eds), L'interpretazione della norma civile, Turin, 1996, 169, 193 f.; E. Briganti (n. 8 above) 301.
- 27 See, for example, the von Hannover case that was concerned with an injunction to prevent a German newspaper from publishing an article about the true ground for the divorce of the Prince of Hannover (an extra-marital affair on his part); BGH, NJW 1999, 2893.
- 28 District Court Amsterdam, 11/7/1991, KG 1991, 242; NJCM Bulletin 16/6/1991, 560 e v., m.n. A. Say; Court of Appeal Amsterdam, 5/3/1992, RN 1992, 296; Hoge Raad, 18/6/1993, RvdW 1993, 136; NJCM Bulletin 18/7/1993, 786 m.n. L. F. M. Verhey.

Courts have, of course, on several occasions been very explicit in considering the relevance of those fundamental rights to which the tortfeasor is entitled in order to ensure a balanced and fair legal reasoning. It suffices to mention that there are cases, for example, where judges have taken into consideration the right to freedom of expression,²⁹ and right to freedom of press³⁰ of the tortfeasor. However, the direct impact of fundamental rights on the position of the tortfeasor, where such impact is permitted, is usually limited to determining whether there is liability in tort or not. Moreover, once liability has been determined, constitutional principles and fundamental rights do not, or at least extremely rarely, play any role in the remaining parts of the civil procedure and judicial reasoning.³¹ This decisional methodology seems far from compatible with the role, contents and scope that constitutional principles and fundamental rights can and should assume in reaching a decision in torts.

The following analysis constitutes a contribution to a change from the focus on the position of the tort victim to that of the tortfeasor. In fact, we have to bear in mind that the law of torts, in the fulfilment of its functions, has to respect the values proclaimed by the principles of self-responsibility, protection of the individual, economic freedom, and equitable distribution of risks. It is clearly the case to say that, in order for the law of torts to fulfil and satisfy all its different functions and interests, while simultaneously respecting and promoting the values above mentioned, the position of the tortfeasor should be analysed *in se*, not as a mere reflection of the position of the tort victim. No other instrument could perform this task better than fundamental rights; dynamic tools that they are.³² In addition, the thorough fulfilment of all fundamental rights equally requires such change in the legal mindset, as the law of torts has to give respect to the fundamental rights of both the tort victim and the tortfeasor in a balanced and just way. A refocus of the debate surrounding the horizontal effect of fundamental rights on the law of torts is therefore proposed, thus also assessing the impact that fundamental rights and principles may have *directly* on the position of the tortfeasor *strictu sensu*.

B. Tortfeasors, fundamental rights, and constitutional principles

The aim of this analysis requires a tour through the relevant constitutional principles and fundamental rights. As *Canaris* rightly points out, even before one determines if there is an obligation of protection ('*Schutzgebotfunktion*'), one must establish whether the normative hypothesis of a fundamental right applies to a certain case.³³ Most of the

fundamental rights relevant to the position of a person (potentially) liable in torts can be found in written constitutional rules. However, others are neither written, nor hold a (formal) constitutional ranking throughout all European jurisdictions. These will all be considered, independently of their written or formal constitutional nature, or lack thereof. Furthermore, a dynamic and modern interpretation of national constitutional norms and fundamental rights will be adopted. In fact, this is the legal field most apt to such approach, since socio-political changes necessarily hold repercussions as to how constitutional norms and fundamental rights are interpreted.³⁴

The references that will be included involve several jurisdictions. However, I have not chosen to divide this analysis per jurisdiction, but per relevant constitutional principle or fundamental right. In fact, although each reference to a fundamental right or principle could be further dissected within the context of each jurisdiction, I found it more enriching for the present analysis to present a study that could extend beyond the borders of national legal orders. More important, nowadays we are spectators and actors of a 'new cosmopolitanism of constitutional law', and individual constitutions are but members of families of constitutions that 'set up similar legal frameworks and present similar challenges'.³⁵

The following account of constitutional principles and fundamental rights relevant to the subject theme of these lines does not, obviously, aim to provide any exhaustive understanding of the structure and content of the principles and rights at stake. This account simply intends to provide an explicit indication of those fundamental principles and rights that might be of relevance to the position of the tortfeasor, and highlight some significant and pertinent elements about them. As we will see below, there are several fundamental rights and constitutional principles that are necessarily linked to the position of tortfeasors, independently of concrete situations, and these, I argue, should play more prominent roles *both* in the determination of liability in torts *and* in the fixation of the amount of damages due or equitable remedies in order. As the right to property and the right to personal freedom of tortfeasors could also influence their position in relation to tort victims, I will make occasional references to them in the following discussion. However, these rights will not be explored extensively, as this would likely be of very little benefit for the present purposes: the right to property (even if bearing in mind its social function³⁶) and the right to personal freedom have a substantial impact on the position of the tort victim, probably even more substantial than on the position of the tortfeasor.³⁷ Besides this, as these rights affect both tort victims and tortfeasors, their extensive consideration would not be decisive in tipping the scale towards any direction. Still, it is adequate to highlight the significance of these rights in defining the position of the tortfeasor.

A final word on the systematisation adopted in the analysis below. In order to furnish this analysis with more clarity and better structure, I have classified the relevant rights

29 BVerfGE 7, 198, 206 ('Luth'); BVerfGE 30, 173 ('Mephisto'); BVerfGE 54, 208 ('Böll'). See, also, on the *Lith* case, G. Brüggenmeier (n. 2 above) 68 ff.; K.M. Lewan (n. 5 above) 587 f.

30 BVerfGE 62, 230 ('Boykottaufruf').

31 That is, in fact, the case of the generality of court rulings, thus not requiring any particular example. Most of the judicial decisions that will be used in my argumentation throughout this text constitute the exception to the rule; my point is that they should not be the exception, but indeed the rule.

32 See, discussing the US American Supreme Court decision in *McCulloch v. Maryland* (1819), L. Paladini (n. 5 above) 32.

33 C.-W. Canaris, *Grundrechte und Privatrecht. Eine Zwischenbilanz*, Berlin et al., 1999, 103.

34 J. I. G. Canotilho, *Direito Constitucional e Teoria da Constituição*, 6th ed., Coimbra, 1995, 1209.

35 L. E. Weinrib/E. J. Weinrib, *Constitutional Values and Private Law in Canada*, in: D. Friedmann/D. Barak-Erez (eds) (n. 1 above) 43, 72.

36 See, for example, Art. 44 CJ, and G. Peces-Barba Martínez, *Curso de Derechos Fundamentales: Teoría General*, Madrid, 1999, 610 f.

37 See, for example, BVerfGE 49, 304.

and principles under four different categories. The criterion was based on the way these rights and principles are usually perceived by legal commentators (or at least what I believe is the perception of most legal commentators of these rights and principles). The fact that I have placed a question mark at the end of each sub-title reflects my doubt in relation to such perception, and aims at questioning it, as the considerations on each right and principle, namely those of 'second' and 'third' ranking, further clarify. In sum, while these sub-titles fulfil for the most part a systematising function, they are also aimed at questioning the hierarchy of rights and principles that is usually implicit to scholarly writings.

1. Constitutional rights of 'first ranking'?

1. Right to Human Dignity

Article 1 of the Universal Declaration of Human Rights (UDHR) establishes that all human beings are born free and equal in dignity and rights. The Charter of Fundamental Rights of the European Union (CFR) similarly places human dignity at the top of its hierarchy of principles.³⁸ Article 1 CFR states that the value of human dignity is inviolable and that it must be respected and protected. In addition, both the CFR Preamble and the new Article 2 Treaty on European Union mention clearly as well that the Union is founded on, among other values, respect for (the indivisible and universal value of) human dignity. Also, at the national level, Article 1 (1) GG states that human dignity is inviolable. Similarly, Article 1 *Constituição da República Portuguesa* (Portuguese Constitution, CRP) establishes that 'Portugal is a sovereign Republic, that is based upon the dignity of the human person and the will of the people and is committed to building a free and just society united in its common purposes'.³⁹ Articles 3 CI and 10 *Constitución Española* (Spanish Constitution, CE) enshrine similar ideas.⁴⁰ In France, the right to human dignity has rather recently been derived from the Preamble of the 1946 Constitution, while assessing the constitutionality of two laws on bioethics.⁴¹ Still, some long

established European democracies, such as The Netherlands and the Scandinavian countries, make no reference to the right to human dignity in their constitutional texts.⁴²

Human dignity, as used in the legal norms above and informed by philosophical, theological and anthropological debates, should, therefore, be regarded as a vast concept that refers to the inalienable patrimony of human beings.⁴³ An appropriate understanding of this concept replaces the individualistic and liberal idea of freedom as in owning property with the idea of freedom as in having one's human being dignity respected.⁴⁴ The influence of this concept in the protection of the most diverse aspects of life is blatant, namely in German case law: from human life and health,⁴⁵ to the protection of children,⁴⁶ all values can one way or the other be linked to it. The right to human dignity has accordingly been considered to be at the top of the social values hierarchy⁴⁷ and the main point of reference of all fundamental rights, including social rights, even though not all rights are necessarily an essential attribute thereof.⁴⁸

Understood as a founding and overarching fundamental right which is of constitutional value, the right to human dignity is a unifying concept that encompasses the dignity of social and economic conditions.⁴⁹ Thus, private autonomy and private economic initiatives may consequently be limited, as patrimonial subjective situations are functionalised in light of essential existential values. The interests of one of the parties involved may, therefore, be sacrificed in light of the existential values of the debtor, non-proprietary, or employee: the limitation of certain rights becomes a necessary instrument for the attainment of human dignity.⁵⁰ As *Perlingieri* duly affirms, even though this may not be evident in our present society, overwhelmed by consumption and production, it is the idea that derives from constitutional orders and the most advanced case law.⁵¹ Furthermore, and particularly relevant for the debate on the horizontal effect of fundamental rights, even where the private legal system does not protect a certain aspect of an individual's existence, if the constitutional order offers such protection, the judiciary has to enforce such constitutional legal protection: insofar as the legal system indeed already offers legal protection to that aspect of the individual's existence (albeit only at

38 Art. 1 (8) of the Treaty amending the Treaty on European Union and the Treaty establishing the European Community ('Reform Treaty').

39 A Portuguese version of the CRP can be found in <<http://www.parlamento.pt/Legislacao/Paginas/ConstituicaoRepublicaPortuguesa.aspx>>.

40 For an account of constitutional provisions on human dignity in Europe, see *F. Moderne, La Dignité de la Personne comme Principe Constitutionnel dans les Constitutions Portugaise et Française*, in: *J. Miranda* (ed.), *Perspectivas Constitucionais: nos 20 Anos da Constituição de 1976*, vol. I, Coimbra, 1996, 197, 200 ff.

41 Conseil d'Etat decisions No. 94-343 and 94-344 DC, 27/7/1994, reaffirmed by decisions regarding legislation on the provision of housing (Decision No. 4-359, 19/1/1995) and dwarf-throwing (27/10/1995, Cases No. 136727 and 143578, RFD adm. 11(6) Nov.-Dec. 1995, 1204). See, also, *S. Mihus, Dwarf-Throwing and Human Dignity: A French Perspective*, JSWFL 1996, 375. On the French dwarf-throwing case and the human dignity discourse in European contract law in general, see also *M. R. Marella, Human Dignity in a Different Light: European Contract Law, Social Dignity and the Retreat of the Welfare State*, and *A. Colombi Ciacchi, Social Rights, Human Dignity and European Contract Law*, both in: *S. Grundmann* (ed.), *Constitutional Values and European Contract Law*, The Hague et al., 2008, 123 ff., 149 ff.

42 *F. Moderne* (n. 40 above) 207.

43 *B. R. Guimbo, Droit au Développement et Dignité Humaine*, in: *J.-Y. Morin* (ed.), *Les Droits Fondamentaux: Actes des 1ères Journées Scientifiques du Réseau Droits Fondamentaux de l'AUFELF-UREF*, Brussels, 1997, 73.

44 *G. Comandé* (n. 3 above) 37, following the thoughts of *F. Modugno*.

45 BVerfGE 45, 187, 254 ff.; BVerfGE 39, 1, 41.

46 BVerfGE 24, 119, 144; BVerfGE 155, 170, 174; *H. von Mangoldt/F. Klein/C. Starck, Kommentar zum Grundgesetz*, vol. I, Munich, 2005, Art. 1, n. 98, and *C. Starck* (n. 9 above) 17.

47 *F. Moderne* (n. 40 above) 199. In the same sense, Portuguese Constitutional Court, decision No. 105/90, 29/3/1990, *Acórdãos do Tribunal Constitucional*, vol. XIV, 1990, 357 ff.

48 *A. Colomer Viadel/L. L. López González, Programa Ideológico y Eficacia Jurídica de los Derechos Sociales: El Caso de Portugal en el Derecho Comparado*, in: *J. Miranda* (ed.), *Perspectivas Constitucionais: Nos 20 Anos da Constituição de 1976*, vol. III, Coimbra, 1998, 307, 320 f.

49 *F. Moderne* (n. 40 above) 220 ff. See the example this author provides from French case law regarding the right to housing: Conseil constitutionnel, decision No. 94-359 DC, 19/1/1995, AJDA 1995, 455, note *B. Lorton*.

50 *F. Lucarelli* (n. 8 above) 39 f.

51 *P. Perlingieri, Profili Istituzionali del Diritto Civile*, Naples, 1975, 200 f.

the constitutional level), the judge cannot refuse to judicially concretise that legally relevant interest.⁵²

Following this line of thought, the *Tribunal Constitucional Português* (Portuguese Constitutional Court, TCP) has held that citizens deserve special protection where their means of subsistence or labour capacity are for some reason reduced. Accordingly, the TCP has held that when, on the one hand, the right to receive a pension that allows a dignified life, and, on the other hand, the right of creditors to satisfy their right, enter into conflict, the legislator must protect the supreme value of human dignity and, thus, sacrifice in the necessary measure the right of creditors.⁵³ Other examples, which, in the same sense, prohibit creditors from depriving debtors of the minimum necessary for their subsistence, can be found in Spain,⁵⁴ and Italy.⁵⁵ In harmony with such case law, even those authors who are more inclined to accept a mere 'objective normative effect of basic rights' willingly acknowledge that 'the guarantee of human dignity (...) not only requires the State to refrain from violating human dignity, but also imposes a duty on the State to protect that dignity', namely making sure that 'private individuals do not place dignity in jeopardy in the course of their dealings with one another'.⁵⁶ The potential for affecting the rights and duties of actors within the law of torts is, thus, remarkable. The impact of the right to human dignity in the field of torts, particularly in regard to the tortfeasor, has been best illustrated by German case law.⁵⁷ In a case decided in 1996, a child would have been held liable without limits if it had not been for judicial intervention. In effect, the court of first instance held that the application of unlimited liability to children would violate their right to human dignity.⁵⁸ Thus, the court's message was clear: even though compensating the victim of a tortious act might be the primary function of the law of torts, its fulfilment has to be balanced with other interests, such as the human dignity of the tortfeasor. In sum, the broad scope and far reaching consequences of the right to human dignity require any legal system to consider attentively the position of tortfeasors, as an award of (full) compensation may, under certain circumstances, limit or eliminate their chances of leading a dignified life.

2. *Right to Equality and Prohibition of Discrimination*

The right to equality is a central element of any constitutional text and human rights document of general character. Reference is made to it in international conventions,⁵⁹

European treaties,⁶⁰ and national constitutions.⁶¹ The exact terms used, scope of the provision, and mode of interpretation, varies enormously, though. The right to equality can be given a formal interpretation, requiring a strict prohibition of discrimination, but it can also assume a substantial and dynamic perspective, namely aiming to guarantee 'equal social dignity'⁶² and removing any obstacles that might exist against the 'fulfilment of the individual personality'.⁶³ A substantive, rather than formalistic, approach to the right to equality requires treating equal matters equally, and treating unequal matters unequally, provided that a difference in fact exists, and that such difference in treatment is objectively and reasonably justified, inclusively based on particular economic and social conditions.⁶⁴ Besides this, one should mention the growing debate on the reform and modernisation of the field of discrimination law. Rather complex cases of multiple or intersectional discrimination, on the one hand, and the unsatisfactory solutions derived as a result of an application of the comparator model, on the other hand, have motivated scholars to wholly re-consider the legislation and case law produced,⁶⁵ with the justification that 'law must embrace a version of equality that focuses on the real issues – domination, disadvantage and disempowerment'.⁶⁶ Alternative criteria have thus been proposed, such as the human dignity discourse,⁶⁷ which is aimed at using human rights as ends in themselves (for example, equality for itself), rather than as means to an end (for example, equality for the purpose of achieving greater economic productivity).

The horizontal effect of the principle of equality has been asserted in several legal systems. Article 3 CI, for example, has been held to be directly operative, with particular regards to civil, ethical-social and political relationships, which concern personal freedoms, family, groups, the individual's development and social infrastructures.⁶⁸ Furthermore, and although the 'very concept of "private" entitlements denotes a strong sense of inequality',⁶⁹ it has been asserted that it is also the role of private law to attain

- 52 Referring specifically to the Italian legal system, see *ibid.*, 200.
- 53 Portuguese Constitutional Court, decision No. 349/91, 3/7/1991, *Diário da República* No. 277, 2/12/1991, II Série, p. 12272. See also, Portuguese Constitutional Court, decision No. 411/93, 29/6/1993, *Diário da República* 19/1/1994, II Série, 512, *F. Moderne* (n. 40 above) 221 f. and n. 67 and 68.
- 54 Spanish Constitutional Court, decisions No. 113/1989, 22/6/1989, and No. 158/1993, 6/5/1993.
- 55 Art. 53 CI and *F. Lucarelli* (n. 8 above) 40.
- 56 *C. Starck* (n. 6 above) 103.
- 57 LG Dessau, NJW-RR 1997, 214. See, also, BVerfG, NJW 1998, 3557.
- 58 Although the BVerfG did not admit the submission of the court of first instance, mostly based on procedural grounds, it willingly recognised that the liability in torts of children could be limited in light of § 242 BGB (good faith clause) and of an updated reading of private legal provisions.
- 59 Art. 2 UDHR, Art. 2 Convention on the Rights of the Child, Art. 24 of the International Covenant on Civil and Political Rights.

60 Art. 14 ECHR and Protocol to the ECHR No. 12. The CFR ranks equality as one of the founding principles of the Union, in its Preamble, and Arts 20 and 21 CFR also contain non-discrimination provisions.

61 Art. 3 CI, Art. 3 GG, Art. 13 CRP, Art. 1 CF, Section 6 Suomen perustuslaki (Finnish Constitution).

62 *C. Solvi*, *Il Danno Extracontrattuale: Modelli e Funzioni*, Naples, 1985, 167.

63 *M. L. Chiarella* (n. 3 above) 60.

64 See, for example, in international law, *G. van Bueren*, *The International Law on the Rights of the Child*, International Studies in Human Rights, 35, Dordrecht et al., 1995, 39.

65 *D. McGoldrick*, *Human Rights and Religion: The Islamic Headscarf Debate in Europe*, Oxford et al., 2006, 270; *S. Friedman*, *Double Trouble: Multiple Discrimination and EU Law*, 2 European Anti-Discrimination Law Review 2005, 13; *D. Schiek*, *A New Framework on Equal Treatment of Persons in EC Law?* Directives 2000/43/EC, 2000/78/EC and 2002/77/EC Changing Directive 76/207/EEC in Context, *ELJ* 2002, 290.

66 *M. Freeman*, *Feminism and Child Law*, in: *J. Bridgeman/D. Monk* (eds), *Feminist Perspectives on Child Law*, London et al., 2000, 19, 21.

67 *G. Moon/R. Allen*, *Dignity Discourse in Discrimination Law: A Better Route to Equality*, *EHRLR* 2006, 610.

68 *F. Lucarelli* (n. 8 above) 36.

69 *Y. Doğan*, *The 'Public', the 'Private', and the Legal Norm of Equality*, *Can. JL. & Soc'y* 2005, 207, 216.

substantive equality.⁷⁰ Even where individuals have not been recognised a subjective right to equality in their relationships with other private parties,⁷¹ the equality principle as a constitutional value has always been considered to have an interpretive function of great importance, inclusively in relation to private law norms.⁷² As such, the right to equality has had a substantial impact in the field of employment law, in the creation of the obligation to contract, etc.⁷³ Furthermore, the principle of equality should also, either through anti-discrimination legislation or a direct application of the principle itself, prevent private conducts that have an inadmissible impact on the human dignity of other private parties, namely their personality rights.⁷⁴ In fact, the right to free development of one's own personality and the principle of human dignity combined require, on the one hand, that those situations of socio-economic disparity that serve as obstacles against them be removed, and allow, on the other hand, that the rights and position of the favoured party be limited.⁷⁵ Accordingly, *Lucarelli* argues that a provision which further undermines the position of the weaker party may be considered unconstitutional, as it also undermines the substantial equality of the parties and harms the dignity and freedom of that individual.⁷⁶

The application of the principle of equality to relationships between private parties can affect the way the law of torts develops and is understood. Although the relationship between the law of torts and equality is rarely touched upon or commented on, it is a rather significant relationship, one which deserves more attention than it currently receives, particularly in a discussion such as the present one. As *Alpa* points out, the relevance of the principle of equality in defining the new borders of the law of torts cannot be overlooked.⁷⁷ In fact, decisions to expand or limit the liability in torts for certain conducts imply affecting the interests of tortfeasors and tort victims in diametrically opposite directions, thus changing the balance struck by the substantive application of the principle of equality in this field.⁷⁸

As already mentioned, the scope of the principle of equality and prohibition of discrimination can be formulated in many different ways. Directly relevant to this discussion are those equality provisions that also prohibit discrimination on economic grounds

70 *P. Rescigno*, *Diritti civili e diritto privato*, in: *Attualità e Attuazione della Costituzione*, Rome et al., 1982, 226, 238.

71 See, on the debate of whether there is merely an objective principle of equality or in reality a subjective right to equality, *B. F. S. Mac Gortie*, *A Vinculação dos Particulares aos Direitos Fundamentais*, Coimbra, 2005, 42 f.

72 *I. Ferranti* (n. 26 above) 273.

73 *Ibid.*, 275 ff. and 303 ff.

74 *J. C. V. de Andrade*, *Os Direitos Fundamentais na Constituição Portuguesa de 1976*, 2nd ed., Coimbra, 2001, 268 f. This happens, for example, when the refusal to contract is based on discriminatory grounds and such conduct attempts against the human dignity of the private party refused a contract: *M.J.A. Costa*, *Direito das Obrigações*, 9th ed., Coimbra, 2001, 211 f. See, similarly, *Y. Dolan* (n. 69 above) 219 f., who, in this regard, speaks of 'political equality'.

75 *F. Lucarelli* (n. 8 above) 38 and 44.

76 *Ibid.*, 266 f.

77 *G. Alpa*, *Le frontiere attuali della responsabilità da illecito nel diritto comparato*, in: *L. Vaccà* (ed.), *La responsabilità civile da atto illecito nella prospettiva storico-comparatistica*, Turin, 1995, 312, 317.

78 *D. Friedmann/D. Barak-Erez* (n. 1 above) 1 f.

or another status related thereto.⁷⁹ In addition, *Vierdag* identified four forms of legislative unequal treatment, among which are the imposition of a duty that is not imposed as heavily on others.⁸⁰ It follows that, where a legal solution imposes a liability in torts equally on all tortfeasors, then, in those cases where such liability is translated into an award of damages, that legal solution subjects those tortfeasors with a lower economic status to a burden which is heavier than the burden imposed on those tortfeasors with a higher economic status. Consequently, the principle of equality applied to the law of torts entails that the socio-economic particularities of each tortfeasor be taken into account. Furthermore, the position of the 'passive' subject, that is, the tortfeasor, must be the object of as much concern as the position of the 'active' subject, that is, the tort victim.⁸¹ Consequently, the property of the tortfeasor should not be wholly available to satisfy the claims of the tort victim. These claims have to be exercised in an ethical way, thus valuing the interests of the tortfeasor. Examples of consequences of this reasoning include, for example, the prohibition of lien of certain goods or income, which are known to be essential to the tortfeasor, as well as not creating unnecessary difficulties for the tortfeasor.⁸²

In addition, following the model developed by *Grosskopf*, one can distinguish between two different concepts of equality: on the one hand, 'vertical equality', which regards the balance between tortfeasors and their victims and is at the heart of the law of torts; on the other hand, 'horizontal equality', which regards the 'fair allocation of scarce resources among victims' and is usually pursued by state benefits.⁸³ It seems that there is an incompatibility between greater horizontal equality and the use of the law of torts as it stands today. In fact, courts are led to assess exclusively whether a wrongful act has been committed and, once that has been established or refused, they tend to view all other possibly existing elements, 'such as the parties' identities, needs or wealth, as irrelevant, and hence illegitimate.'⁸⁴ Courts, therefore, promote 'corrective justice', which is conceptually and also, quite often in practice, extremely different from 'horizontal equality'. The concept of 'distributive justice', which is a 'form of equal treatment that compares what we have, not the way we were able to achieve it', is much more similar to that of 'horizontal equality'.⁸⁵ Is there room for improvement in the present system of torts, namely favouring further 'distributive justice', instead of focussing

79 See, for example, Art. 2 UDHR, which prohibits discrimination on several grounds, among each social origin and 'other status'. Another status, very often connected to social origin, is the economic one. Protocol to the ECHR No. 12, for example, prohibits discrimination on, among others, social origin, property, or other status. Yet another example is Art. 13 CRP, which determines that '[n]o one shall be privileged or favoured, or discriminated against, or deprived of any right or exempted from any duty, by reason of his or her (...) economic situation or social circumstances.'

80 *E. W. Vierdag*, *The Concept of Discrimination in International Law*, The Hague, 1973.

81 *D. L. de Campos*, *O Direito e os Direitos da Personalidade*, in: *D. L. de Campos* (ed.), *Nós: Estudos sobre o Direito das Pessoas*, Coimbra, 2004, 109, 131.

82 *Ibid.* Although this author explicates this argument mostly relating to the law of contracts, the same reasoning is wholly applicable to the law of torts.

83 *O. Grosskopf*, *Horizontal Equality and the Law of Torts*, in: *D. Friedmann/D. Barak-Erez* (eds) (n. 1 above) 357.

84 *Ibid.*, 359.

85 *Ibid.*, 360. In the same sense, defending that the principle of equality should be read in light of the concept of distributive justice, *P. Perlingieri* (n. 51 above) 74 f.

exclusively on 'corrective justice'? In this context, it suffices to respond by saying that 'the victim's loss must be evaluated in light of the relevant social and legal contexts', including those elements which regard the tortfeasor.⁸⁶ Consequently, and in conclusion, as situations that are materially different are to be treated differently and (also) in light of distributive justice considerations, the socio-economic conditions of the tortfeasor and tort victim are elements apt to *in casu* allow for exceptions to the duty to fully compensate the victim.⁸⁷

3. Right to Development of One's Own Personality

The 'supreme right to development of one's own personality',⁸⁸ also referred to sometimes as the general right to personhood, relates to the 'right to make important decisions, freely develop one's personality, and to be left unhindered in one's private sphere'.⁸⁹ On the one hand, the right to free development of one's own personality has been considered the natural extension of the right to human dignity, insofar as the latter implies the creation of a political, economic, social, cultural and legal framework capable of favouring the thorough fulfilment of each individual.⁹⁰ On the other hand, it has been considered the right that equality and solidarity truly aim to protect.⁹¹ Consequently, the right to development of one's own personality seems to be the ultimate fusion of human dignity, equality and solidarity as ground values of our social, political and economic structures.

The right to development of one's own personality may be defined in different ways and may be expressly linked to limits or not. Under German law, the right to development of one's own personality was derived from Articles 1 (1) GG, concerning the right to human dignity, and 2 (1) GG, which states that all persons shall have the right to free development of their personality insofar as they do not violate the rights of others or commit any offence against the constitutional order or the principle of morality.⁹² German superior courts have also widely recognised this right.⁹³ The 1958 *Constitution Française* (French Constitution, CF) protects, as well, the right to personhood, insofar as it adheres to the 1946 CF, whose preamble proclaims in its paragraph 10 the 'right to conditions necessary for personal and family development'. The right to development of one's own personality can also be derived from Article 26 CRP, Article 10 CE, and the integrated and systematic interpretation of Articles 2 and 3 (2) CI.⁹⁴

- 86 *O. Grosskopf* (n. 83 above) 367.
- 87 *I. Ferranti* (n. 26 above) 300 ff.
- 88 Expression suggested by *Romano: M. Romano*, Sulla rilevanza del D.Lgs. 4 agosto 1999, N. 345 in tema di lavoro dei minori alla luce dei principi generali, *Famiglia* 2001, 671, 674.
- 89 *A. Heldrich/G. M. Rehm* (n. 17 above) 117.
- 90 *F. Moderne* (n. 40 above) 200.
- 91 *P. Perlingieri* (n. 51 above) 76.
- 92 *A. Freckmann/T. Wegerich*, The German Legal System, London, 1999, 81.
- 93 See, for example, BVerfGE 34, 238, 245; BVerfGE 35, 202, 219 ff. ('Lebach'); BVerfGE 54, 148, 152 ff.; BVerfGE 65, 1, 41 ff. See, also, *G. Brüggenmeier* (n. 2 above) 63 ff.; *H. von Mangoldt/F. Klein/C. Starck* (n. 46 above) Art. 1, n. 99 ff., and Art. 2, n. 58 ff.
- 94 See, for example, *P. Perlingieri*, Corte Cost., 29/4/1999, N. 167, case note *P. Perlingieri*, Principio 'personalista', 'funzione sociale della proprietà' e servizi coattiva di passaggio, *Rass. dir. civ.* 1999, 688.

The right to development of one's own personality concerns both the general right of personality⁹⁵ and the general freedom of action, and its extent is only duly appreciated when it is read in light of the value of human dignity.⁹⁶ It supersedes the usual private law understanding of individuals as subjects who aim to defend themselves, exclusively protecting their own rights. Instead, individuals are regarded as people to whom the community guarantees conditions for the development of personality, thereby increasing their dignity.⁹⁷ This new perspective, which holds the individual as a central and unitary value of the application of law, requires the private lawyer to reconsider all traditional private law institutions: an automatic and ill-thought application of these institutions should be replaced by a consideration of all law as instrumental in the valuation of the subjectivity of individuals.⁹⁸ In this regard, it is relevant to mention the decision of the *Bundesgerichtshof* (German Federal Court of Justice, BGH) in the *Schacht* case,⁹⁹ which was the first in Germany to look at injury to the personality rights as a basis for liability. From this decision, the doctrine of the general personality right was conceived, according to which the free development of one's personality is protected by the legal order as a subjective right.¹⁰⁰ The court had the opportunity to affirm that:

[n]otwithstanding, now that the Basic Law (*Grundgesetz*) has recognised the right of a human being to have his dignity respected (Art. 1 GG), and also the right to free development of his personality as a private right, to be universally respected in so far as it does not infringe another person's right or is not in conflict with the constitutional order or morality (Art. 2 GG), the general personality right must be regarded as constitutionally guaranteed fundamental right.¹⁰¹

In the years that followed, several other German court decisions took into consideration the existence and protection of a general right to personality and freedom of action.¹⁰² In 1986, a crucial case for the legal protection of children was also decided on the basis of the general right of personality, as protected by Article 1 GG. A constitutional complaint against a decision of the BGH¹⁰³ resulted in the *Bundesverfassungsgericht* (Ger-

- 95 Although not all personality rights may be considered constitutionally recognised fundamental rights, there is a growing trend to protect all personality rights as fundamental rights in light of the constitutional recognition of the dignity of the human being: *R. V. A. C. de Sousa*, O Direito Geral de Personalidade, Coimbra, 1995, 581 ff.
- 96 *J. Miranda/R. Medeiros*, Constituição Portuguesa Anotada, I, Coimbra, 2005, 287.
- 97 *P. Rescigno* (n. 70 above) 238.
- 98 *N. Lipari*, Diritti fondamentali e categorie civilistiche, *Riv. dir. civ.* I, 1996, 413, 418.
- 99 BGHZ 13, 334 ('Schacht').
- 100 *G. Brüggenmeier* (n. 2 above) 63 ff.; *P. Beckmann/A. Colombi Ciacchi/N. Ferreira et al.* (n. 3 above) Part 2, § 2, A; Part 3, § 2, A II.
- 101 English version taken from the German Law Archive of Oxford University, <<http://www.iuscomp.org/gla/index.htm>>.
- 102 See, inter alia, BGHZ 26, 349 = NJW 58, 827 ('Herrenreiter'); BVerfGE 35, 202; BVerfGE 84, 192.
- 103 Following the recognition of a large debt of a company (in the amount of DM 851,000, correspondent to approximately € 435,116), two children were, among others, held liable for such debt, insofar as they had inherited the company from their father and it still belonged to them at the time of the recognition of the debt. The BGH was clear in holding the two young girls joint debtors, in light of the (broad) application of German company law. For a discussion of this decision, see *K. Schmidt*, Minderjährigen-Haftungsbeschränkung im Unternehmensrecht: Funktioniert das? – Eine Analyse des § 1629 a BGB mit Rückblick auf BGHZ 92, 259 = NJW 1985, 136, JUS 2004, 361.

man Federal Constitutional Court, BVerfG) declaring that, allowing the exercise of the parents' right to legal representation to lead to a child's unlimited liability is a violation of that child's general right of personality (Article 1 (1) GG).¹⁰⁴ As a consequence, a legal reform amended the relevant legal provisions and limited the liability of children deriving from legal acts practiced before they reach the age of majority.¹⁰⁵ A few years later, the BVerfG decided a case on the validity of an imbalanced suretyship contract, the renowned *Bürgschaft* case.¹⁰⁶ The BVerfG affirmed that ordinary courts have to give due consideration to the right to private autonomy protected by Article 1 GG when applying general clauses such as §§ 138 (public policy) and 242 BGB (good faith). Courts, therefore, have a duty to control the content of contracts which excessively burden one of its parties. If a court fails to do so, then it may violate the fundamental right to development of one's own personality. Furthermore, the court discussed the excessive indebtedness of young adults as a consequence of joint liability for bank loans and considered that¹⁰⁷

'the case-law of the Federal High Court misjudges the general personality right of these (...) The case-law of the Federal High Court makes it possible for young adults, with only one signature on a usual bank form, for altruistic or family reasons, to come into such high indebtedness that the structure of their own economic existence is life-long blocked. Their individual financial and social self-determination is lost.'

Finally, in 1994, the right to personality was again seen, not only as 'another right' (for the purposes of § 823 (1) BGB), but as a fundamental right to be protected according to Article 1 and 2 (1) GG.¹⁰⁸

During the period between the first and last decisions just mentioned, several authors argued in favour and against the recognition of a wide concept of a general personality right and some also about the possibility of such right having some kind of horizontal effect.¹⁰⁹ Although still arguable and not agreed upon by all legal scholars and case law,

104 BVerfGE 72, 155 = NJW 1986, 1839; M. G. Cuheda, La legge tedesca sulla limitazione della responsabilità del minore, *Famila* 2001, 179, especially n. 15; and K. Schmidt (n. 103 above).

105 Gesetz zur Beschränkung der Haftung Minderjähriger (Minderjährighaftungsbeschränkungsgesetz - MHBG), 25/8/1998, BGBl I, 2487, which came into force on 1/1/1999.

106 BVerfGE 89, 214 ('Bürgschaft'). In this case, a young woman stood surety for the huge business debts of her father. The bank employee had handed out the suretyship contract form to her and had said: 'Please sign here, it is just for our files'. For more details on the repercussions of this decision and how it relates with the application of fundamental rights and general clauses, see A. Colombi Ciacchi, Le fidejussioni rovinose: un nuovo campo di applicazione delle clausole generali del BGB a tutela della parte debole, in: S. Patti (ed.), *Annuario di Diritto Tedesco* 1999, 149; id., Non-Legislative Harmonisation of Private Law under the European Constitution: The Case of Unfair Suretyships, ERPL 2005, 285; P. Roti, German Law on Family Suretyships: An Overrated System, in: A. Colombi Ciacchi (ed.), *Protection of Non-Professional Sureties in Europe: Formal and Substantive Disparity*, Baden-Baden, 2007, 51; G. Brüggenmeier (n. 2 above) 72 ff.

107 Excerpts of this decision translated into English were taken from P. Beckmann/A. Colombi Ciacchi/N. Ferreira et al. (n. 3 above) Part 2, § 4, B.

108 BGHZ 128, 1, 15.

109 Later on, in 2001, the BVerfG (BVerfGE 103, 89) again claimed Art. 2 (1) GG to play a direct role between private: the general freedom of action stated in the said norm also has an essential role in balancing and correcting the contents of an agreement, in the concrete case in conjunction with Art. 6 GG (rights of the family) and in regards to a prenuptial agreement.

it is relevant to observe that the mentioned decisions represent milestones in the German case law history and show a tendency to consider the right to personality, including the right to development of personality, as a fundamental right to which horizontal effects are recognised, be it with sound legal grounds, be it for the sake of effectiveness and pragmatic reasons.

Taking these decisions into consideration, and in line with what *Canaris* defends, it can be argued that the fixing of the age of liability in torts is constrained by a prohibition of excess ('*Übermaßverbot*') and a prohibition of insufficiency of protection ('*Untermäßverbot*') of the right to development of one's own development. Indeed, *Canaris* offers a clear example concerning the age of full legal capacity: if the legislator determined the age of 25 years of age as the age of full legal capacity, it would be considered an unconstitutional interference with the right to autonomy guaranteed by Article 2 (1) GG for violation of the prohibition of excess; if, on the contrary, the legislator lowered the age of legal capacity to 14 years of age, it would also be considered an offence against the minimum guaranteed constitutional protection. Similarly, if the age of liability in torts is fixed at an age considered too low or too high, it might violate the prohibition of excess or insufficiency of protection of the right to development of one's own personality.¹¹⁰ *Canaris* goes beyond the individual aspect of age of liability in torts, and considers that the duty to pay damages may, under certain circumstances, be unconstitutional, if it would result in bankruptcy for the liable person.¹¹¹ *Canaris* rightly argues that the duty to pay damages, as well as all pecuniary obligations of liable persons, constitutes an 'interference' with the fundamental rights of liable persons, at least regarding their right to development of personality and freedom of action. The obligation to pay damages can, therefore, constitute a disproportionate interference with these fundamental rights, thus violating the principle of proportionality ('*Grundsatz der Verhältnismäßigkeit*') and the prohibition of excess ('*Übermaßverbot*').¹¹² Consequently, state authorities have, in this regard, to ensure that the duty to pay damages respects the prohibition of excess and is submitted to a control of proportionality. The principle of proportionality, understood as a 'commandment of optimisation' ('*Optimierungsgebot*'), advocates for the maximum respect of all (conflicting) fundamental rights in the possible legal and factual measure.¹¹³ In order to do this, it is necessary to consider the drastic effects that the liable person will suffer in virtue of payment of large amounts of damages against the need of the person who suffered a damage to be compensated, as well as consider the real need for prevention. This exercise may lead to a reduction in the amount of damages if (but only if) it is economically legitimate to demand from the tort victim such limitation. This means that, only in situations involving a 'rich' tort victim and the financial ruin of the tortfeasor as a consequence of the payment of full compensation, will it be possible to reduce the amount of damages due, since it is only under these circumstances that the control of constitutional proportionality may favour the post-

110 C.-W. *Canaris* (n. 33 above) 21.

111 Ibid., 50; C.-W. *Canaris*, Verstoße gegen das verfassungsrechtliche Übermaßverbot im Recht der Geschäftsfähigkeit und im Schadensersatzrecht, JZ 1987, 1001 ff.; and F. Bydlinski, System und Prinzipien des Privatrechts, Vienna, 1996, 226 and n. 36.

112 For a constitutional reference to these principles, see, for example, Art. 18 (2) CRP.

113 R. Alexy, *Theorie der Grundrechte*, Baden-Baden, 1985, 100.

tion of the liable person.¹¹⁴ Other authors support this line of thought, including *Bleckmann*, who goes even further and argues that the same logic applies all the same if the rights at stake are not even indirectly founded on constitutional norms.¹¹⁵ In sum, in a situation of litigation in torts, the proportionality test requires evidence that the payment of damages will minimally impair the rights of the tortfeasor (namely the right to development of one's own personality), as well as that the reduction or exclusion of that payment will minimally impair the rights of the tort victim (namely the right to property).¹¹⁶

4. Right to Private Autonomy

As the right to private autonomy derives from the fundamental right to freedom of action and free development of one's personality, it is the function of the law to provide equal protection for the right to autonomy of any private party, and not only that of the stronger party.¹¹⁷ When discussing the already mentioned German *Bürgschaft* case,¹¹⁸ *Canaris* argues that the core thought of this decision lies on the fact that the constitutionally protected value of private autonomy cannot be understood only in a mere formal sense, but also requires a consideration of the material sense. This means that concrete private parties may need, under certain conditions, to be protected from being bound to a contract that is disadvantageous or dangerous to them, insofar as, at the time of its conclusion, those parties were considerably prevented from fully exercising their self-determination, within the exercise of private autonomy.¹¹⁹ Thus, contractual agreements, albeit being the expression of individual private autonomy, need to be controlled, having as parameters both their content and the personal situation of the parties entering into the contract, even those personal circumstances that precede the agreement and/or cannot be identified from it.¹²⁰

It follows, I argue, that the same reasoning can be, *mutatis mutandis*, applied to cases of torts. Where tortfeasors are considerably prevented from fully exercising their self-determination, within the exercise of private autonomy, then they may be protected from being bound to liability in torts (which, by its own nature, is always 'disadvantageous' or 'dangerous' to tortfeasors). This is, in fact, what already exists with some rules in the field of torts, of course: norms regarding the age of tortfeasors, their capacity to discern, the circumstances of the committing of the tort, etc. intend to reduce or exclude liability in tort by reason of the protection owed to tortfeasors under certain conditions. The reasoning behind decisions concerning the right to development of one's own personality discussed above may inspire a new, further step in this protection of tortfeasors when their position is, due to the circumstances of the case, deserving of particular consideration. If this is possible in regards to a contract, I find it difficult to understand why it cannot also be applicable to torts: in both situations there is some

114 C.-W. *Canaris* (n. 33 above) 51 f.

115 A. *Bleckmann*, *Begründung und Anwendungsbereich des Verhältnismäßigkeitsprinzips*, JUS 1994, 177.

116 L. E. *Weinrib/E. J. Weinrib* (n. 35 above) 55.

117 See, for example, Art. 2 (1) GG and BVerfGE 89, 214. See, also, A. *Colombi Giacchi* (1999, n. 106 above) 161 ff.; *ibid.* (2005, n. 106 above) 306 ff.

118 BVerfGE 89, 214.

119 C.-W. *Canaris* (n. 33 above) 49.

120 A. *Colombi Giacchi* (1999, n. 106 above) 166; *ibid.* (2005, n. 106 above) 306 ff.

kind of material or immaterial interest that one party of the contract (A) or the tort victim legitimately, at least at first sight, wants to see prevail, while simultaneously the other party to the contract (B) or the tortfeasor also holds particular interests and acted under particular circumstances that may provide solid justification to limiting the satisfaction of the claim of contractual party A or the tort victim. Furthermore, if justifiable and necessary to respect the substance of the fundamental rights at stake (be it through an indirect or direct effect, a violation of prohibition of insufficiency or an interpretation in light of fundamental rights), there is no definitive reason to restrain the grounds by limiting a liability in torts to those strictly established by private law norms. Lawfully limiting the effects of a contract on the grounds of protection of private autonomy or the right to development of one's own personality legitimises, I believe, also limiting the effects of a liability in torts on the same grounds.

A case that most evidently illustrates the connection between the right to autonomy and the limitation or exclusion of the right to damages was decided by a Canadian court. In *Dobson v. Dobson*,¹²¹ a mother was brought to court as a result of a claim for damages by her own son. The claim was attributed to injuries suffered by the child, during pregnancy, due to his mother's negligent drinking. The action was dismissed on the ground that the mother's right to autonomy, as well as her right to privacy, excluded liability for the mother's behaviour in regard to injuries which occurred to the child during the pregnancy. Although the main body of the decision did not expressly base the decision on the Canadian Charter, the concurring judgment by Justice *McLachlin* did refer explicitly to constitutional values that supported the decision, namely the right to autonomy of the pregnant woman. Although the decision can be criticised for failing to provide a deeper analysis of the contrasting interests,¹²² this case is an obvious example of how private autonomy can play a role in limiting or excluding liability in torts.

II. Constitutional rights of 'second ranking'?

I. Economic, Social and Cultural Rights

Traditionally, economic, social and cultural rights have been considered 'second generation' rights, in the sense that they belong to a second group of internationally and constitutionally protected fundamental rights, the 'first generation' corresponding to civil and political rights.¹²³ Reasons relating to their historic origin, present formulation, the European socio-economic framework, and more or less hidden prejudices against them, may account for, but not justify, why these rights seem to occupy a rather secondary role in the fundamental rights debate.¹²⁴ Simultaneously, states seem to adopt a double standard in relation to economic, social and cultural rights: while praising these rights in

121 (1999) 174 DLR (4th) 1 (SCC), [1999] 2 SCR 753.

122 L. E. *Weinrib/E. J. Weinrib* (n. 35 above) 69 ff.

123 L. L. *Hierro*, *Los Derechos Humanos del Niño - Ponencia*, in: A. *Marzal* (ed.), *Derechos Humanos del Niño, de los Trabajadores, de las Minorías... y Complejidad del Sujeto*, Barcelona, 1999, 15, 17.

124 J. J. G. *Canotilho*, *Metodologia 'Fuzzy' e 'Canalões Normativos' na Problemática Actual dos Direitos Económicos, Sociais e Culturais*, in: J. J. G. *Canotilho* (ed.), *Estudos sobre Direitos Fundamentais*, Coimbra, 2004, 97, 104.

the international arena through the signature and ratification of international treaties such as the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) and the European Social Charter, some states and scholars are extremely reluctant to recognise or commend the dignity and effectiveness of these provisions at national level, even in those cases where international law has direct effect in national legal systems.¹²⁵

It is imperative to discuss the false perception of the implications entailed in the enforcement of economic, social and cultural rights. In fact, there is a common belief that these rights are more *costly* than civil and political rights, thus limiting the extent to which economic, social and economic rights can be implemented to the financial resources available.¹²⁶ Wholly agreeing with this idea would mean accepting that, on the one hand, the legislator could completely relieve itself from the duty of giving effect to these rights, and, on the other hand, these rights would barely have any autonomous legal efficacy.¹²⁷ However, this common belief can easily be deconstructed: guaranteeing fundamental rights in the field of administration of justice can be immensely more costly than guaranteeing the fundamental right to health.¹²⁸ In addition, no truly convincing classification of these rights exists (the classification of a right is not mutually exclusive), and distinctions based on suitability for judicial proceedings or (lack of) ideological grounds are equally wrong.¹²⁹ Consequently, *van Bueren* has argued that '[t]he protection and promotion of human rights is contextual and to maintain into the 21st century such an artificial division of the context only hampers the effective protection of human rights'.¹³⁰ In sum, the above mentioned traditional assertions need to be toned down: despite the financial constraints that some economic, social and cultural right may be subjected to, and the legislative discretion that characterises this field, these rights are still binding and possess a minimum (constitutional) content that has to be respected.¹³¹ *Tunkin* has inclusively argued that social and economic rights are more important than civil and political rights, insofar as the latter reinforce the inequality of distribution, while the former aim to oppose such inequality.¹³² A comparative look at the legal value of economic and social rights also illustrates that it is possible to judicially protect these constitutional norms.¹³³ Furthermore, the most modern scholarly writings on the enforceability of economic and social rights argue precisely that not only should this group of rights be considered as fundamental, but they should also be

justiciable and enforceable.¹³⁴ A clear example thereof is the already mentioned Italian case law on the '*danno biologico*'. The wordings of Article 32 CI in relation to the right to health, a right traditionally understood as an economic and social right in most jurisdictions, places the duty to protect health on the state. Still, it served to develop an individual and concrete right to health which translates into a duty equally incumbent upon private parties.¹³⁵

Economic and social fundamental rights traditionally include the right to education, right to health, right to employment, and other rights usually connected with the welfare state. One of the most basilar economic and social rights is the right to development. In 1986, the United Nations (UN) General Assembly approved a Declaration on the Right to Development, whose Article 1 states that '[t]he right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized'.¹³⁶ Later on, the right to development was again given particular attention at the 1993 World Conference on Human Rights, which reaffirmed 'the right to development (...) as a universal and inalienable right and an integral part of fundamental human rights' and it was recalled that 'development facilitates the enjoyment of all human rights'.¹³⁷ In addition, the right to development can be explicitly read in the ICESCR, as well as derived from the ECHR.¹³⁸

An automatic reflection of the right to development is illustrated by the right to a minimal livelihood. Much of the impact of economic and social rights on private law provisions resides precisely in the right to development and to minimal livelihood. The importance of the right to livelihood is further reflected by the fact that it has been judicially enforced in private litigation, both in the Irish¹³⁹ and Israeli¹⁴⁰ jurisdictions, namely in cases regarding the payment of alimony.¹⁴¹ States have to ensure, through all reasonable and adequate measures, that all individuals are offered the necessary legal and factual conditions to enjoy, at least, basic living standards; in other words, states, informed by the principles of human dignity, solidarity and justice, have positive obligations.

134 T. Pogge, *Freedom from Poverty as a Human Right*, Oxford, 2007; D. Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights*, Oxford, 2007.

135 *Paladin* (n. 5 above) 37.

136 Document A/RES/41/128, 4/12/1986, UN General Assembly 97th plenary meeting, <<http://www.un.org/documents/ga/res/41/a41r128.htm>>.

137 World Conference on Human Rights, Vienna Declaration and Programme of Action, para. 10, Vienna, 14/6 to 25/6/1993, <[http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument)>.

138 In light of an evolutionary interpretation of, and the 'indirect protection' ('protection par ricochet') by, Art. 2 (1) (right to life), 3 (prohibition of inhuman or degrading treatment), 8 (right to respect for private and family life), and 12 (right to marry and found a family): M. Lavine, *Recherche sur les fondements du 'droit au développement de l'être humain' à partir de l'exemple de la Convention Européenne des Droits de l'Homme*, in: J.-Y. Morin (ed.), *Les Droits Fondamentaux: Actes des 1ères Journées Scientifiques du Réseau Droits Fondamentaux de l'AUPELF-UREF*, Bruxelles, 1997, 43, 53 ff.; A. D. Olinga, *Le droit à des conditions matérielles d'existence minimales en tant qu'élément de la dignité humaine* (Articles 2 et 3 de la CEDH), *ibid.*, 91 ff.

139 *Lowett v. Gogan* [1995] 1 IR 12, and *Parsons v. Kanagh* [1990] 10 IR 560 (Ir. H. Ct.).

140 *CAA 4905/98 Gamso v. Yishayyho* (1998) 55(3) PD 360.

141 On these cases, see Y. Doran (n. 69 above) n. 53.

125 *Ibid.*

126 This is illustrated by the fact that, while the rights guaranteed in the 1966 International Covenant on Civil and Political Rights had to be implemented immediately, those guaranteed by the ICESCR only need to be implemented as the states parties to the Covenant have available resources: G. van Bueren (n. 64 above) 20.

127 J. J. G. Canotilho (n. 124 above) 107 f.

128 G. van Bueren (n. 64 above) 20 and 382.

129 *Ibid.*, 382.

130 *Ibid.*, 383.

131 J. J. G. Canotilho (n. 124 above) 108 ff.

132 G. van Bueren (n. 64 above) 4.

133 Colomer Viadel and López González use Art. 5 (LXXI) 1988 Brazilian Constitution as an example thereof: A. Colomer Viadel/L. López González (n. 48 above) 325.

gations to safeguard a legal and socio-economic system that prevents individuals from being deprived from their (economic and social) right to development and minimal livelihood.¹⁴² It follows that it is also reasonable to apply the rights to development and to minimal livelihood in cases of private torts litigation as well. Having an awareness that the economic and social rights of tortfeasors and tort victims deserve equal, careful attention, the role that economic and social rights, and the right to minimal livelihood in particular, can play in shaping the liability of tortfeasors and protecting their fundamental rights becomes obvious.

2. Social Justice

Social justice, understood as the progressive reduction of socio-economic inequalities within the context of the 'welfare state', seems to be at the heart of much of the private law developments in the last few decades in several jurisdictions. In fact, although private law has traditionally been concerned with patrimonial obligations and personal rights, largely neglecting wider economic, ethical and social interests, its concepts and institutions have gained a key role in promoting redistributive justice and acting as social state mechanisms, thus progressively acquiring a new ethical-social dimension.¹⁴³ Besides this, social justice, as a constitutional value, also requires all rights to be interpreted in light of their social functions.¹⁴⁴ The fundamental right that best illustrates this assertion is the right to property: although its historical and ideological foundations initially almost shaped it as a *ius abutendi* (right to abuse one's property), the right to property is nowadays closer to a *ius utendi* (right to use and enjoy one's property).¹⁴⁵ The right to free economic initiative and private law contracts have suffered a similar evolution, insofar as they are also subject to the idea of social state and social utility, even if through the application of general clauses and indeterminate concepts.¹⁴⁶ Accordingly, private law presently works as a dynamic instrument that promotes social well-being, understood as material and spiritual progress, which consequently limits the activity of the legislator and the courts.¹⁴⁷ Particularly in relation to the latter, this means that all specific circumstances of the case, no matter whether criminal or civil proceedings are at stake, need to be taken into account, among which is the parties' economic, social and educational background.¹⁴⁸ In light of these circumstances, the judge should aim at a decision that is most efficiently capable of extinguishing obstacles to the parties' economic and social well-being. Only through these means, will the judge be able to go beyond literal justice (which would, in fact, be injustice), and provide con-

crete, social justice, a justice that is coherent with all the (constitutional and private) legal system.¹⁴⁹

A particularly incisive private law instrument of promotion of social justice is the protection of weaker parties through the judicial control of the content of imbalanced contracts. This control, predominantly entrenched in German private law, no longer takes place solely in relation to special matters such as labour contracts,¹⁵⁰ standard contract terms and consumer contracts, but to the whole spectrum of contract law. In the early 1990s, the BVerfG held, in the *Bürgschaft* case, that, if a contract was concluded under a structural inequality of bargaining power ('strukturell ungleiche Verhandlungsstärke') and, as a consequence, became unusually burdensome ('ungewöhnliche Belastung') for one of the parties, civil courts have the duty, in light of the fundamental right to private autonomy (Article 2 (1) GG) and the principle of the social state (Articles 20 (1) and 28 (1) GG), to control and, if the circumstances so require, correct the content of the contract by making use of the general clauses of the BGB, such as good faith (§ 242 BGB) and public policy (§ 138 BGB).¹⁵¹ Arguably, this decision served as a 'clear call on the "material ethic of social responsibility"', by clarifying that 'equity shall prevail over formal contractual freedom'.¹⁵² The same approach has been taken by German courts in relation to suretyship contracts, commercial agency contracts¹⁵³ and marriage contracts,¹⁵⁴ which suggests that it will be generally valid for all kinds of contractual relationships characterised by structural inequality of bargaining power.

Going a step further, we can raise the question of whether, how, and to what extent an unusually burdensome liability in tort of structurally weaker individuals could be excluded or mitigated by reasons of social justice. The need to reduce, under certain circumstances, the amount of damages due under tort liability in order to avoid the financial ruin of the liable person, thus safeguarding their fundamental rights, has already been recognised by *Canaris*. In fact, as discussed above in regards to the right to development of one's own personality, *Canaris* argues that, under certain circumstances, an obligation to pay damages can be unconstitutional if it results in the liable person's financial ruin. Also, if paying full compensation would mean living on a minimum income for the rest of the tortfeasor's life, then that obligation should also be mitigated on the basis of the fundamental right to freedom of action, interpreted in light of the principle of reasonableness and good faith.¹⁵⁵ This reasoning can only be reinforced by the principle of social justice, no matter how well it is understood and materialised in prac-

¹⁴⁹ Ibid.

¹⁵⁰ In Germany, the concept of 'structural inequality of bargaining power' arose initially and most strongly in the field of labour law, but then was spread throughout other legal areas and now produces effects in the whole law of obligations: *P. Bechmann/A. Colombi Ciacchi/N. Ferreira et al.* (n. 3 above) Part 3, § 2, A I and B, *passim*.

¹⁵¹ BVerfGE 89, 214. See, also, *A. Colombi Ciacchi* (1999, n. 106 above) at specially 186; *ibid.* (2005, n. 106 above) 300; *P. Rott* (n. 106 above) 51.

¹⁵² *P. Bechmann/A. Colombi Ciacchi/N. Ferreira et al.* (n. 3 above) Part 2, § 4, B. According to *G. Bräggemeier* (n. 2 above) 73, the 'Bürgschaft' decision was 'less the case of applying fundamental rights in private law than evoking the principle of social responsibility and solidarity in contract law'.

¹⁵³ BVerfGE 81, 242 = NJW 1990, 1469.

¹⁵⁴ BVerfGE 103, 89 = NJW 2001, 957.

¹⁵⁵ *C.-W. Canaris* (n. 111 above).

¹⁴² *M. Levinet* (n. 138 above) 58 ff.; and *B. R. Guimbo* (n. 43 above) 76 f.

¹⁴³ *A. Di Majo*, *La tutela civile dei diritti*, Milan, 1982, 12 f.; and *M. L. Chiarella* (n. 3 above) 41.

¹⁴⁴ *G. Pecces-Barba Martinez* (n. 36 above) 610.

¹⁴⁵ *Ibid.*, 610-611. See, also, *E. Briganti* (n. 8 above) 297; and Corte Costituzionale Italiana (Italian Constitutional Court), 29/4/1999, n. 167.

¹⁴⁶ *U. Magliola*, *Fonti del Diritto Privato*, in: *M. Bassone* (ed.), *Istituzioni di Diritto Privato*, 4th ed., Turin, 1997, 20.

¹⁴⁷ *G. Oppo*, *Iniziativa Economica*, in: *Scritti in Onore di A. Falzea*, I, Milan, 1991, 421, 443 and 448. See, also, with specific references to the German context, *A. Freckmann/T. Wegerich* (n. 92 above) 91.

¹⁴⁸ *P. Perlingieri* (n. 51 above) 78.

tice. In fact, the principle of social justice has reshaped the idea of subjective right, insofar as subjective rights now need to be interpreted in light of their social function, of the limits imposed on private autonomy, and of the freedom, dignity, and economic conditions of individuals.¹⁵⁶ Indeed, rights cannot be considered independently from each other and exclusively in their patrimonial dimension, as they exist to contribute to individuals' well-being.¹⁵⁷ Accordingly, no legal imposition may deprive an individual – not even, of course, tortfeasors – of the means necessary for a dignified existence.¹⁵⁸

3. *The Principle of Solidarity*

Social justice, understood as the creation of the necessary conditions to promote a society of equality and fairness, is inseparably connected with the principle of solidarity. In fact, solidarity can no longer be regarded as an individual ethical principle and has attained the status of a guiding principle of social organisation which aims to guarantee to all members of society dignity and equal opportunities of development.¹⁵⁹ In contrast to the classical contractualism, the present day value of solidarity requires respecting the interests of others as we would respect ours, whenever such interests deserve such consideration, whilst recognising external realities and external problems.¹⁶⁰ It follows that the principle of solidarity can be seen as a relational value, both complementing the values of equality and freedom, and occupying its own space: it imposes a certain 'attitude' towards all other rights, a certain way of legally organising the society, founding human rights, and interpreting them.¹⁶¹ In effect, rights can be applied and interpreted in an either egoistic way or a solidary way: the former creates a series of pathologies in the legal system, such as affirming absolute, limitless rights, or enforcing rights regardless of consequences, while the latter pursues respect for everyone else's rights and considers the consequences legal enforcement entails.¹⁶² Accordingly, as no right in the legal system exists exclusively for the sake of the individual who is entitled to it, there are no truly subjective rights, only legally protected interests, that is, subjective legal situations with limitations.¹⁶³

Several constitutional texts in Europe contain more or less direct references to the principle of solidarity. Indeed, implicit to the notion of the rule of law subsistent to most constitutional texts is a certain balance between liberty, democracy, solidarity and social cohesion. Additionally, several European constitutions promote solidarity as a responsibility not only of the state, but also of private institutions and individuals, of which Article 2 CI is an example.¹⁶⁴ Besides this, the interaction between the principle of solidarity and private law is very strong, particularly in regards to the law of torts. The fact that the law of torts is densely 'inhabited' by general clauses and concepts in need of further

concretisation allows for interpretive operations to be more richly constitutionally impregnated than in other legal fields.¹⁶⁵ General interests assume a very strong influence on the law of torts, be it in regards to whom should bear the costs of the harm, be it in regards to the balance between the interests of the parties.¹⁶⁶ This influence is most obviously reflected in the relativisation of the importance of the role of fault (ultimately through the creation of norms of strict liability) and by the offer of protection for a greater variety of tort victims interests.¹⁶⁷

Nonetheless, the importance of the principle of solidarity can also be decisive in questioning, modernising or contesting other aspects of the law of torts, thus functionally redefining it.¹⁶⁸ The principle of solidarity can, therefore, have a crucial, instructive role in the interpretation of those rules that determine who will bear the economic cost of a harmful act: since 'solidarity' towards one party will mean a loss for the other party bearing that cost, a concrete balance between the interests of both parties necessarily has to be done.¹⁶⁹ Therefore, another consequence of the solidarity dimension of law is that the position of the 'passive' subject (the tortfeasor, in the law of torts, and the debtor, in the law of contracts) deserves as much consideration as the position of the 'active' subject (the tort victim, in the law of torts, and the creditor, in the law of contracts).¹⁷⁰ This is increasingly accepted in the field of contract law,¹⁷¹ however, the impact of this idea in the field of torts has been considerably slower. In any case, it is undeniable that nowadays social values, of which solidarity is one of the most striking ones, require the legal system to exclude absolute, unilateral positions, such as the right to damages or any other claim related to a liability in torts: legal conflicts have to be contextualised, and the individual positions and interests of the parties involved have to be considered in their reciprocity, transitivity and reflexivity.¹⁷²

III. *Constitutional rights of 'third ranking'?*

1. *Right to Search for Happiness*

The right to search for happiness is an old concept. *Aristotle* and *Athanasius of Alexandria* argued that happiness was a right, despite not agreeing as to whether only certain persons or all human species were entitled to it.¹⁷³ The right to search for happiness is nowadays commonly invoked in political and philosophical speeches, and, in more

156 *E. Briganti* (n. 8 above) 313.

157 *P. Perlingieri*, *Mercato, solidarietà e diritti umani*, *Rass. dir. civ.* I, 01-03/1995, 84, 92 f.

158 *E. Briganti* (n. 8 above) 316 f.

159 *M. Fortino*, *Solidarietà e protezione dei minori*, *Famila* 2003, 91, 104.

160 See, following the writings of *González Amuchastegui*, *G. Peces Barba Martínez* (n. 36 above) 277.

161 *Ibid.*, 262 and 279.

162 *Ibid.*, 282.

163 *P. Perlingieri* (n. 51 above) 143 f.

164 *V. Canas*, *O Princípio da Proibição do Excesso na Constituição: Arqueologia e Aplicações*, in: *J. Miranda* (ed.), *Perspectivas Constitucionais*, Nos 20 *Anos da Constituição de 1976*, II, Coimbra, 1997, 323, 352.

165 *C. Salvi* (n. 62 above) 153.

166 *Ibid.*

167 *Ibid.*, 154 ff., and *E. Briganti* (n. 8 above) 277 f. and 293.

168 *C. Salvi* (n. 62 above) 154 f.

169 *Ibid.*, 156.

170 *D.L. de Campos* (n. 81 above) 131.

171 *U. Breccia*, *Problema costituzionale e sistema privatistico*, *Riv. crit. dir. priv.* II/4, 12/1984, 687, 708.

172 *M. L. Chiarella* (n. 3 above) 73.

173 *D. L. de Campos* (n. 81 above) 110.

mundane contexts, famous personalities also feel at ease invoking such a right.¹⁷⁴ However, the right to happiness is hardly referred to in legal scholarly writings. The second paragraph of the Declaration of Independence of the USA of 4 July 1776 contains the clearest reference to the right to search for happiness:

'We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.'¹⁷⁵

The right to happiness is thus considered a basic right of the US American legal system, and its courts have persistently supported decisions based upon it.¹⁷⁶ Although the idea of happiness is absent from most European constitutional texts, it has not escaped the attention of European scholars and judges altogether.

The natural right to search for happiness is usually expressed in conjunction with the rights to freedom, to safety, and to property.¹⁷⁷ Also, a more intense study of the principle of solidarity connects this value with the 'guarantee of the minimum of happiness'. More importantly, this is not only a responsibility of the state, but also of private individuals and bodies.¹⁷⁸ Furthermore, any legal regulation must consider the ultimate aim of individuals, that is, happiness and well-being. In the German jurisdiction this thought has been more clearly expressed through the BVerfG decisions on the protection of professional files. In fact, the BVerfG has had the opportunity in several cases to decide that the principle of the pursuit of happiness requires files put together by a physician or a lawyer on a patient or client, and containing personal and private information on the latter, to be protected from misuse from unauthorised persons.¹⁷⁹ This line of case law, from which the right to informational self-determination ('*Recht auf informationelle Selbstbestimmung*') originates, is illustrative of the potential in using the right or principle of search of happiness in legal reasoning. German case law provides us with yet another example of how the right to the pursuit of happiness may be recognised as a legal value and also impact the outcome of a case. In 1988, the *Oberlandesgericht* (Regional Court) Stuttgart decided that a contract which, if not in words, at least in facts, most probably leads to the transfer of a part of the debtor's future patrimony is, in analogy to § 310 BGB (old version)¹⁸⁰ and in light of § 138 BGB (public policy clause), null

and void, where the actual circumstances are obvious to the creditor.¹⁸¹ The main ground indicated by the Court in its decision was precisely, and in reference to the already quoted paragraph of the Declaration of Independence of the USA, the 'inalienable right of hope and pursuit of happiness' ('*Erhaltung des unveräußerlichen Menschenrechtes auf Hoffnung, auf das Streben nach dem Glück*'), which, according to the same Court, has constitutional character. This non-written constitutional principle would, therefore, imply that private parties may not be left with less than what is necessary for a dignified existence ('*Existenzminimum*').

It may be argued that tortfeasors should equally be protected by a similar legal reasoning. In fact, the Italian scholar *Minozzi* had already at the beginning of the XX century rightly linked the notion of happiness to the regulation of compensation for pain and suffering.¹⁸² The law of torts is undoubtedly intimately related to the right to pursuit of happiness, and that does not pertain exclusively to tort victims, but also to tortfeasors. Accordingly, tortfeasors may not, in light of the right to pursuit of happiness, be deprived of their (present or future) economic resources to an extent that will prevent them from pursuing an existence with the indispensable socio-economic well-being.

2. Right to Hope

Hope, as the *Oberlandesgericht* Stuttgart rightly pointed out in its above mentioned decision of 1988, is one of the basic characteristics of humanity, and that has been so recognised by philosophy throughout history.¹⁸³ Other German courts, inter alia the BVerfG, have had the opportunity to bring the right to hope to the legal discussion and draw consequences from that, specifically in reference to the debate surrounding the constitutionality of life sentencing. According to the line of case law that dealt with this issue, life sentencing can only be compatible with Article 1 (1) GG and the rule of law if there is a concrete and feasible possibility of the sentenced offender being freed in the future.¹⁸⁴ The prohibition of lifelong imprisonment without the possibility of parole is justified by the fact that the core of human dignity would be struck if the sentencing of offenders, disregarding their personality development, were to remove any hope of acquiring freedom again.¹⁸⁵ In light of Article 1 GG and the principle of the rule of law, some level of concreteness concerning the possibility of reacquisition of freedom has thus to be ensured, so that the core of the right to human dignity and of individuals is preserved.¹⁸⁶ The same applies even to those individuals who have committed serious offences, even if all the aims of criminal penalties have to be taken into consideration in the process.¹⁸⁷

174 *Rockefeller*, for example, has, at one instance, been quoted as stating that 'I believe in the supreme worth of the individual and his right to life, liberty and the pursuit of happiness'. *Jr. J. D. Rockefeller, Our Family Creed*, in: *B. S. Shekhar* (ed.), *The World's Great Speeches*, Mumbai, 318.

175 The original text can be found in <http://www.archives.gov/national-archives-experience/charters/declaration_transcript.html>.

176 See, for example, 71 US 333 (1866), 71 US 277 (1867), 336 Mich. 107, 57 N.W.2d 439 (1953), 441 US 153, 99 S.Ct. 1635 (1979).

177 *J. Balarín Jibarren*, *Derechos Fundamentales y Relaciones entre Particulares*, Rev. Esp. Derecho Const. 8/24, 1988, 285-288; and *P. Cruz Villalón*, *Derechos Fundamentales y Derechos Privado*, in: *P. Cruz Villalón* (ed.), *La Cuestión del Jurista Pensa, y otros Estudios sobre la Constitución*, Madrid, 1999.

178 *F. Canas* (n. 164 above) 352.

179 BVerfGE 32, 373, 379; BVerfGE 79, 256, 268 ff.; *A. Freckmann/T. Wegerich* (n. 92 above) 89.

180 § 310 BGB ('Vertrag über künftiges Vermögen') required a 'public act' (notary attestation) for a contract that totally or partially transferred, or contracted the enjoyment of, the debtor's future patrimony.

181 OLG Stuttgart, NJW 1988, 833, 835. See, on this decision, *H. Heinrich*, *Palandt Kommentar*, 49th ed., München, 1990, § 310.

182 *E. Navarretta* (n. 25 above) 73, n. 92.

183 OLG Stuttgart, NJW 1988, 833, 835.

184 BVerfGE 45, 245. Similarly, BVerfGE 113, 154, para. 30 (without drawing the necessary and logical consequences regarding the request of extradition of a convict, para. 21), and dissenting opinion of Judge Winter in BVerfGE 86, 288 ('Strafauferlegung bei lebenslanger Freiheitsstrafe'), para. 215.

185 BVerfGE 72, 105 ('Lebenslange Freiheitsstrafe').

186 BVerfGE 45, 187 ('Lebenslange Freiheitsstrafe'), para. 191.

187 BVerfGE 64, 261 ('Hafturlaub'), paras 35 and 56.

The consequences of the consideration of the right to hope have inevitably influenced the law of torts. Coherently, in light of the rights to human dignity and to personality, German case law provides that holding a child liable without limits for the commission of a negligent tort is a violation of the inalienable right to hope, as that would entail long-lasting indebtedness from the coming of age onwards.¹⁸⁸ Accordingly, any judicial decision holding tortfeasors liable should consider their right to hope and ensure that the core of this right is respected when determining the extent of their liability.

3. *The Ethic of Care*

The idea underlying all fundamental rights and principles mentioned so far in this text is the unquestioned assumption that the goal of judging is justice.¹⁸⁹ Several answers are possible to the question of what the aim of adjudication is: 'legal economists argue that judges should aim for efficiency, liberal legalists argue that judges should aim to enforce rights, and legal humanists argue that judges should aim for narrative or aesthetic integrity.'¹⁹⁰ *West*, certainly inspired by the writings of *Gilligan* on the ethic of care,¹⁹¹ argues that, concomitantly to the goal of justice, judges should also consider another goal of adjudication, 'that of compassion, or care for the litigants before them.'¹⁹² The ethic of justice itself demands the consideration of the ethic of care, since virtues of care and justice are not, as traditionally seen, contradictory to each other: consideration for universal rules, consistency, reason, rights, the public sphere and masculine virtues (associated with 'justice') are all interrelated and interdependent with consideration for particularity, context, affect, relationship, the private sphere and femininity.¹⁹³ Judges aiming for justice have, for this reason, to be caring as well, since an uncaring decision is an unjust one.¹⁹⁴

While being neither a right nor a legal principle as such, the ethic of care is, to the say the least, an approach to justice enlightened by certain highly defensible values and strongly affiliated to the right to human dignity and the principle of solidarity. The relevance of all this to the law of torts is pointed out by *West* herself: the law of torts is excessively linked to a notion of impartial compensatory justice. This means that, presently, although imbalances of resources brought on by negligent acts only have to be rectified when there is a clear causal connection between the tortfeasor and the tort victim, once that connection is asserted, in principle all must be rectified.¹⁹⁵ The judge, to be rigorously impartial, is expected to be institutionally consistent, impartially universal, in possession of personal integrity, and blind to all differentiating factors, leaving

all considerations of nurturance, compassion or commitment aside.¹⁹⁶ The position assumed by *West* in this regard is imposing:¹⁹⁷ integrity without compassion, justice without compassion, leads to 'cramped, often dishonest, fundamentally false, and oftentimes lethal' justice,¹⁹⁸ impartiality without relationship allows the denial of the 'particular human relationship between court and litigant', ignoring the uniqueness of each litigant and frustrating the pursuit of justice;¹⁹⁹ consistency without nurturance 'can lead to injustice and even absurdity if it is not tempered by an attitude of care toward, or at least sensitivity to, contemporary circumstances, including whatever circumstances characterize the pending case.'²⁰⁰ *West* is clear in also admitting that the pursuit of care unconstrained by the ethic of justice equally fails, both as a matter of care and as a matter of justice: nurturance, compassion and particularity need to be tempered with consistency, integrity, and the scales of justice.²⁰¹

A particular instance of how the ethic of care may influence the outcome of legal proceedings is the judicial ruling that re-shaped vicarious liability in France. The company Parfums Rochas filed a lawsuit against the company Valières and its employees Mr Foret and Mrs Duchesne. Valières and these two employees had been linked to the counterfeiting of Parfums Rochas products. Although the French vicarious liability regime up until that moment had indicated that the employees involved in this tortious activity would, or at least could, also be held liable, the *Cour de Cassation* (French Supreme Court, CCassF) decided otherwise: as the employees had acted within the functions that had been designated to them by their employer and had not exceeded the limits of those functions, and had not committed any 'personal fault' that could entail their individual liability, the CCassF concluded that these employees could not be held liable.²⁰² This reasoning was later on confirmed by the same Court in other cases.²⁰³ The reasoning behind this line of case law is that employees are placed in particularly vulnerable positions and lack real decisional autonomy, therefore, it is those who possess a true leeway to decide and are usually not subject to instructions that should be liable for the consequences of the company's wrongful activities.²⁰⁴ Clearly subadjacent to this reasoning is also the idea that courts cannot apply justice strictly in light of legal consistency, integrity, and scales of justice, but that they also have to bear in mind ideas of

- 188 LG Dessau, NJW-RR 1997, 214. The submission to the BVerfG was refused, still the BVerfG recognised the need for limitation of liability in torts of children: BVerfG, NJW 1998, 3557.
- 189 R. West, *Caring for Justice*, New York et al., 1997, 22.
- 190 *Ibid.*
- 191 C. Gilligan, *In a Different Voice: Psychological Theory and Women's Development*, Cambridge (Mass.), et al., 1993.
- 192 R. West (n. 189 above) 23; and A. Barak, *Constitutional Human Rights and Private Law*, in: D. Friedmann/D. Barak-Erez (eds) (n. 1 above) 13.
- 193 R. West (n. 189 above) 23 f.
- 194 *Ibid.*, 24 f.
- 195 *Ibid.*, 29.

- 196 *Ibid.*, 29 ff.
- 197 For a critique of *West's* findings in the work under analysis, see, for the most part supporting it, L. C. McClain, *Liberal Future of Relational Feminism*: Robin West's *Caring for Justice*, *Law & Soc. Inquiry* 1999, 477; and, in a more critical tone, J. Halley, *The Politics of Injury: A Review of Robin West's Caring for Justice*, *Unbound* 2005, 65.
- 198 R. West (n. 189 above) 43.
- 199 *Ibid.*, 54 ff.
- 200 *Ibid.*, 61.
- 201 *Ibid.*, 74 ff.
- 202 Case *Rochas*, *Chambre commerciale*, 12/10/1993, Bull. 1993 IV n. 338, 245; D. 10/3/1994, n. 10, 124, note G. Finet; J.C.P., 27/9/1995, n. 39, 356, note F. Chabaz; LPA, 23/7/1997, n. 88, 15, note S. Fourrier; J.C.P., 12/6/1996, n. 24, 235, note B. Pailh. By 'personal fault' is meant a wrongful act separable from the employee's functions and for which he/she is personally responsible; *Chambre commerciale*, 28/4/1998, Bull. Com. n. 139; *Troisième chambre civile*, 17/3/1999, Bull. 3ème Civ. n. 72; *Deuxième chambre civile*, 19/2/1997, Bull. 3ème Civ. n. 53; *Première chambre civile*, 30/10/1995, Bull. 1er Civ. n. 383.
- 203 See, for example, *Assemblée Plénière*, 25/2/2000, *Bulletin d'information* n. 512, 15/4/2000.
- 204 Conclusion of Mr. Kessous in *Assemblée Plénière*, 25/2/2000 (n. 203 above).

nurturance, compassion and particularity, in this case nurturance for, compassion for, and particularity of employees subject to instructions leading to wrongful acts.

The case just discussed illustrates very well the legal implications of the way Gilligan envisages the ethic of care, an ethic that 'focuses on the dynamics of relationships and dissipates the tension between selfishness and responsibility through a new understanding of the interconnection between other and self. Care becomes the self-chosen principle of a judgment that remains psychological in its concern with relationships and response but becomes universal in its condemnation of exploitation and hurt'.²⁰⁵ In conclusion,

[c]onstitutional arguments and judicial decisions which directly aim to improve the quality of life of those who are most endangered, and which do so, in essence, because an ethic of care demands it, are stronger arguments – and more just – because of it.²⁰⁶

Judicial decisions on the liability of tortfeasors invariably affect their quality of life, and, if disproportional, excessive or ruinous, can, especially in cases of non-intentional wrongful acts, become a tool of 'exploitation and hurt'. When tortfeasors find themselves in economic and/or social hardship, courts have all the more reason to consider those specific circumstances and reach a decision that respects both the ethic of justice and the ethic of care. Only if this happens will the interests of both the tort victim and the tortfeasor be truly justly considered in their right dimension and extent.

IV. Constitutional rights of 'third ranking' or strictly (traditional) private law institutions?

1. Principles of Good Faith and Public Policy / *Ordre Public*

The principles of good faith and public policy are open-textured norms that require further judicial interpretation in order for their substance to be revealed in the concrete case. It can be argued that these principles are not constitutionally protected; however, three points have to be made in this regard. Firstly, these principles must inevitably be interpreted and applied with the aid and in the light of constitutional principles and fundamental rights. Secondly, even in those legal orders that do not offer constitutional ranking to good faith and public policy, these principles can most commonly be inferred from those principles and rights with constitutional ranking. Thirdly, these principles have been considered as limits to the exercise of any fundamental right. To grasp the extent of this limitation one needs to systematically analyse the constitution, and to consider all other fundamental rights and principles that inform the limitations to the exercise of each right.²⁰⁷ In sum, although these principles are still generally framed within the private law legislation, ultimately within civil codes, they are materially constitutional.²⁰⁸ For this reason, I found it pertinent and justifiable to give the principles of good faith and public policy due consideration in this discussion.

Good faith is a general clause that has found a place amongst the private law of most, if not all, jurisdictions in Europe.²⁰⁹ It has been held that the good faith clause 'is universally applicable to all types of private law relations and that it obligates the parties not to exercise existing rights improperly'.²¹⁰ With such a broad wording, it is no surprise that this clause can be used in very diverse scenarios, inevitably shaping and limiting the private autonomy of private parties.²¹¹ The principle of good faith has, accordingly, been applied generally to fundamental rights, thus ensuring the efficiency of law.²¹² Concomitantly, the increasing relevance of the principle of good faith in relation to the law of torts has been identified as a trend in Europe. The principle of good faith serves as an essential aid in the assessment of the behaviour of both the tortfeasor and the tort victim.²¹³ Accordingly, the good faith clause has inspired the BGH decisions prohibiting over compensation, also referred to as account of compensating advantages ('*Vorteilsausgleichung*'), which is coherent with the general prohibition of unjust enrichment.²¹⁴ In addition, German authors have argued that the imposition of unlimited liability on children, before the present § 828 par. 2 BGB was approved, should be considered a violation of § 242 BGB.²¹⁵ In sum, the principle of good faith contributes to shaping the exact scope of decisions on liability in torts, thus co-determining the extent to which a tortfeasor can be held liable without violating constitutional values.

As regards public policy, it is the principle that most closely translates the Latin 'boni mores' and nowadays legal concepts referred to in other languages as '*bons costumes*',²¹⁶ 'good morals',²¹⁷ 'good moral standards',²¹⁸ and '*guten Sitten*'.²¹⁹ In the words of Barak, 'public policy is the channel through which constitutional values flow into private law',²²⁰ and, it must be added that it is not only an essential channel for keeping private law in touch with reality, but also an efficient tool of social organisation. An example of how the public policy clause may influence the reform of private law is illustrated in the way in which § 138 BGB has been employed in the determination of financial contracts as null and void, where these lead to the economic ruin of individuals who were not aware of the legal and financial implications of these contracts

²⁰⁹ See, namely in the field of the law of obligations, § 242 BGB ('Treu und Glauben'), Art. 1134 Code Civil Français (French Civil Code, CCF) ('bonne foi'), Art. 227 and 762 Código Civil Português (Portuguese Civil Code, CCP) ('boa fé'), Articles 1337, 1366, and 1375 CCI ('buona fede'). In common law, the concept of good faith is, in certain cases, lost to that of equitable estoppel. *A. Heldrich/G. M. Rehm* (n. 17 above) 120, n. 25.

²¹⁰ OLG Stuttgart, FamRZ 1998, 260.

²¹¹ *I. Ferranti* (n. 26 above) 282 ff. An example thereof is the consideration of a dismissal as wrongful in light of the principle of good faith: BAG, NZA 1994, 1080, 1082.

²¹² *G. Peeces-Barba Martínez* (n. 36 above) 607.

²¹³ *G. Alpa* (n. 77 above) 317.

²¹⁴ For references, see *G. Brüggenmeier* (n. 10 above) 190 ff.

²¹⁵ See, for example, *C. Rolfs*, JZ 1999, 233; and *C.-W. Canaris* (n. 111 above).

²¹⁶ Art. 271 CCP.

²¹⁷ *S. Gardbaum*, 'The Horizontal Effect of Constitutional Rights', Mich. L. Rev. 2003, 387, 405.

²¹⁸ *A. Heldrich/G. M. Rehm* (n. 17 above) 113.

²¹⁹ § 138 BGB.

²²⁰ *A. Barak* (n. 192 above) 22.

²⁰⁵ *C. Gilligan* (n. 191 above) 74.

²⁰⁶ *R. West* (n. 189 above) 91.

²⁰⁷ *G. Peeces-Barba Martínez* (n. 36 above) 605.

²⁰⁸ *Ibid.*, 607.

due to their lack of life experience and/or education.²²¹ Thus, for example, a loan contract signed by a nineteen year old individual was considered to violate § 138 BGB, as the young adult in question, due to socio-economic and intellectual limitations, was not able to grasp the dimension of the obligation.²²² A similar impact of the principle of public policy in private law norms can also be observed in the law of torts. A striking example of this is the BGH ruling in the sense that the enforcement of a given US American judgment ruling on punitive damages would be void, as it would be against the German legal principle prohibiting the windfall enrichment of tort victims.²²³ It follows that the public policy clause may also be essential in delineating the law of torts of a given legal system, depending on the use that is made of it.

2. Abuse of a Right

In the same way as public authorities may not abuse their powers, private powers are not allowed to abuse their rights either. Private parties may detain powerful positions and use them to subdue other private parties, such as weaker contractual parties, less powerful businesspersons, and consumers. For such a reason, it is essential to control and prevent situations of abuse of private power.²²⁴ Consequently, the 'abuse of right', known in other languages as '*abuse de droit*', '*abuso di diritto*', '*abuso de direito*' or '*Rechtsmissbrauch*', is generally considered a wrongful act in European jurisdictions.²²⁵ The abuse of right is presently commonly perceived as consisting in the exercise of a right in a way that strips that subjective right from its lawfulness, in light of, for example, intention to harm, fraudulent fault, bad faith, in sum, an excessive use usually to the detriment of others and without any benefit for the individuals themselves.²²⁶ A more extensive view of this concept also includes under its scope, those cases where holders of a right opt for a genuinely useful way to exercise their rights, but choose to do that independently of the fact that the advantage so produced is disproportionate to the disadvantage caused to the rights or legitimate interests of third parties.²²⁷ The French case law particularly provides numerous examples that illustrate the broad application and elasticity of the abuse of right.²²⁸ Ger-

man legal provisions equally allow for liability in torts for intentional infliction of harm *contra bonos mores*, which includes abusing a right.²²⁹

The abuse of right is usually an element of the private law realm, commonly having hardly any connection with the fundamental rights debate. However, constitutionally protected freedoms and rights of those subjected to private powers, as well as the constitutionally relevant interests of those individuals, also constitute limits to those powers.²³⁰ Furthermore, as we saw above in regard to the principle of solidarity, rights can be applied and interpreted in either an egoistic way or a solidary way. The principle of solidarity requires rights to be applied having consideration of the boundaries of one's right, for the rights of the others, and for consequences of legal enforcement. In light of these considerations, the principle of solidarity has introduced the legal institution of abuse of right in the fundamental rights discourse.²³¹ Furthermore, and similarly to what has been pointed out in relation to the principle of good faith, the fact that the prohibition of abuse of right is still generally included in private law legislation, namely in civil codes, does not extinguish its materially constitutional character.²³²

The relevance of the institution of abuse of right to the law of torts is all but marginal. In reality, the scope of the prohibition of abuse of right is so rich that it may be applied much beyond the boundaries of contractual law, rendering it a general principle particularly apt to be used by courts in balancing the interests existent in the field of torts.²³³ The relevance for tort victims is obvious: individuals may claim damages from other private parties who abuse their own rights and, in so doing, cause harm to the former. That is, for example, what § 826 BGB expressly states. However, the abuse of right may also be of considerable importance in relation to the position of the tortfeasor. In fact, paying an amount of damages that becomes itself an unlawful harm to the tortfeasor held liable may constitute an abuse of the right to damages. If those damages exceed 'the permissible boundaries of the balancing formula',²³⁴ then the application of the standard provisions in the field of torts must be corrected by the judge. This does not mean unlawfully limiting the right to damages of the tort victim, as the award of damages beyond an amount that would violate the fundamental rights of the tortfeasor is not worthy of legal protection. Furthermore, as *van Gerven* highlights, there is a close similarity between the test used to find an abuse of right and the principle of proportionality.²³⁵ It follows that, in order to avoid abusing one's right to compensation, this right should be exercised in a proportional way to the harm caused by tortfeasors, as well as in a way that avoids causing a disproportional harm to tortfeasors themselves.

- 221 See, with further case law and scholarly references on this legal evolution in Germany, *A. Colombi Ciacchi* (1999, n. 106 above) 152 ff.; *P. Rott* (n. 106 above) 51.
- 222 OLG Düsseldorf, ZIP 1984, 166.
- 223 BGHZ 118, 312, 334 ff. = NJW 1992, 3096; BVerfG JZ 2003, 956 = NJW 2003, 2598. For further references, see *G. Brüggenmeier* (n. 10 above) 217 f.; *E. C. Stiefel/R. Stürner/A. Stadler*, The Enforceability of Excessive U.S. Punitive Damages Awards in Germany, *Am. J. Comp. L.* 1991, 779; and *B. Friedrich*, Federal Constitutional Court Grants Interim Legal Protection against a Service of a Writ of Punitive Damages Suit, *GLJ* 2003.
- 224 *A. Di Majo* (n. 143 above) 14.
- 225 See, for example, Arts 1382-1383 CCF, Art. 334 CCP, §§ 226 and 242 BGB, and *C. van Dam* (n. 11 above) 48 f. Even in those legal systems, as the Italian one, where the concept of abuse of right is not object of a normative definition and systematic treatment, one can refer to it in light of the occasional legislative, scholarly and judicial contributions, such as Arts 833, 1175, 1366, 1375 CCI and *F. D. Busnelli/E. Navarretta*, Abuso del diritto e responsabilità civile, in: *Responsabilità civile e tutela dei diritti* (Studi in onore di Pietro Rescigno), 5, Milano, 1998, 77-115.
- 226 *C. van Dam* (n. 11 above) 48; and *G. Pecce-Barba Martinez* (n. 36 above) 606.
- 227 *W. van Gerven*, Remedies for Infringements of Fundamental Rights, *EPL* 2004, 261, 279.
- 228 *C. van Dam* (n. 11 above) 49; *F. D. Busnelli/E. Navarretta* (n. 225 above) 99.

- 229 *C. van Dam* (n. 11 above) 70 ff.; *F. D. Busnelli/E. Navarretta* (n. 225 above) 81.
- 230 *A. Di Majo* (n. 143 above) 14.
- 231 *G. Pecce-Barba Martinez* (n. 36 above) 282.
- 232 *Ibid.*, 607; and *F. D. Busnelli/E. Navarretta* (n. 225 above) 111.
- 233 *F. D. Busnelli/E. Navarretta* (n. 225 above) 79 f., 82 and 89 f.
- 234 *A. Barak* (n. 192 above) 41.
- 235 *W. van Gerven* (n. 227 above) 279 f. The author draws a parallel between, on the one hand, the ECJ's application of the three elements of the principle of proportionality in assessing the legitimacy of EC and national measures that affect fundamental rights of private parties, and, on the other hand, the test used by national courts to find an abuse of a right by a private party, namely in the field of the law of contracts and torts.

C. The practical impact of the horizontal effect of fundamental rights on the position of the tortfeasor

It is now opportune to further consider the practical impact of the fundamental rights and principles explored above on the law of torts and, more in particular, on the position of the tortfeasor. It is argued by some authors that there is only a duty of protection of a fundamental right if a factual, absolute necessity of protection of the fundamental right in cause is asserted.²³⁶ Notwithstanding the dogmatic value or intrinsic logic of such arguments, I believe that they offer a rather limited scope of action for fundamental rights. Without wishing to enter into any kind of discussion on the different models of horizontal effect of fundamental rights debated by legal scholarship, as that would fall outside the scope of this analysis, I argue that a stronger and more determinant effect of fundamental rights on private law norms is not incompatible with the principle of separation of powers, private autonomy or the autonomy of private law, nor does it create legal uncertainty any more than certain private law norms already do. Limiting the possibility of fundamental rights influencing the substance of private law norms seems to impoverish the true importance and legal potential of fundamental rights in any given legal order. I, therefore, propose a stronger and more dynamic role of fundamental rights in contributing not only to the interpretation of private law norms, but to actually provide a socially updated reading of those norms. In accordance, I argue that courts should assume a more committed role aimed at the fulfilment of the fundamental rights and other constitutionally protected principles.

Constitutional protected rights and principles can, indeed, greatly enlighten many cases in judicial litigation, thus relieving the legislator of the need to pass new Acts or amendments. To facilitate a private legal system which is more in conformity with the constitution, legislative Acts are not essential, as judges should have the freedom to interpret and apply the constitutional text with the necessary space for manoeuvre to ensure a just decision. This approach would be more compatible with a dynamic judicial practice, in constant dialogue with reality.²³⁷ Moreover, it would also be fairer to private parties who need fully constitutionally just decisions when they are in court, and not mere legislative amendments a few years later, which are then of no use for those private parties once in litigation.

The above considerations imply that, when courts rule on cases of liability in torts, as well as on the constitutionality of norms pertaining to this legal field, judges have to consider in all their depth, the rights to human dignity, development of one's own personality, equality, private autonomy, minimal livelihood, search for happiness, and hope of the tortfeasor, as well as the implications for the tortfeasor of the principles of social justice, solidarity, good faith, public policy, and abuse of right, all enlightened by the values of the ethic of care. As *Friedmann* and *Barak-Erez* underline, '[p]rivate law will have to adapt to these values [human rights]', even if that means that private law 'is

likely to undergo a considerable transformation.'²³⁸ Judges should not see their role in this transformation diminished to such an extent that may harm the genuine protection of fundamental rights, in this case of the tortfeasor.

D. Conclusion

The ontological parity of human beings excludes the possibility of establishing (absolute) power relationships: on the contrary, it only allows bilateral relationships in which each one of them has simultaneously, rights and obligations.²³⁹ In harmony with this assertion, the category of 'subjective right' is limited in two ways: internally, it is limited by the ethical-judicial duty towards the other party, transforming the 'subjective right' (understood as 'power') into a 'power-duty' (understood as an instrument of co-operation); externally, it is limited by the complex of rights and duties that both parties have towards each other, translating the density of social complexities.²⁴⁰ This is not aimed at making a choice between the absolute 'individual' or the absolute 'social', since both lead to 'absolute bondage' for any of the parties involved. It aims merely to strike a just balance between the 'individual' and the 'social'.²⁴¹

In light of this understanding, and in light of the fundamental rights that the tortfeasor is entitled to in face of the tort victim, the position of the tortfeasor is much more complex and richer than generally considered. The 'bigger picture', hopefully now more perceptible, entails consequences for the position of the tort victim, even if perhaps only in extreme cases. Courts cannot escape from having to deal with and solving extreme cases, so any guidelines provided by scholars may anticipate future difficulties. Fundamental rights and freedoms can, generally, be limited in light of, on the one hand, other fundamental rights and freedoms, and on the other hand, application of constitutional objective principles and values.²⁴² Accordingly, the fundamental rights and freedoms of the tort victim can suffer limitations in light of constitutional principles and values, as well as of the fundamental rights and freedoms of the tortfeasor, as discussed above. Furthermore, several of these rights, insofar as they can be considered *mutual* and *originary* 'personality rights', in their broadest and deepest senses, can be considered to assume a position of greater importance than constitutions. In effect, the 'essential nucleus' of fundamental rights is untouchable, in light of their superior legal character, constitutive of our juridical-cultural identity.²⁴³ Thus, when a constitution does not in-

²³⁸ D. *Friedmann*/D. *Barak-Erez* (n. 1 above) 3.

²³⁹ D. *L. de Campos* (n. 81 above) 132.

²⁴⁰ *Ibid.*

²⁴¹ D. *L. de Campos*, Os Direitos da Personalidade: Categoria em Reapreciação, in: D. *L. de Campos* (ed.), Nôos: Estudos sobre o Direito das Pessoas, Coimbra, 2004, 151, 162.

²⁴² J. *Miranda/R. Medeiros* (n. 96 above) 161; J. J. G. *Canotilho*, Dogmática de Direitos Fundamentais e Direito Privado, in: J. J. G. *Canotilho* (ed.), Estudos sobre Direitos Fundamentais, Coimbra, 2004, 191.

²⁴³ J. J. G. *Canotilho*, Métodos de Protecção de Direitos, Liberdades e Garantias, in: J. J. G. *Canotilho* (ed.) (n. 242 above) 137, 142.

²³⁶ See, for example, C.-W. *Canaris* (n. 33 above) 74 f.

²³⁷ Also arguing for an interventionist/participative role for judges in the adjustment of private law to the application of constitutional human rights, see A. *Barak* (n. 192 above) 33 ff.

clude them, respect them and enforce them, it will be either deficient or unjust. These *natural* and *originary* 'personality rights', as well as other principles and rights of similar nature, will complete and correct such constitutional texts.²⁴⁴ This is all the more true for the insufficiencies and deficiencies of private legal norms. It seems that further validation of this conclusion can be inferred from the wise words of *Brüggenmeier*, who rightly argues that the law of torts corresponds nowadays to a structure of principles and systematised casuistry, and these can only adequately address social conflicts if they are flexible and context-sensitive.²⁴⁵

²⁴⁴ *D. L. de Campos* (n. 81 above) 133.

²⁴⁵ *G. Brüggenmeier* (n. 10 above) 24.