

Part 1:

Fundamental Rights and Private Law in the EU Member States

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I. Sources of Fundamental Rights

1. Multi-level system of fundamental rights protection. The process of European integration has resulted in a considerable increase in the complexity of the interplay between fundamental rights and private law. The topic is no longer limited to the question of determining the relationship between private law and fundamental rights enshrined in national Constitutions. Today, the legal landscape within the EU is marked by a multi-level system in which different sources of fundamental rights – national, supranational and international – have an influence on the application and interpretation of private law rules. Although the different systems of fundamental rights show many commonalities, a closer analysis reveals differences both with regard to the scope of protection and the justification of restrictions. Notable examples are the differing concept of ‘family life’ under the ECHR and Member State constitutions,¹ the relationship between freedom of press and protection of privacy,² as well as different readings of the principle of non-discrimination on grounds of age which is now enshrined in Article 21(1) EU Charter of Fundamental Rights.³ In order to assess the impact of fundamental rights on Member State private law systems it is necessary, in a first step, to provide an overview of the different sources that are taken into consideration by courts in civil proceedings.

A. National Sources

2. National constitutions. In several Member States the constitution contains a more or less detailed catalogue of fundamental rights (e.g. BULGARIA, DENMARK, GERMANY, GREECE, IRELAND, THE NETHERLANDS, POLAND, PORTUGAL).⁴ A special

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¹ See e.g. ECtHR, 3 December 2009, Case no. 22028/04 (*Zaunegger/Germany*); for further case law examples see the comment to Article 8 ECHR in *J.A. Frowein/W.Peukert*, *Europäische Menschenrechtskonvention: EMRK-Kommentar*, 3rd. ed., Kehl 2009.

² See ECtHR, 24 June 2004, Case no. 59320/00 (*von Hannover/Germany*).

³ See ECJ, 22 November 2005, C-144/04, [2005] ECR I-9881 (*Mangold*); ECJ, 19 January 2010, C-555/07 (*Kücükdeveci*).

⁴ See Chapter 2 of the BULGARIAN Constitution, Articles 71-80 of the DANISH Constitution (‘*Grundlov*’), Articles 1-20 of the GERMAN Constitution (‘*Grundgesetz*’), Articles 4-25 of the GREEK Constitu-

case is SWEDEN which has a ‘composite constitution’ consisting of several constitutional laws dealing with civil rights and freedoms.⁵ In other Member States the constitution does not contain a codified list of fundamental rights. As a consequence, case law plays a more important role in the elaboration of a set of fundamental rights. For example, in FRANCE the Constitutional Council has elaborated a judicial charter of fundamental rights (*charte jurisprudentielle de droits fondamentaux*).⁶ The so-called *bloc de constitutionnalité* comprises the 1789 Declaration and the Preamble of the 1946 Constitution and – most recently – the *Charte de l’environnement 2004*.⁷ Thus the absence of fundamental rights in the ‘formal constitution’ (*constitution formelle*) has led to the judicial development of what has been called the ‘material constitution’ (*constitution matérielle*).⁸ The ITALIAN Constitution makes a terminological distinction between ‘fundamental rights’ (*diritti fondamentali*) and ‘inviolable rights’ (*diritti inviolabili*).⁹ Only the right to health is explicitly defined as a fundamental right (Article 32 of the Constitution). However, it is commonly understood that Article 2 of the Constitution according to which the ‘inviolable rights of man’ are recognised and guaranteed by the State serves as a kind of ‘general clause’. Thus, it has been possible to extend the catalogue of fundamental rights through judicial interpretation.¹⁰

3. Extra-constitutional sources. Certain fundamental rights may also be expressed directly in the Civil Code. This is true in particular for the concept of private property¹¹, freedom of contract¹² and the right to privacy¹³. For example, the PORTUGUESE Civil Code contains a detailed list of personality rights (e.g. physical and mental integrity, secrecy of correspondence, right to one’s image, right to private life) that have the character and status of fundamental rights.¹⁴ Similarly, Article 16 of the FRENCH Civil Code states that the law prohibits any violation of human dignity. Furthermore, in some cases fundamental rights have been implemented by means of specific legislation. For example, in FRANCE the tenant’s right to an antenna (as part of the fundamental right to information) has been laid down in a specific Act of Par-

tion, Articles 40-44 of the IRISH Constitution, Chapter 1 of the Constitution of THE NETHERLANDS (*‘Grondwet’*) (since the revision of 1983), Chapter 2 of the POLISH Constitution of 1997, Articles 12-79 of the PORTUGUESE Constitution.

⁵ See Chapter 2 of the Instrument of Government (*‘Regeringsformen’*), the Freedom of Press Act (*‘Tryckfrihetsförordningen’*) and the Freedom of Expression Act (*‘Yttrandefrihetsgrundlag’*).

⁶ See *Champeil-Desplats*, Dalloz, *Chronique*, 1995, 323, 327.

⁷ See FRENCH Constitutional Court, 19 June 2008, 2008-564 DC (*Loi relative aux organismes génétiquement modifiés*) and 29 December 2009, 2009-599 DC (*Loi de finances pour 2010*).

⁸ See *C. Herrmann/C. Perfumi*, in: G. Brüggemeier/A. Colombi Ciacchi/G. Comandé (eds.), *Fundamental Rights and Private Law in the European Union*, Vol. I, Cambridge 2010, pp. 195.

⁹ In addition, the second chapter of the ITALIAN Constitution (Articles 13-54) contains a number of rights and duties of the citizens.

¹⁰ See *E. Navaretta*, I danni non patrimoniali nella responsabilità extracontrattuale, in: *E. Navaretta* (ed.), *I danni non patrimoniali. Lineamenti sistematici e guida alla liquidazione*, Milano 2004, p. 23; see also *C. Mak*, *Fundamental Rights in European Contract Law*, Austin 2008, pp. 17-20.

¹¹ See e.g. Art. 544 FRENCH Civil Code; cf. *Cass. Civ.*, 4 January 1995, *Bull. civ. I*, no. 4; § 903 GERMAN Civil Code.

¹² See e.g. Article 1134 FRENCH Civil Code and Article 361 GREEK Civil Code.

¹³ See Article 9 FRENCH Code Civil.

¹⁴ See Article 70 et seq. PORTUGUESE Civil Code; cf. *C. Mota Pinto* (continued by *A. Pinto Monteiro* and *P. Mota Pinto*), *Teoria geral do direito civil*, 4th ed., Coimbra 2005, pp. 87 et seq.

liament.¹⁵ In addition, in a number of Member States the principle of non-discrimination has been set out in equal treatment laws.¹⁶ Despite their location in ‘simple’ legislative acts, provisions expressing fundamental rights may have a constitutional status. Thus, the FRENCH Constitutional Council has held that Article 9 of the FRENCH Civil Code, which gives a right to compensation in case of a violation of privacy, has a supra-legislative status.¹⁷

B. EU Sources

4. Fundamental rights developed through ECJ case law. Before the entry into force of the Lisbon Treaty and the EU Charter of Fundamental Rights, the European treaties only contained a rather limited number of express written rights which, apart from the fundamental freedoms,¹⁸ primarily concern the prohibition of discrimination and certain procedural and civic rights. Consequently, the recognition of fundamental rights as part of EU law was mainly left to the ECJ.¹⁹ From the early 1970s onwards, the ECJ developed extensive case law on fundamental rights derived from the constitutional traditions common to the Member States²⁰ and the international treaties for the protection of human rights,²¹ in particular the ECHR.²² This approach was codified in the Treaty of Maastricht²³ and further extended in the Treaty of Amsterdam.²⁴ The judicial elaboration of fundamental rights by the ECJ had the advantage of flexibility and allowed the Court to develop what it considered as a ‘best solution’ on the basis of a comparative analysis of different approaches in the Member States.²⁵ However, in comparison to a codified catalogue of fundamental rights, the collection of such rights on a case-by-case basis lacks transparency and the ECJ has been criticised – in particular with regard to its recent judgments concerning the principle of

¹⁵ Act no. 66-457 of 2 July 1966 ‘relative à l’installation d’antennes réceptrices de radiodiffusion’, O.J. 3 July 1966.

¹⁶ See e.g. the General Equal Treatment Act of 14 August 2006 (*Allgemeines Gleichbehandlungsgesetz*) in GERMANY, the Equal Treatment Act of 2 March 1994 (*Algemene Wet Gelijke Behandeling*) in the NETHERLANDS or the Act implementing the Principle of Equal Treatment of 22 April 2004 in SLOVENIA (*Zakon o uresničevanju načela enakega obravnavanja*).

¹⁷ Decision 99-422 DC of 21 December 1999; Decision 2003-467 of 13 March 2003; cf. C. Herrmann/C. Perfumi, in: G. Brüggemeier/A. Colombi Ciacchi/G. Comandé (eds.), *Fundamental Rights and Private Law in the European Union*, Vol. I, Cambridge 2010, p. 223.

¹⁸ See above para. 11 of the Introduction on the relationship between EU fundamental freedoms and fundamental rights; see also D. Ehlers, in: D. Ehlers (ed.), *European Fundamental Rights and Freedoms*, Berlin 2007, § 14 I 4, para. 12.

¹⁹ See as the first judgment ECJ, 12 November 1969, [1969] ECR 419, 424 (*Stauder*).

²⁰ See ECJ, 17 December 1970, [1970] ECR 1125 (*Internationale Handelsgesellschaft*), para. 4.

²¹ See ECJ, 14 May 1974, [1974] ECR 491 (*Nold*), para. 13.

²² See *P. Craig/G. de Búrca*, EU law, 4th ed., Oxford 2007, pp. 379 et seq.; D. Ehlers (ed.), *European Fundamental Rights and Freedoms*, Berlin 2007, § 14 I 3, pp. 373 et seq.

²³ See ex Article 5(2) TEU.

²⁴ See ex Article 6(2) TEU.

²⁵ See D. Ehlers (ed.), *European Fundamental Rights and Freedoms*, Berlin 2007 § 14 I 3, p. 374; M. Zuleeg, *Zum Verhältnis nationaler und europäischer Grundrechte*, *Europäische Grundrechte-Zeitschrift* (EuGRZ) 2000, 511.

non-discrimination²⁶ – for exceeding its competences by ‘inventing’ new fundamental rights.²⁷

5. The EU Charter of Fundamental Rights. The signing of the EU Charter of Fundamental Rights at Nice in 2000 was heralded as the beginning of a new phase of fundamental rights protection at EU level. However, for almost a decade the Charter only had the status of ‘soft law’ and it does not come as a surprise that there have been only a very small number of references to the Charter in civil proceedings before Member State courts.²⁸ In 2005 the POLISH Supreme Court even stated explicitly that the EU Charter only serves as an ‘interpretative aid’ and could not constitute the sole source of individual rights asserted before national courts, nor an appropriate basis for a judicial review of statutory provisions.²⁹ This situation is likely to change in the near future as the Treaty of Lisbon, which entered into force in December 2009, has strengthened the role of fundamental rights as a cornerstone of EU law.³⁰ In particular, the Treaty of Lisbon has endowed the EU Charter with the status of EU primary law placing it on a par with the Treaties.³¹ It is to be expected that the Charter not only makes the ‘fundamental rights acquis’ more transparent but also reduces the necessity and the leeway for the judicial ‘invention’ of new fundamental rights by the ECJ.³²

6. Scope of application of EU fundamental rights. EU fundamental rights are not only binding on EU institutions. Member States are also bound by them when implementing EU law.³³ This obligation not only applies to Member State legislators when transposing EU directives into the national legal order. In its recent *Promusicae* decision, the ECJ made it clear that the duty to observe EU fundamental rights also applies to Member State courts when interpreting EU secondary law.³⁴ The ECJ held that a Member State court which applies a national statute in conformity with an underlying EU directive must not interpret the directive in a manner which collides

²⁶ See ECJ, 22 November 2005, C-144/04, [2005] ECR I-9881 (*Mangold*) and ECJ, 19 January 2010, C-555/07 (*Kücükdeveci*).

²⁷ See e.g. L. Gerken et al. (eds.), ‘Mangold’ als ausbrechender Rechtsakt, Munich 2009, available online: <archiv.jura.uni-sb.de/projekte/Bibliothek2/text.php?id=530>; cf. also M. Schmidt, The Principle of Non-discrimination in Respect of Age: Dimensions of the ECJ’s Mangold Judgment, 7 German Law Journal 504-524, available online: <http://www.germanlawjournal.com/article.php?id=728>; see also S. Laulom, Non-discrimination en fonction de l’âge: un principe général du droit de l’UE, Semaine sociale Lamy, 8 February 2010, pp. 5-9, available online <http://www.wk-rh.fr/actualites/upload/SSL1432_non_discrimination.pdf>.

²⁸ A rare example from GERMAN case law is the decision of Amtsgericht Garmisch-Partenkirchen, 16 December 2007, 1 F 293/07, which refers to Article 24 EU Charter.

²⁹ Supreme Court of POLAND, 17 March 2005, III PK 83/2004, (2006) 1-2 OSNP [1]; see A. Jańczuk/J. Krzemińska-Vamvaka, in: G. Brüggemeier/A. Colombi Ciacchi/G. Comandé (eds.), Fundamental Rights and Private Law in the European Union, Vol. I, Cambridge 2010, p. 532 for a summary of the case.

³⁰ See the new ‘value clause’ in Article 2 TEU which declares that the EU is founded on the respect of human dignity and the protection of fundamental rights.

³¹ See the new Article 6(1) TEU.

³² C. Busch, Europäischer Grundrechtsschutz im Privatrecht nach Lissabon: Die EU-Grundrechtecharta als neuer Prüfungsmaßstab für Umsetzungsgesetze, Deutsche Richterzeitung (DRiZ) 2010, 63-66.

³³ ECJ, 13 July 1989, [1989] ECR 2609 (*Wachauf*), para. 19; 18 June 1991, [1991] ECR I-2925 (*ERT*), para. 43; 13 April 2000, [2000] ECR I-2737 (*Karlsson*), para. 23.

³⁴ ECJ, 29 January 2008, [2008] ECR I-271 (*Promusicae*).

with EU fundamental rights or other general principles of EU law e.g. the principle of proportionality. Thus, EU fundamental rights are indirectly imported into the growing areas of Member State private law which serve for the transposition of EU directives. This raises the question how these EU fundamental rights interact in these areas with fundamental rights derived from national constitutions. In other words: Can Member State courts entitled to exercise a judicial review still control statutory law which serves for the transposition of EU directives against the national constitution? Or, do they have to apply the EU Charter as a yardstick for judicial review? Considering the doctrine of supremacy of EU law, the latter seems to be true.³⁵ Indeed, the GERMAN Constitutional Court recently refused to control the constitutionality of a statute which served for the transposition of an EU directive which left no margin of transposition for the national legislator.³⁶ The ECJ even goes one step further and holds that Member States are comprehensively bound by EU fundamental rights when implementing EU directives regardless of whether the directive leaves a margin of transposition or not.³⁷

7. Horizontal effect of EU fundamental rights? While the entry into force of the EU Charter has created a new legal basis, the question to what extent EU fundamental rights are applicable in private law relationships is still a matter of controversy. So far, the ECJ has not yet taken a clear position on this issue. While the Court has, under certain conditions, imposed on private parties a duty to respect fundamental *freedoms*,³⁸ it has not yet extended this approach to fundamental *rights*. Thus, it is widely held that EU fundamental rights do not have a direct horizontal effect.³⁹ In fact, in the *Dietzinger* case (regarding the application of the Doorstep Selling Directive⁴⁰ of a consumer who had acted as guarantor for his parents' business debts) the ECJ opted for judicial self restraint and did not take the chance to enter into a debate on the fundamental rights dimension of the case, despite the obvious parallels to the famous '*Bürgschaft*' case⁴¹ decided a few years earlier by the GERMAN Constitutional Court.⁴² Also the European Convention, which drafted the EU Charter, has refrained from deciding the question of horizontal effect and has explicitly left this issue to the

³⁵ Compare *D. Ehlers*, in: D. Ehlers (ed.), *European Fundamental Rights and Freedoms*, Berlin 2007, § 14 I 4, para. 15; see also *C. Busch*, *Europäischer Grundrechtsschutz im Privatrecht nach Lissabon: Die EU-Grundrechtecharta als neuer Prüfungsmaßstab für Umsetzungsgesetze*, *Deutsche Richterzeitung (DRiZ)* 2010, pp. 63-66.

³⁶ See GERMAN Constitutional Court, 13 March 2007, BVerfGE 118, 79-111 (*Emissionshandel I*) and 14 May 2007, *Neue Zeitschrift für Verwaltungsrecht (NVwZ)* 2007, 942-945 (*Emissionshandel II*); cf. FRENCH Conseil d'Etat, 8 February 2007, No. 287110.

³⁷ ECJ, 27 June 2006, C-540/03 (*Parliament/Council*); see also *D. Thym*, *Europäischer Grundrechtsschutz und Familienzusammenführung*, *Neue Juristische Wochenschrift (NJW)* 2006, 3249-3252 at 3250; *C. Calliess*, *Europäische Gesetzgebung und nationale Grundrechte, Divergenzen in der aktuellen Rechtsprechung von EuGH und BVerfG?*, *Juristenzeitung (JZ)* 2009, 113-121 at 117.

³⁸ See e.g. ECJ, 6 June 2000, [2000] ECR I-4139 (*Angonese*), paras. 34 et seq.

³⁹ See e.g. *D. Ehlers*, in: D. Ehlers (ed.), *European Fundamental Rights and Freedoms*, Berlin 2007, § 14 IV 3, para. 35.

⁴⁰ Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises; OJ L 372 of 31 December 1985, 31-33.

⁴¹ See GERMAN Constitutional Court, 19 October 1993, BVerfGE 89, 214 (*Bürgschaft*).

⁴² For details see *O. Cherednychenko*, *Fundamental Rights, Contract Law and the Protection of the Weaker Party*, Munich 2007, pp. 213-214.