Evaluating the 'new culture' of human rights in European Private Law

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1. Fundamental Rights and Private Law in the European Union: Background to the Project

Fundamental rights, as expressed in constitutional texts and traditions, case law and international agreements, have traditionally been regarded as rights enjoyed by the citizen vis-à-vis the State i.e. they have vertical effect. Whether fundamental rights have horizontal effect between private parties, including the nature and extent of any such effect, has long been a matter of academic and judicial discussion in many European legal systems.¹ The same debate has also taken place in regard to the European Community fundamental freedoms and rights², as well as in relation to international human rights law.³ The late Professor Sir William Wade described this horizontality as forming part of a 'new culture of human rights [where] the citizen can legitimately expect that his human rights will be respected by his neighbours as well as his government.'⁴

This special edition of the *European Review of Private Law* presents some of the results of a project entitled 'Fundamental Rights and Private Law in the European Union'. This project, funded as a Research Training Network under the European Community's Fifth Framework Programme, consisted of a four year adventurous endeavour to map the effect of fundamental

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¹ See, for example, the widely cited collection edited by D. Friedmann & D. Barak-Erez, *Human Rights in Private Law*, Hart Publishing, Oxford/Portland, Oregon, 2001; and the work of C.-W. CANARIS, *Grundrechte und Privatrecht: Eine Zwischenbilanz*, Walter de Gruyter, Berlin/New York, 1999.

² See, for example, T.O. GANTEN, *Die Drittwirkung der Grundfreiheiten: Die EG-Grundfreiheiten als Grenze der Handlung- und Vertragsfreiheit im Verhältnis zwischen Privaten*, Duncker & Humblot, Berlin, 2000; and N. FERREIRA, J. KRZEMINSKA, & T. RUSSO, 'Horizontal effects of fundamental rights and freedoms in European Union law', in G. Brügge, A. Colombi Ciacchi, & G. Comandé (eds.), *Fundamental Rights and Private Law in the European Union: A Comparative Overview*, CUP, Cambridge, 2008 (forthcoming).

³ A. CLAPHAM, *The Human Rights Obligations of Non-State Actors*, OUP, Oxford, 2006.

⁴ H.W.R. WADE, Horizons of Horizontality, [2000] 116 *Law Quarterly Review* 217, at 224

rights on private legal relationships in European jurisdictions. The work was carried out by more than 50 researchers from 12 legal systems under the direction of Gert Brüggemeier and Aurelia Colombi Ciacchi, of Zentrum für Europäische Rechtspolitik an der Universität Bremen⁵, and Giovanni Comandé, of Scuola Superiore Sant'Anna di Studi Universitari e di Perfezionamento⁶. Being a 'Research Training Network' meant that a great part of the emphasis of this project was on the training of the young researchers appointed in each team and in the contribution to the creation of a true European academic community.⁷ The researchers were based at nine institutions, across the European Union, and examined nine legal systems in detail: England and Wales, France, Germany, Italy, the Netherlands, Poland, Portugal, Spain and Sweden.

For the purposes of our research, we essentially employed a 'bottom up' methodology i.e. defining the nature and scope of fundamental rights by concentrating, in the first place, on concrete private law problems/cases. In other words, we focused on the 'law in action' as opposed to the 'law in books'. The first stage of the project was the completion of general national reports for each of the nine legal systems mentioned above. The reports examined the theories of, and debates about, horizontal effect in each jurisdiction, and served to set the context to the case-law to be analysed later on. A general overview of the relevant legislation, case-law and scholarly work was also provided. The second stage involved the collection of hundreds of 'horizontal effect' cases, which were summarised and translated into English by the researchers.

We proceeded to organise the collected case law into four different pillars. As we were not able to cover the whole of private law, due to time and material limitations, we decided to concentrate on four broad areas: tort law, contract law, property law and family law. Under each pillar, we made a list of the most common 'fact patterns'. A 'fact pattern' refers to an abstract description of litigious facts which sought a solution through private law, usually in more than one jurisdiction. The final structure of 'fact patterns' resulted as follows:

⁵ Centre for European Law and Politics at the University of Bremen (ZERP). Both editors of this special edition of the ERPL were young researchers in the project's team based in ZERP.

⁶ Sant'Anna School for Advanced Studies of Pisa (SSSUP).

⁷ More information on this project can be found in the websites <<http://www.fundamentalrights.uni-bremen.de/>> and <<http://www.lider-lab.org/joomla/rtn>>, last accessed on 15 April 2008.

I. Contract Law

1. The object, cause, content or purpose of the contract or a contract clause infringes a fundamental right
 - 1.1. Surrogate motherhood
 - 1.2. Contractual waiver of a right
 - 1.3. Consumer contracts – indemnification for lost profits
 - 1.4. Landlord-tenant relationship – validity of contractual clause restricting access of family members or life partners
2. Discrimination
 - 2.1. Discrimination on the basis of age
 - 2.2. Discrimination on the basis of sex
 - 2.3. Discrimination on the basis of religion, belief, political opinion
 - 2.4. Discrimination on the basis of nationality
 - 2.5. Discrimination on the basis of race
 - 2.6. Discrimination on the basis of other grounds
3. Duty of care/duty of confidence/duty of co-operation
4. The performance of a contract leads to major imbalances between the parties
 - 4.1. Suretyship (in particular of relatives)
 - 4.2. Penalty clauses
 - 4.3. Other contractual clauses leading to major imbalances between the parties
5. After the conclusion of a contract circumstances occur that have not been foreseen in the contract
6. Termination of the contract
 - 6.1 Termination of tenancy contracts

II. Tort Law

1. Using/publishing photos, names and likeness of non-public persons without their consent
2. Using/publishing photos, names and likeness of celebrities without their consent
3. Using/publishing information regarding non-public persons without their consent
4. Using/publishing information regarding celebrities without their consent
5. Using speech against economic, professional or artistic initiative and potentially causing economic loss or harm to honour
6. Personal injury – Injured person claims for non-pecuniary damages

7. Person is killed or injured and third person/s (relative/s) claim/s for (non-)pecuniary damages
8. Wrongful life / wrongful birth / wrongful conception

III. Property Law

1. Property and antenna cases
2. Public accessible property and the right to information
3. Property-Nuisance
4. Nuisance: Extension of actionable rights of property to non owners

IV. Family Law

1. Relations between spouses
 - 1.1. Repudiation vs. divorce
 - 1.2. Patrimony (e.g. alimony) issues after separation
 - 1.3. Different treatment of married and unmarried partnerships
2. Relationships between parents and children
 - 2.1. Determination/recognition/denial of paternity; right to be a father
 - 2.2. Biological test regarding determination of paternity
 - 2.3. Adoption by singles
 - 2.4. Obligation to provide alimony
 - 2.5. Visiting rights
 - 2.6. Different treatment of children born out of wedlock
3. Testatory freedom vs. non-discrimination
4. Family domicile

In describing each 'fact pattern' we avoided the use of any legal terminology which could already somehow predetermine the solution in a certain way. In the final stage of the project, we analysed the 'fact patterns' in depth and collected the legal materials necessary to provide a solution to them in each legal system included in the project, both through the horizontal effect of fundamental rights and through ordinary private law rules. Finally, groups of two authors from different legal systems co-authored articles on a selected 'fact pattern', using the material collected during the previous years. In these co-authored articles, researchers tried to determine in what ways judges in private law cases have protected fundamental rights in relationships between private parties in regard to that specific 'fact

pattern', what differences and similarities there are in the solutions of the different legal systems, and, finally, whether harmonisation of European Private Law might be (and should be) achieved in respect of this topic. These articles, as well as the national questionnaires, will be published later this year.⁸

2. Contributions to this special edition of the ERPL

In this special edition of the *European Review of Private Law*, we include contributions from individual young researchers working in a number of European legal systems and in a number of legal fields. The contributors base their work on relevant fact patterns from the project and study them from a macro- and/or micro-perspective, often adopting a transversal perspective.

Maria Dolores Sánchez Galera looks at *Drittwirkung* within the context of environmental law. She explores the controversial issue of a fundamental right to environment and argues that the constitutionalisation of private law is leading to more and more protection of environmental interests in private law. While it is still difficult to define the boundaries of such a fundamental right, Sánchez Galera utilises examples of case-law from several European legal orders and argues that the decisions demonstrate the increasing relevance of a fundamental right to environment and a conciliation of public and private law.

Bart de Vos' contribution is a more sceptical take on the role of fundamental rights in private law. Using the example of conditional bequests, he argues that the debate surrounding fundamental rights and private law is merely the result of a terminological innovation given that certain fundamental interests have always been protected by private law. De Vos evaluates pertinent rules and case law in the Belgian, Dutch, English, French, German, Italian and Portuguese legal systems and questions the suitability and adequacy of fundamental rights as instruments of protection in private law, arguing that horizontal effect is unlikely to offer any additional value.

⁸ G. Brüggemeier, A. Colombi Ciacchi, & G. Comandé (eds.), *Fundamental Rights and Private Law in the European Union: A Comparative Overview*, CUP, Cambridge, 2008; and G. Brüggemeier, A. Colombi Ciacchi, & G. Comandé (eds.), *Fundamental Rights and Private Law in the European Union: Comparative Analyses of Selected Fact Patterns*, CUP, Cambridge, 2008; both forthcoming.

Judith Conrad explores the relationship between language and private law in her contribution. Using examples of case law in several European legal systems, she focuses, in particular, on language-based contractual disputes. Conrad argues that there is no possibility for a uniform European solution to such hard cases not least because European countries still do not share a uniformly defined set of common values, such as diversity, equality and non-discrimination. In examining the broad field of linguistic and minority rights, Conrad argues that the only solution is to employ a multi-dimensional approach taking into account all of the different complexities involved.

In this special edition we also include three articles which focus in particular on Portuguese law. The Portuguese Constitution is one of the youngest in Western Europe, as it was only approved in 1976, and has been frequently amended.⁹ Furthermore, it was approved in a political context that favoured a particularly strong emphasis on the protection of political, social and economic fundamental rights. The origins, youth and regular modernisation of this constitutional text account for the originality and wide scope of many of its provisions¹⁰. During our research we were indeed struck by the extent and depth of the rights and social guarantees in its text.¹¹ Consequently, we consider it an excellent case study for the application of fundamental rights in private law.

Marta Costa explores some generally relevant issues, while placing a particular emphasis on the fundamental right to adopt. Within the context of the 'best interests of the child' principle, she examines the constitutionality of restrictions on the right to adopt in Portugal and argues that restrictions relating to sexual orientation are unconstitutional. Taking into account approaches in other legal systems, Costa suggests that the Portuguese legislator should review the regulation of adoption in order to come to a better conciliation of the many interests at stake.

As far as we are aware the Portuguese Constitution is the only basic text which includes consumer rights as fundamental rights, and that makes *Diovana Barbieri's* contribution all the more pertinent. In her article, Barbieri analyses the constitutional text and

⁹ The Portuguese Constitution was revised seven times: in 1982, 1989, 1992, 1997, 2001, 2004 and 2005.

¹⁰ Generally, see on the Portuguese Constitution: J.J.G. CANOTILHO, *Direito Constitucional e Teoria da Constituição*, 7th edn., Almedina, Coimbra, 2008; and J. MIRANDA, *Manual de Direito Constitucional*, volume IV - Direitos Fundamentais, 3rd edn., Coimbra Editora, Coimbra, 2000.

¹¹ In the same sense, see A. COLOMER VIADEL and J.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*, III, Coimbra Editora, Coimbra, 1998, p 315.

relevant case law and evaluates whether consumer fundamental rights can be said to have direct horizontal effect. Barbieri examines the complex area of the relationship between the supply of goods and services and fundamental rights and she questions whether direct horizontal effect would really be of benefit to consumer protection.

Much has been written about the fundamental right to know one's genetic origins, particularly in a German and Dutch context. In this edition, *Rafael Vale e Reis* examines the right in the context of the Portuguese legal system. He reminds us of the complexity of this area and the various interests that are at stake before questioning the constitutionality of the current standing of the law in Portugal. He suggests that individuals who are conceived through assisted reproductive technologies should have access to the identity of the donor; however, first the donor should be allowed the opportunity to establish in court any overriding reason to retain anonymity. In this way, a harmonious balancing of interests can be secured.

3. Concluding remarks

The four years of research which were carried out by researchers from such different institutions and diverse legal systems have given rise to an impressive selection of very interesting materials within the scope of the project. The analysis carried out in the final phases of this research project have dealt in particular with the following issues: to which extent fundamental rights can improve the protection of private parties in their relationships and whether there are gaps in the protection of fundamental rights in private law. In this analysis, researchers have also assessed the possible need for further harmonisation in each specific field and made proposals for achieving this.

Although the coordinators of this project had a clear idea of the objectives and had ensured a certain degree of structure from the start, the execution of such a long and complex research project required flexible and creative coordination and implementation. In fact, many of the positive working instruments and methods created by the researchers during these four years were a product of spontaneous discussions and fruitful brainstorming. Furthermore, in order to actually achieve the set objectives and to produce quality materials, the working plans previously outlined had to suffer substantial amendments on several occasions. This

flexibility and room for change also contributed to the transversal and multilayered contributions that were included in this special edition.

In addition to the two books which will be published later this year and will contain the national questionnaires and co-authored articles on specific 'fact patterns', this special edition aims to make public some of the research developed within the framework of the Research Training Network 'Fundamental Rights and Private Law in the European Union'. This way, we hope to ensure that the materials collected and work developed during the duration of this project find their way to those readers interested in this topic, thus contributing to the advancement of the European *Drittwirkung* scholarship.

To date, a study of this size on horizontal effect of fundamental rights had not been undertaken in Europe. This topic is of current significance in the majority of European legal systems. In the United Kingdom, for example, the introduction of the Human Rights Act 1998 has led to substantial interest in the relationship between human rights and private law.¹² The growing and revived interest in this debate is also noticeable in other jurisdictions.¹³ This interest is, we believe, entirely justifiable and commendable. After all, we believe that one of the main concerns that should guide all lawyers nowadays, no matter what specific legal fields they work in, is how fundamental rights in the European Union can be better protected and promoted, not only in regards to acts of State authorities, but also in regards to action of other private parties.

¹² See, for example, R. BUXTON, 'The Human Rights Act and Private Law', *Law Quarterly Review*, 116 (2000), 48-65; G. PHILLIPSON, 'The Human Rights Act, "Horizontal Effect" and the Common Law: a Bang or a Whimper?' *Modern Law Review*, 62/6 (1999), 824-49; and S. PALMER, 'Human Rights: Implications for Labour Law', *Cambridge Law Journal*, 59/1 (March 2000), 168-200.

¹³ See, for example, in Portugal, B.F. DA S.M. CRORIE, *A Vinculação dos Particulares aos Direitos Fundamentais*, Almedina, Coimbra, 2005; and, in Italy, G. Commandé (ed.), *Diritto privato europeo e diritti fondamentali: Saggi e Ricerche*, G. Giappichelli, Torino, 2004.