Maastricht Working Papers
Faculty of Law

Private Law and Fundamental Rights: a sceptical view

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2006-8

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Published in Maastricht, October 2006

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This paper is to be cited as Maastricht Faculty of Law Working Paper 2006/8

Private law and fundamental rights: a sceptical view

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1. Introduction

The applicability of fundamental rights to private law is a vexed question. Over the last decade or so, many countries have seen a growing influence of fundamental rights in contract, tort and property law. This development, sometimes referred to as the 'constitutionalisation' of private law,[1] is often regarded as highly beneficial. It seems after all to be of high standing to allow fundamental rights to play a role in relationships between private persons. However, the application of universal standards of what is regarded as fair in the relationship between the State and the citizen – which is of course what fundamental rights were originally designed for – to private parties can also be looked at with suspicion. The aim of this contribution is to reflect on the desirableness of the constitutionalisation of private law and to show the adverse effects of this development. It is therefore not intended to describe the present state of affairs in this area; instead, the focus will be on the normative questions of the desirability of fundamental rights influence and the best way in which this influence is accommodated.

There are two important restrictions to be made. First, the phenomenon of constitutionalisation of private law is usually associated with case law: it is in particular the growing reference to fundamental rights by national courts that has received a lot of attention. This contribution is also limited to this topic: I will not discuss the sometimes far going influence of national legislation in this area. Second, no attention is paid to the so-called European freedoms. These freedoms, such as the right to free movement of persons, have had an enormous influence on national legal systems as well. Sometimes, this influence is also described in terms of 'constitutionalisation', but it will not be discussed here.[2]

This contribution is structured as follows. The next section is devoted to a definition of constitutionalisation of private law. It seems of high importance to define what is meant with it before anything can be said about its value. Section 3 contains the main arguments why – in my view – fundamental rights have only limited value in deciding private law cases. Finally, and by way of a general conclusion, the room still left for reference to constitutional rights is discussed in section 4.

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[1] The term was used by, *e.g.*, Basil Markesinis, Comparative Law – A Subject in Search of an Audience, Modern Law Review 53 (1990), p. 10; Gabriela Shalev, Constitutionalization of Contract Law, in: A. Gambaro and A.M. Rabello (eds.), Towards a New European Ius Commune, Jerusalem 1999, p. 205; Lord Reed, The Constitutionalisation of Private Law: Scotland, Electronic Journal of Comparative Law Vol. 5.2 (May 2001).

[2] On which, e.g., T.O. Ganten, Die Drittwirkung der Grundfreiheiten, Berlin 2000.

2. What is 'constitutionalisation' of private law?

Generally speaking, the constitutionalisation of private law can be described as the increasing influence of fundamental rights in relationships between private parties, fundamental rights being those rights that were originally developed to govern the relationship between the State and its citizens. These rights can be codified in a national constitution or in a human rights treaty (like the ECHR) or can be unwritten. Still, this definition is rather broad; it needs to be refined in at least two different ways. First, the question is what type of relationships between private parties are usually meant when one discusses the constitutionalisation process. Second, the definition is vague as it leaves open what exactly is to be understood by 'influence' of fundamental rights.

The first refinement to be made is that in the rapidly growing literature on private law and fundamental rights,[3] constitutionalisation is usually referred to as the increasing influence of fundamental rights in the fields of contracts, tort and property. Family law is often left out. Of course, the influence of art. 8 ECHR on the protection of 'family life' has been extremely pervasive for most of the European national legal systems,[4] but there is good reason to leave it aside when one talks about the constitutionalisation of private law. Family law is characterised by a high level of public policy considerations that make it difficult to compare it to other areas of private law where private autonomy is much more important. In addition to this, one cannot deny that the whole debate about constitutionalisation as it developed over the last decade was initiated in particular by private law scholars who neglected to some extent the already well-developed public law doctrines of 'horizontal effect of human rights' and 'positive obligations' of the State.[5] These doctrines look at exactly the same problem as we are concerned with in the constitutionalisation debate, be it from a different angle; it is unlucky if this is forgotten. A topic at the borderline of private law and public law scholarship should benefit from both.

Second, it is essential to clarify that fundamental rights can influence private relationships in several different ways, not only dependent on the field of the law (contracts, tort or property) and who is applying fundamental rights (the legislator or the court) but also on the method of reasoning. To illustrate this, it is useful to look at several examples of constitutionalisation.

In the field of contract law, the influence of fundamental rights is in particular apparent in case of onerous, one-sided, contracts. Fundamental rights like freedom of contract and human dignity can then be used to regard such a contract as non-binding upon the weaker party. Perhaps the most famous

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[3] Cf. for general overviews e.g. Claus-Wilhelm Canaris, Grundrechte und Privatrecht, Berlin 1999 and Daniel Friedmann and Daphne Barak-Erez (eds.), Human Rights in Private Law, Oxford 2001. For Dutch law cf. S.D. Lindenbergh, De constitutionalisering van het contractenrecht, Weekblad voor Privaatrecht, Notariaat en Registratie 2004, p. 977 ff, J.H. Nieuwenhuis, De Constitutie van het burgerlijk recht, RM Themis 2000, p. 203 ff and J.M. Smits, Constitutionalisering van het vermogensrecht, Deventer 2003.

[4] Cf., e.g., Francis G. Jacobs and Robin C.A. White, The European Convention on Human Rights, 2nd ed., Oxford 1996, p. 122 ff. and the special issue of Rabels Zeitschrift 63 (1999), p. 409 ff.

[5] Also see the contribution of Tom Barkhuysen to this book.

example[6] of this is the *Bürgschaft*-case decided by the German constitutional court.[7] A bank had offered a businessman a loan of 100.000 DM (now approximately 50.000 Euro) on condition that his, then 21 years old, daughter would accept to provide the bank with a personal guarantee. She did so and on signing the contract of suretyship, the employee of the bank told her she needed to sign the contract for the files of the bank and that she did not take any major obligation upon her in doing so. When some years later her father went bankrupt, the bank claimed the 100.000 DM from the daughter. She refused to pay, claiming she did not know this was the consequence of her signing the contract. The *Bundesgerichtshof*, the highest court in civil cases in Germany, held the bank could invoke the guarantee, saying that a contract is a contract. But the daughter succeeded in her appeal to the German constitutional court: she claimed the civil court had violated the German constitution, in particular her right to human dignity (art. 1) and to party autonomy (art. 2). It is in this respect important to consider her personal situation: she was uneducated, and most of the time unemployed; when she did work, she earned no more than 1150 DM (500 Euro). If the bank could indeed have enforced the contract, the daughter would probably have stayed at a minimum income the rest of her life as only the monthly interest on the 100.000 DM would already have been 708 DM (350 Euro). The constitutional court, in line with its previous case law on the indirect effect of fundamental rights, held that a civil court must intervene on the basis of the general clauses of private law (like the provisions on contracts contrary to good faith or good morals) if a structural imbalance in bargaining power led to a one-sided onerous contract. If a civil court does not do so, it may violate human dignity as protected by art. 1 of the German constitution.

In this type of cases, fundamental rights influence private relationships in a subtle way: they are applied *indirectly*, meaning they are only of importance *through* the rules of private law. Open-ended concepts like good faith, good morals and public policy are filled-in by these fundamental rights and more specific rules of private law can often be considered as applications of fundamental rights for relationships between private parties as well. This doctrine of indirect effect is now accepted in many countries, including Germany,[8] the Netherlands,[9] the United Kingdom[10] and South Africa.[11]

There is a second way in which fundamental rights are of importance to contract law. These rights cannot only enlighten us about how private law norms should be interpreted, they can also be used to set limits to freedom of contract in a more direct way. Freedom of contract itself can be seen as

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[6] There are more cases. See, for example, Bundesverfassungsgericht 81, 242, Neue Juristische Wochenschrift (NJW) 1990, 1469 (Handelsvertreter) and Bundesverfassungsgericht 103, 89, NJW 2001, 957.
[7] Bundesverfassungsgericht 19 October 1993, NJW 1994, 36 (Bürgschaft).
[8] Bundesverfassungsgericht 7, 198, NJW 1958, 257 (Lüth) and compare Christian Starck, Human Rights and Private Law in German Constitutional Development and in the Jurisdiction of the Federal Constitutional Court, in: Friedmann and Barak-Erez (eds.), o.c., p. 98.
[9] Cf. for an extensive overview Smits, p. 30 ff.
[10] Cf. Hugh Beale and Nicola Pittam, The Impact of the Human Rights Act 1998 on English Tort and Contract Law, in: Friedmann and Barak-Erez (eds.), o.c., p. 137.
[11] Art. 8 of the Constitution (on which Smits, o.c., p. 41); cf. Du Plessis and others v. De Klerk and another, [1996] 3 South African Law Reports 850.

a fundamental right, even when it is not contained in a national constitution,[12] but it is widely accepted that this right is limited by other fundamental rights such as freedom of speech, freedom of religion or bodily integrity. It is generally held that a contract in which someone gives up his or her freedom of religion cannot be enforced as it is a violation of a fundamental right. Abundant case law confirms this view. In the Dutch case of *Protestant Association v. Hoogers*[13] for example, a landlord had let land to a lessee under the condition that the lessee would remain active for the protestant church. After a few years the lessee joined the Jehovah's Witnesses and the landlord subsequently terminated the lease contract. The court simply held that the condition in the contract was a violation of freedom of religion and could therefore not be enforced.

In tort law, the influence of fundamental rights takes a somewhat different form. Traditionally, tort law is associated the most with the influence of fundamental rights because of the fact that the so-called personality rights are traditionally protected by tort or delict. Violations of the bodily integrity or privacy are typical examples of both violations of human rights and of tortuous conduct as such. One could also say that in particular in tort law there is a great amount of influence of fundamental rights as tort law is to a large extent mandatory law, closely connected to the general interest.[14]

In addition to these more traditional cases, fundamental rights are now often used in tort cases to establish what is in conformity with human dignity and what is not. This is apparent in particular in cases where difficult moral issues are at stake, such as in wrongful birth cases. The German, English and Dutch highest courts have all – like their colleagues in other countries – referred to the general argument of human dignity in relation to a general personality right to decide whether the parents of a healthy child can claim damages from the person who is held responsible for the child being born (see below, section 3.3).[15] Also in answering the question whether immaterial damages should be allowed in cases not covered by statute, an argument based on the personality right of the victim can be brought forward.[16]

In property law the constitutionalisation process is usually associated with the protection offered by art. 1 of the first protocol to the ECHR.[17] It is rather seldom that in private relationships

[12] It is part of a general right to 'personality': see for example Bundesverfassungsgericht 8, 274, NJW 1959, 475 (Preisgesetz); compare Shalev, o.c., p. 211 and Smits, o.c., p. 67 ff.
[13] Court of Appeal Arnhem 25 October 1948, Nederlandse Jurisprudentie (NJ) 1949, 331 (Protestant Association v. Hoogers).
[14] See Christian Von Bar, The Common European Law of Torts, Vol. 1, Oxford 1998, p. 577 and Christian Von Bar, Der Einfluss des Verfassungsrechts auf die westeuropäischen Deliktsrechte, Rabels Zeitschrift 59 (1995), p. 207. On this: Smits, o.c., p. 120.
[15] Cf. Walter van Gerven, Ius Commune Casebooks: Tort Law, Oxford 2000, p. 92 ff.
[16] Cf. the German cases published in Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 26, 349 (Herrenreiter) and 35, 363 (Ginseng) and for Dutch law for example A.J. Verheij, Vergoeding van immateriële schade wegens aantasting in de persoon, Nijmegen 2002, p. 387 ff. and Hoge Raad 18 March 2005, Rechtspraak van de Week 2005, 42 (wrongful life).
[17] Cf. T. Barkhuysen et al, De eigendomsbescherming van art. 1 van het Eerste Protocol bij het EVRM en het Nederlandse burgerlijk recht, Deventer 2005; Jan-Peter Loof (ed.), The right to property, Maastricht 2000.

courts refer to the protection of property offered by their own national constitution.[18] This is quite logical as the private law rules on property usually offer much more elaborated norms than the constitutional protection of property vis-à-vis the national State.

3. The limited value of fundamental rights in deciding a case among private parties

3.1 Introduction

If one looks for a commonality in the above examples, it is that fundamental rights are increasingly invoked by the courts to help deciding a case. Even though there may be rules available that traditionally belong to the area of private law, courts are inclined to find arguments in fundamental rights. The question to be answered is how to assess this development. How to look at the use of fundamental rights in relationships between private parties? Is the shift in reasoning to be assessed positively? There are three arguments that, taken together, should explain why one can be sceptical about this development.

3.2 First argument: subsidiarity in reasoning

The first argument why the use of fundamental rights can only have limited value lies in the idea of indirect effect itself. In section 2, it was explained that the doctrine of indirect effect means that fundamental rights can only be of importance *through* the rules of private law. This means in essence that the rules designed for relationships between private parties have priority over fundamental rights. Private law can be interpreted in the light of fundamental rights, but can in the end *not* be absorbed by these rights: the private law rules remain decisive for deciding the case. A different view would be counterproductive as the existing knowledge about the best way how to solve an issue would be thrown away. What would be the use of replacing the existing private law on protection of property by new rules based on the constitutional protection of this right? If there is a conflict between two neighbours, one can certainly solve this conflict by reference to their fundamental rights to property. But this would be a step back because one would then neglect the well-developed rules about nuisance and the rules on how neighbours should behave. In my view, the essence of the doctrine of indirect effect is that the existing private law is already to a very large extent an expression of the values behind fundamental rights and therefore one should apply private law and not fundamental rights. This means that reference to fundamental rights most of the time does not offer anything extra.

[18] Not every national constitution offers property protection. Art. 14 of the German *Grundgesetz* and art. 16 of the Belgian constitution do. However, art. 14 of the Dutch *Grondwet* only recognises the right implicitly; in France, the 1958 Constitution refers to the *Déclaration des Droits de l'Homme et du Citoyen* of 1789 with its property as 'droit inviolable et sacré'.

The *Bürgschaft*-case offers a nice illustration of this viewpoint. The German constitutional court held that the civil court should simply apply private law taking into account the constitutional values *underlying* this private law.[19] The court had all the instruments it needed available in, for example, rules on good faith and good morals that are in themselves already applications of the values underlying the constitution. If the court would have done things properly, it would not have needed to turn to the Constitution at all. This is confirmed by how cases similar to the *Bürgschaft*-case were decided in other countries. Dutch case law shows that the bank should simply have informed the daughter about the risk of standing surety. In English law, the House of Lords also found a pre-contractual obligation of the bank to inform the weaker party about the risks of signing the guarantee.[20]

This argument of subsidiarity makes clear that it is private law that already defines the values of a just society among private persons. Even in South Africa, where the new Constitution of 1996 is generally used as a 'development tool'[21] towards a more just society, there is fear that private law will in the end be absorbed by constitutional rights. Yet, the correct viewpoint is aptly summarised by Judge Kentridge of the Constitutional Court of South Africa, where he held: 'I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.'[22]

3.3 Second argument: fundamental rights do not offer enough guidance

The second argument why I am sceptical about the use of fundamental rights in private law issues has to do with the diffuse character of such rights: they do not offer enough guidance to decide a case. We should keep in mind that in case a private person invokes the protection of a fundamental right (say: privacy), the other party can almost always also invoke a fundamental right (in this case freedom of speech). In the *Bürgschaft* decision, the daughter could invoke human dignity or her right to exercise her private autonomy, but as a defence the bank could invoke its autonomy or freedom of contract. It is difficult to solve such a collision of fundamental rights. The truth is that among private parties both these rights are expressions of what we consider to be just societal norms: we value both autonomy *and* human dignity. But what should prevail among these private parties is often unclear and in any

[19] Thus loyal to its Lüth-decision (see section 2 above), in which fundamental rights were regarded as creating an 'objektive Wertordnung.'
[20] Cf. Hoge Raad 1 June 1990, NJ 1991, 759 (Van Lanschot/Bink) and Barclays Bank plc v. O'Brien [1994] 1 Appeal Cases 180, on which Olha Cherednychenko, The Constitutionalization of Contract Law: Something New Under the Sun?, in: Jan Smits and Sophie Stijns (eds.), Inhoud en werking van de overeenkomst naar Belgisch en Nederlands recht, Antwerpen 2005, p. 231 ff.
[21] Cf. Hanri Mostert, Die invloed van die grondwetlike eiendomsklousule op die eiendomskonsep in die Suid-Afrikaanse reg, in: Jan Smits and Gerhard Lubbe (eds.), Remedies in Zuid-Afrika en Europa: bijdragen over privaatrecht en constitutioneel recht in Zuid-Afrika, Nederland en België, Antwerpen 2003, p. 119.
[22] Constitutional Court, S. v. Mhlungu, [1995] 7 Butterworths Constitutional Law Reports 793, per J. Kentridge.

event something one cannot decide at the level of constitutional rights themselves. Balancing these rights in case of a conflict between two private parties is typically a private law exercise.[23]

The little guidance provided by fundamental rights can be illustrated by reference to the wrongful birth cases.[24] Even though the highest courts of the United Kingdom, Germany and the Netherlands referred to the argument of human dignity in relation to the general personality right of the healthy child in deciding whether the parents had a claim for damages, it is far from it that this provided the court with a criterion to decide the case. Since 1980, the German *Bundesgerichtshof* has allowed such claims for damages for raising a child, without paying much attention to the human dignity argument.[25] The first senate of the *Bundesverfassungsgericht* is of the same opinion,[26] but the second senate of the same court has, in a case on abortion, [27] held that to regard the existence of a child as a ground for damages is contrary to human dignity and therefore a violation of art. 1 of the German constitution. This uncertainty about what human dignity requires – and whether human dignity should play a role at all – is also apparent from a comparison of the Dutch and English wrongful birth-cases. While the Dutch *Hoge Raad* allowed the claim for damages on basis of the argument that it is not the child itself that is being regarded as damages but only the costs of raising that child,[28] the House of Lords expressed the opposite view. In MacFarlane, Lord Steyn held:[29]

> 'Instinctively, the traveller on the Underground would consider that the law of torts has no business to provide legal remedies consequent upon the birth of a healthy child, which all of us regard as a valuable and good thing. (…) Relying on principles of distributive justice I am persuaded that our tort law does not permit parents of a healthy unwanted child to claim the cost of bringing up the child from a health authority or a doctor. (…)'

My point is that the notion of human dignity or of the child as a 'valuable and good thing' is inherently vague. It can play a role on the way towards the proper outcome of the case but it can never be a decisive argument to decide the case. The different views of the highest courts are evidence for this.

Now, one could of course argue that the example of wrongful birth is not a good one as 'human dignity' is probably the vaguest fundamental right there is and that if other fundamental rights are concerned they do offer guidance. This view is wrong. This can be illustrated by reference to the conflict between the more specific fundamental rights of freedom of press and privacy. In this respect, a similar case was decided in Germany and in the Netherlands. In both cases, there was a criminal that

[23] This argument is also brought forward by Bydlinski: F. Bydlinski, Kriterien und Sinn der Unterscheidung von Privatrecht und öffentlichem Recht, Archiv für die civilistische Praxis 194 (1994), p. 319 ff.
[24] Also see section 2 above.
[25] Bundesgerichtshof, NJW 1980, 1450.
[26] Bundesverfassungsgericht 96, 375, NJW 1998, 519 (Sterilisation).
[27] Bundesverfassungsgericht 88, 203, NJW 1993, 1751 (Schwangerschaftsabbruch II).
[28] Hoge Raad 21 February 1997, NJ 1999, 145.
[29] MacFarlane and Another v. Tayside Health Board, [1999] 4 All ER 963.

was convicted to a long sentence. At the time of the crime and the conviction, the case received a lot of publicity and pictures of the criminal were published in the national newspapers. A few years after the conviction, the question arose whether it would infringe upon the criminal's privacy to publish these pictures again. The Dutch *Hoge Raad* decided this conflict between privacy and freedom of press by holding that privacy should prevail.[30] The German *Bundesverfassungsgericht* on the other hand held, making use of the same arguments but weighing these in a different way, the freedom of press to be superior.[31] My point is that in weighing fundamental rights in private law cases, these rights do not offer the guidance the court needs.

3.4 Third argument: private parties are not bound by fundamental rights

The two arguments discussed in the above are of a more technical nature: they deal with the role of fundamental rights in *deciding* a case by a court. The third argument why the role of fundamental rights in private law is limited is an argument of substance. It denies, as a matter of principle, that private parties are bound by fundamental rights. Any other view would be a violation of the autonomy of the private person. In order to substantiate this view, it is useful to look first at the distinction between public and private law in historical perspective and then to provide some examples.

The function of fundamental rights is closely connected to the separation of public and private law as it developed over the last two centuries. Among the founders of this sharp distinction is Montesquieu, who distinguished between a private sphere, governed by the *lois civiles*, and a public sphere governed by the *lois politiques*.[32] The subjects in the private sphere (private persons) have other interests than the State. Only by separating these two spheres, a free sphere for private persons can emerge. The consequence of this is that private persons do not need to pursue the public interest: they are autonomous and can make their own choices about what they consider to be just. It is private law that makes this possible. In the public sphere, these private persons can be forced to respect decisions they do not like, but this is justified as these decisions are democratically legitimised.

In this traditional view, fundamental rights have for a function to guard against public intermeddling with private affairs: not always when the public interest requires so, the State can intervene. The fundamental rights protect this free sphere. In particular John Locke[33] elaborated this idea of fundamental rights as inalienable rights vis-à-vis the State. It follows from this that it is in the nature of fundamental rights that they control State power. The enforcement of fundamental rights in private relationships can thus never find its justification in the same reason why fundamental rights

[30] Hoge Raad 21 January 1994, NJ 1994, 473 (Ferdi E./Spaarnestad).
[31] Bundesverfassungsgericht 35, 202; also see Christian Von Bar, Der Einfluss des Verfassungsrechts auf die westeuropäischen Deliktsrechte, Rabels Zeitschrift 59 (1995), p. 227.
[32] De l'Esprit des Lois (1748), in particular Book XXVI, Chapter XV and XVI (GF-Flammarion-edition, Paris 1979: part II, p. 193 ff.).
[33] Two Treatises of Government (1690), in particular Book II (P. Laslett (ed.), revised edition, New York 1965).

can be enforced vis-à-vis the State. It also explains why private parties are never directly bound by fundamental rights. At its most – this is the core of the doctrine of indirect effect – they are bound by the values *underlying* that fundamental right that are also part of the private order. This is why private parties sometimes need to comply with the principle of equality or the protection of privacy as these are then *also* part of the values to be adhered to among individuals. A modern version of this essential difference between the public interest and private law is provided by Ernest J. Weinrib.[34] To Weinrib, it is essential to distinguish sharply between law and politics and therefore between corrective and distributive justice. While distributive justice is the home of the political, the constitution must be obeyed by the State. Corrective justice on the other hand does not deal with collective purposes: there is no external purpose to private law then simply being private law.

The question is whether present case law does fully appreciate this difference between private law and considerations of public interest. In the above, reference was made to cases in which someone gives up a fundamental right in return for a certain benefit. Thus, in the case of *Protestant Association v. Hoogers*,[35] a future tenant agreed not to give up his religion in return for a lease contract. The general view is that such contracts cannot be enforced: if the lessee does alter his religion, the lease contract remains valid. However, one can express doubts whether this is the proper view under all circumstances. The fundamental right to freedom of religion is a right that can be enforced against the State, but that in a private relationship will always have to be weighed against other fundamental rights such as freedom of contract. It seems rather paternalistic to say that fully capable private persons would never be allowed to contract about their fundamental rights. If one is allowed to contract with a doctor about undergoing surgery, thus allowing a violation of one's bodily integrity, why would it not be possible to agree to give up expressing one's religion in public? This is not to say that contracting away fundamental rights is always possible. If it is clear that the person giving away his rights was in a dependent position when it did so, it should of course be protected. If a female employee agrees with her employer that she will not get pregnant, this is a void contract: the economic interest of her employer is outweighed by her personality right.[36] But there are cases in which it is possible to 'contract away' one's fundamental rights. In private relationships, the values of a just society are decisive and these values may entail that in certain cases freedom of contract is valued more than other fundamental rights.

What is defended here for contract law is already accepted in inheritance law. The testator is in principle not bound by fundamental rights in deciding who is going to inherit. This is apparent in both English and German law where discriminatory conditions are allowed in wills. In the English case of Blathwayt v. Baron Cawley,[37] the last will of Baron Cawley stated that the beneficiary were not to become a Roman-Catholic if he wanted to inherit. This clause was regarded as valid. Lord

[34] Ernest J. Weinrib, The Idea of Private Law, Cambridge Mass. 1995, p. 208 ff.
[35] Section 2 above.
[36] See, in more detail, Smits, o.c., p. 97 ff.
[37] [1975] 3 All England Law Reports 625.

Wilberforce held that 'discrimination is not the same thing as choice, it operates over a larger and less personal area, and (…) private selection (has not) yet become a matter of public policy'. In Germany, art. 14 of the constitution explicitly protects the freedom to dispose of one's assets .[38] In case of a conflict with the freedom of religion (art. 3) or the right to marry (art. 6), German courts almost invariably regard the right of the testator as prevalent. In a case where the condition for inheritance was that the son of the testator would separate from his disloyal wife, this clause was valid.[39] If a member of a noble family marries without having complied with the family rules (for example because he did not obtain the permission of his father or because his future wife is not *ebenbürtig*), this is also a reason to disallow a claim to the family fortune.[40] The freedom to pass property under will includes the freedom to dispose differently of one's assets than is in line with general societal norms. Here, considerations of a public law nature are not apt.

4. Is there any added value of fundamental rights in private law?

The scepticism expressed in the above about the use of fundamental rights in deciding cases among private persons should not lead us away from the functions that fundamental rights may still have. There are two functions that fundamental rights can fulfil in the private law debate.

The first function was already mentioned. Fundamental rights can be a source of inspiration for what is considered to be a just society, also among private persons. This is the essence of the doctrine of indirect effect: the values behind fundamental rights reflect our societal norms and are thus an important source of knowledge about how to assess a private law case. But again, it is to be emphasised that this does not mean one should decide a private law case on basis of these rights. For this purpose they are too vague. Even if one would directly apply a fundamental right to a case, this leads as such to nothing as the other party can always invoke another fundamental right in his favour. To deal with this collision is best left to the weighing of interests in private law.

The second function of fundamental rights is that they can serve as a warning sign for the court that human dignity is at stake. A reference to violation of a fundamental right by one person vis-à-vis another may make clear how serious the matter is. Thus, in the *Bürgschaft*-case, counsel was right to refer the court to the fact that the 'Existenzgrundlage' (the very reason for her existence) of the daughter was at stake if, given her personal situation, she had to stand surety for her father. To make clear that enforcing the contract would have left her with no more than 200 Euro per month to live on, while she did not know this was what she agreed upon, made clear the conditions for a reasonable human existence were in danger. Thus, reference to fundamental rights can have an important rhetoric

[38] See Andreas Heldrich and Gebhard M. Rehm, Importing Constitutional Values through Blanket Clauses, in: Friedmann and Barak-Erez (eds.), o.c., p. 117.
[39] Bundesgerichtshof 28 January 1956, Zeitschrift für das gesamte Familienrecht 1956, p. 130.
[40] Bundesgerichtshof 2 December 1998, NJW 1999, 566 ff (Hohenzollern) and Bundesverfassungsgericht 21 February 2000, 1937/97 (Leiningen). Also see Heldrich and Rehm, o.c., p. 122.

function: it does impress upon the court how serious the matter is. But, to end with, it should be repeated this does *not* mean a court should in the end base its decision on it. That is, for the three reasons set out in the above, a task for the rules designed to have effect among private parties: private law.

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