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***Fundamental rights in
private law***

Anchors or goals in a globalizing legal order?

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1. Human rights in private law

Is a woman who has at the age of 21 signed for possible future debts of her father liable for these debts, even if this inevitably leads to a heavy lifelong burden? Can an employer of an employee who appears seven months pregnant on the day she returns from her parental leave revoke his consent with her early return? Can a taxi company argue successfully against a passenger who suffers severe injuries due to a taxi driver's fault that his liability is limited by law to an amount of 137.000 euros, while the loss amounts to a tenfold? Does a property developer who leaves his land unused for years lose his property to farming neighbors due to limitation?

These questions can be regarded as the most classical issues in private law. Does a given promise bind under all circumstances? Under which circumstances does fraud or deceit lead to annulment of an agreement? Do statutory rules bind parties in a contract? And what are the consequences of not exercising property rights for a long period of time? All modern jurisdictions, be it with a common law tradition or a civil law tradition or with a combination of the two, have private law rules that are, no doubt, able to regulate these issues. Yet, the above examples have in common that they deal with essential values for the development of one's personality: financial independence, equal treatment of women and men, compensation of personal injury, property. Of course, a modern jurisdiction should, and in most cases will, be able to protect these interests to a certain extent. However, the development of fundamental rights in constitutions or human rights treaties may raise the question whether of the protection provided in private law is adequate and sufficient from the viewpoint of enforcement of human rights.

This issue, the influence of fundamental rights in private law, raises fundamental questions, not only of a dogmatic and technical nature. How can these rights, which often stem from a public law tradition, be applied in private law? What does this mean for the structure of private law?¹ But also in a legal-political sense. What are the implications for the role of the (national) legislator and of the (national or transnational) judiciary? Can fundamental rights provide sufficient guidance *ex ante* to influence the behaviour of private parties? What does their influence imply for the certainty for private law parties? Furthermore, the influence of fundamental rights in private law is by its nature not a strictly national matter; it is almost by definition a cross-border issue, related to globalization in several ways.

On the one hand fundamental rights may lead private law to new horizons and they may provide incentives for more fair solutions in specific cases. They may very well furnish tools for development of a more just society.² On the other hand their influence challenges the structure both of private law and of the national legal order in relation to its international legal environment.

¹ See on this Andre van der Walt, 'n nuwe, grondwetlike, ius commune?, in: Jan Smits & Gerhard Lubbe (Ed.), Remedies in Zuid-Afrika en Europa: bijdragen over privaatrecht en constitutioneel recht in Zuid-Afrika, Nederland en België, Antwerpen 2003, p. 183 and J.M. Smits, Constitutionalisering van het vermogensrecht, Preadvies NVR, Deventer: Kluwer 2003, p. 57 ff..

² See for South Africa, for instance, Hanri Mostert, De invloed van die grondwetlike eiendomsklousule op die eiendomskonsep in die Suid-Afrikaanse reg, in: Jan Smits & Gerhard Lubbe (Ed.), Remedies in Zuid-Afrika en Europa: bijdragen over privaatrecht en constitutioneel recht in Zuid-Afrika, Nederland en België, Antwerpen 2003, p. 119.

In theory, private law should be able to apply, protect and enforce fundamental rights of private persons adequately, as it is aimed at and suited for regulation of relationships and conflicts between private parties. The traditional accent in private law on matters of patrimonial rights and dogmas may yet be a cause of an underrating of the fundamental rights at stake. In this view the influence of fundamental rights in private law is merely a matter of a 'border struggle' between private law and public law: are fundamental rights sufficiently recognized in private law?

One can, however, also notice a much more substantial influence of human rights or fundamental rights on private law. For example in countries such as South Africa and in parts of Eastern Europe and Latin America, the substantial and global moral pressure of international organizations, such as the United Nations, and (other) international politics gives rise to the question of whether private law is indeed sufficiently able to accommodate what is necessary for liberalization and for protection of human rights. In this respect the international public order seems to overwhelm the entire structure and development of private law.

It is, however, not only the material influence of the development of protection of personality interests in public law that has fuelled the debate concerning fundamental rights in private law. A major contributory factor has, at least in Europe, been the development of multi-level jurisdictions, which has had its effect on private law as well. The area of private law is thus no longer left to the exclusive competence of the traditional national civil court, but it is in Europe influenced substantially by a national constitutional jurisdiction (for example the German Bundesverfassungsgericht) and/or by supranational jurisdictions, such as the European Court of Human Rights (Strasbourg) and the European Court of Justice (Luxembourg). This has not only brought about a strong influence of 'human rights thinking' in general, but also - at least to some extent - a shift of judicial power to decide what is 'adequate and sufficient' with respect to the protection of fundamental rights in private law issues.

In order to evaluate the influence of fundamental rights in private law in relation to globalization, this chapter is structured as follows. First, a few concrete examples will be presented in order to illustrate how private law is in Europe influenced by fundamental rights. Secondly the more technical question of the working of fundamental rights in private law will be addressed: what is the relationship between private law and public law in this respect? Thirdly the (potential) added value of fundamental rights in private law will be examined. Fourthly, the development and influence of constitutional courts will be addressed. Then the relevance of the influence of fundamental rights in private law will be discussed in relation to globalization. In that respect a new development - the enforcement of fundamental rights through private law - will be observed. Finally a few closing remarks will be made.

2. Four illustrations

Four remarkable cases in Europe may serve to illustrate the influence of human rights in private law disputes. These cases do not only represent different areas of private law (contract, tort and property), but they also reflect different jurisdictions: the German constitutional court (Bundesverfassungsgericht), the European Court, the European Court of Human Rights and a domestic (Dutch) civil law court.

2.1 *The Bürgschaft case*

A profound illustration of the strong influence of fundamental rights on contract law is the German Bürgschaft case.³ The case concerns a woman who in 1982 at the age of 21 agreed to act as a surety for her father's credit towards a bank. The daughter had no relevant professional experience; she was mostly unemployed or earned a very modest income. When her father could not pay his debts, she was held liable for 160000 DM. The daughter was at that time a young mother without a job. This meant that she would most likely not be able to free herself from this debt before the end of her life.

The case must be seen against the background of the hard line of the Bundesgerichtshof with regard to personal surety, according to which it upheld the principle of the binding character of a promise. The Bundesgerichtshof did not relent in this case either, as it upheld the unilaterally binding character of the surety.⁴ The German constitutional court, the Bundesverfassungsgericht, however, judged that the Bundesgerichtshof had with its decision violated Article 2, section 2 of the Grundgesetz, which guarantees the right to self-determination. This right includes the right to private party autonomy, which was, according to the Bundesverfassungsgericht, offended as the daughter had not been able to decide freely about the closing as well as the content of the contract. In typical cases in which one of the contractual parties is in a structurally weaker position and the consequences of the contract are very severe for that party, the Grundgesetz requires according to the Bundesverfassungsgericht that private law provides remedies. As a consequence, the Bundesgerichtshof judged in a new decision that the surety was contrary to good morals and should thus be declared void.⁵

This case shows that private law can be substantially influenced by fundamental rights within the domestic legal order. It is not only an illustration of this substantial effect but also of the influence of a constitutional court, which put an end to a discord in the policy of two different chambers of the Bundesgerichtshof.

2.2 *The case of Wiebke Busch*

Another telling example of influence of fundamental rights in private law is the case of Wiebke Busch, a German nurse who had taken parental leave for a period of three years but had expressed the wish to return to work before the end of this period. Immediately after her employer had consented to her return to work, the woman informed him of her seven-month pregnancy, and she announced that she would take and was entitled to maternity leave on full pay. The employer tried to reverse his agreement to the return to work on the basis of error and fraud.

The European Court of Justice holds that the protection of the pregnant woman laid down in EU directives and enshrined in domestic legislation means that the woman was not obliged to notify her employer of her pregnancy.⁶ Further, the Court holds that the directive does not permit an employer to revoke his consent to a female employee's return to work before the end of a parental leave period on the ground of error as to the pregnancy of the employee under domestic law.

³ BVerfG 19 October 1993, BVerfGE 89, 214.

⁴ BGH 16 March 1989, NJW 1989, p. 1605.

⁵ BGH (IX) 24 February 1994, NJW 1994, 1341.

⁶ ECJ 27 February 2003, Nederlandse Jurisprudentie 2003, 654 (Wiebke Busch/Klinikum Neustadt).

This case illustrates the strong influence of EU law regarding equal treatment on private law issues,⁷ as it shows that domestic rules on error may not be applied in the - according to private law - usual sense, but should be strictly interpreted according to EU law.

2.3 *The traveler case: limitation of liability*

A strong impulse for the influence of fundamental rights in private law is the jurisdiction of the European Court of Human Rights in Article 1 of the First Protocol to the European Convention of Human Rights (ECHR) regarding the right to the peaceful enjoyment of one's possessions.⁸ Due to the extensive interpretation of this article by the Court, especially with regard to the concept of 'possession', its influence on private law issues has increased substantially. This article has thus become a crowbar in many cases, varying from classical private law questions regarding property and ownership even to matters of personal injury. Illustrations of the latter are the cases in the Netherlands in which the application of statutory rules on limitation of liability with regard to passenger transport is concerned.

An example of a successful claim with reference to Article 1 of the First Protocol to the ECHR is the judgment of the Amsterdam Court of Appeal in the case of a young woman who suffered severe injuries (she lost both legs) due to the fact that the Dutch railway company (Nederlandse Spoorwegen) had not maintained to adequate safety standards.⁹ The Court held that the appeal to the statutory limitation of liability of Article 110 (section 1) of Book 8 of the Dutch Civil Code (which holds a maximum liability of 137000 euros in case of death or personal injury) had to be set aside, as this appeal was considered unacceptable according to the standard of reasonableness and fairness (good faith). The Court was of the opinion that the fact that limitation may serve a legitimate purpose (controllability of the entrepreneurial risk and insurability) did not alter the fact that this case lacked a fair balance between the general interest on the one hand and the protection of individual rights on the other hand. In this context, the Court also considered it relevant that a rather old limit up to a modest sum, non-indexed for inflation purposes, had been used (which the Court thought was even 'quite low'), whereas, the tendency in international treaties showed an increase in amounts of limits. The Court thus declared the appeal to the statutory limitation unacceptable.

Remarkably, in later cases the Court of The Hague and the Court of Arnhem declared similar appeals unacceptable only to a certain level of the limitation. The Court of The Hague independently 'raised' the limitation to 200000 euros¹⁰ and the Court of Arnhem thought, referring to the compulsory insurance amount for motor vehicles, a limit of 1 million euros adequate.¹¹

These cases illustrate that fundamental rights may serve as a rich source for arguments in private law issues where statutory law can be considered to be no longer up to date.

⁷ I consider the European freedoms as fundamental rights as well. See on these freedoms: T.O. Ganten, *Die Drittwirkung der Grundfreiheiten*, Berlin 2000.

⁸ See Jan Peter Loof, (ed.), *The right to property*, Maastricht 2000; T. Barkhuysen, M.L. van Emmerik, H.D. Ploeger, *De eigendomsbescherming van artikel 1 van het Eerste Protocol bij het EVRM en het Nederlandse burgerlijk recht*, Preadvies Vereniging voor Burgerlijk Recht, Deventer: Kluwer 2005.

⁹ Hof Amsterdam 12 August 2004, *Nederlandse Jurisprudentie Feitenrechtspraak* 2004, 543, LJV AR2333.

¹⁰ Rechtbank Den Haag 17 January 2007, *Jurisprudentie Aansprakelijkheid* 2007, 119.

¹¹ Rechtbank Arnhem 27 mei 2008, LJV BD2533, *Jurisprudentie Aansprakelijkheid* 2008, 97.

They also throw light on the problem that arises once such a specific statutory rule is put aside. This, of course, is not a matter that is specific to fundamental rights, but it can nevertheless be an important result of judicial activism in this area of the law.

2.4 *The Pye-case: deprivation of possession, or not?*

Perhaps one of the most exciting issues of the influence of fundamental rights in private law is the question of whether domestic regulation of ownership of land can be set aside with an appeal to Article 1 of the First Protocol of the ECHR. This was at stake in the case of *Pye Ltd v United Kingdom*, where Pye had been deprived of his land by the operation of domestic rules (the Land Registration Act 1925 and the Limitation Act 1980) on adverse possession. Pye, a property developer, had bought land in 1975 and 1977. At that time the legal regime included the risk of losing the interest in the land after 12 years of adverse possession (this rule was abandoned in 2002). Pye had in 1983 agreed on a grazing licence on behalf of his neighbor Graham. Graham tried to continue that agreement in 1984, but Pye refused, because he wanted to start building on the property soon. Graham's attempts to contact Pye were not answered and Graham kept using the fields for his cattle. In 1997 Graham placed a 'warning' in the Land Registry that no longer Pye but Graham was entitled to the land.

The House of Lords decided - reluctantly - that, according to the old Land Registration Act, Graham was entitled to the land.¹² Pye brought the case before the European Court of Human Rights and in 2005 the Court decided, in the smallest possible majority, that United Kingdom law was not in line with Article 1 of the First Protocol of the ECHR, because it did not offer Pye any compensation for the deprivation of his property right.¹³

Because of the fundamental character of the issue, the case was then brought before the Grand Chamber of the European Court of Human Rights, which in 2007 ruled that the law on adverse possession was not in violation of Article 1 of the First Protocol of the ECHR, because the interference with Pye's right should not be regarded as a deprivation of possession, in which case a compensation is mandatory, but should rather be considered as a 'control of use' of the land. The Court found that the result of the control of use by the Land Registration Act (the loss of property by Pye) did not upset the fair balance between the aim of the interference and the means employed.¹⁴

These cases stress that, although the European Court of Human Rights appears in the end to be reluctant to interfere with domestic regulation of property of land, this area of domestic law, which could be considered at the heart of private law, is not 'safe' from the influence of the Court.¹⁵ They illustrate, therefore, not only that this area is not immune from the influence of fundamental rights but also the, be it cautious, willingness of the European Court of Human Rights to interfere with domestic law in this domain.

¹² Pye v. Graham [2003] 1 A.C. 419. See on the English decisions also W.J. Zwolve, What a condition would man be in! (Three cases on prescription and adverse possession), *Stellenbosch Law Review* Regstydskrif 16 (2005), p. 336.

¹³ ECHR 15 November 2005, nr. 44302/02 (Pye v. United Kingdom I).

¹⁴ ECHR 30 August 2007, nr. 44302/02 (Pye v. United Kingdom II).

¹⁵ See on the influence of fundamental rights on property rights in South Africa for instance A.J. van der Walt, Tradition on Trial: a Critical Analysis of the Civil-Law Tradition in South African Property Law, *SAJHR* 1995 ff; A.J. van der Walt, Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Model to Evaluate South African Land-Reform Legislation, *Tydskrif vir die Suid-Afrikaanse Reg* (TSAR) 2002, p. 254 ff; A.J. van der Walt, Constitutional Property Clauses, Cape Town 1999.

3. Bridging the traditional dichotomy between private law and public law

The above described cases have all, at least initially, been solved in private law disputes, settled before civil courts. There is also little doubt that private law can —by its flexible structure - technically dispose of adequate and sufficient tools to deal with issues of fundamental rights. Yet, there can be much dispute about the question *how* fundamental rights could find their way - in a more technical way - into private law, as well as about the question of *to what extent* fundamental rights should influence the outcome of private law disputes. The first question will be addressed shortly in this section; the 'added value' of the fundamental rights perspective in private law will be discussed in the next section.

An essential question in the debate about the influence of fundamental rights in private law is how an appeal to fundamental rights may be interpreted in private law issues. In other words, how can fundamental rights, which seem to spring from a public law tradition, fit into the structure of private law debates? For a large part, this question reflects the distinction between the direct and indirect effects of fundamental rights,¹⁶ but even if one prefers the approach of indirect effect, different modes of influence of fundamental rights in private law can be distinguished.¹⁷

First, several fundamental rights have found their way into specific private law regulations, such as the law regarding labor contracts or medical treatment, which in many respects contain *ex ante* assessments by the legislator with regard to individual rights and freedoms. In these cases the private law rules can be said to have been influenced *ab initio* by fundamental rights. The influence of human rights from an extra-national source seems most problematic for this category of private law rules, because it immediately appeals to the issue of supremacy.

Secondly, fundamental rights may find their way through general clauses in the private law domain, such as unlawfulness, negligence, good morals or good faith.¹⁸ Private law thus offers several structures such as 'open norms' which may serve the influence of fundamental rights in the process of balancing of interests.

Thirdly, private law occasionally seems to allow a specific role for a fundamental right in forming a basis for an action in court. For example, a fundamental right may, then usually under the flag of a personality right (German Persönlichkeitsrecht, Dutch persoonlijkheidsrecht), be recognized as a 'private law right' as such.¹⁹ The Dutch Hoge Raad has, for instance, spoken of the general personality right *underlying* basic rights, such as the right to privacy, the right to freedom of thought, conscience and religion, and the freedom of expression.

¹⁶ See for a first strong advocate of direct effect: Hans Nipperdey, *Gleicher Lohn der Frau für gleiche Leistung*, *Recht der Arbeit* 1950, p. 121-128.

¹⁷ See on the state of affairs with regard to direct and indirect effect recently Chantal Mak, *Fundamental rights in European Contract Law, A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England*, Alphen aan den Rijn: Kluwer Law International, p. 46 ff.

¹⁸ See Andreas Heldrich and Gebhard M. Rehm, *Importing Constitutional Values through Blanket Clauses*, in: Daniel Friedmann & Daphne Barak-Erez (eds.), *Human Rights in Private Law*, Oxford, Hart Publishing 2001, p. 113 ff.

¹⁹ See on this role of persoonlijkheidsrechten S.D. Lindenbergh, *De positie en handhaving van persoonlijkheidsrechten in het Nederlandse privaatrecht*, *Tijdschrift voor Privaatrecht* 1999, p. 1665-1707 and R. Nehmelman, *Het algemeen persoonlijkheidsrecht*, diss. Utrecht, Deventer: W.E.J. Tjeenk Willink 2001.

This shows that fundamental rights may constitute a source for solutions in a private law context, even if they have not been articulated in detail in constitutional rights and without the need to address formal effect issues.

All in all, private law seems technically sufficiently flexible to accommodate fundamental rights properly. One can of course argue that as a result the added value of fundamental rights in private law is limited, because fundamental rights take a subsidiary position in private law, as private law itself is (at least more or less technically) decisive for their influence, and that the diffuse character of fundamental rights accounts for a lack of guidance to solve private law disputes.²⁰ This may be true, but it does not detract in any way from the ability of private law to host and vindicate fundamental rights in private law. The argument is, furthermore, weakened by the above described examples, which show the material influence of fundamental rights in solving conflicts in a private law setting.

With this in mind, it can be said that private law technically offers adequate tools for the accommodation of fundamental rights and, consequently it, allows rights and values from other domains, such as public law, to influence the private law domain. It seems, however, too simple to think that fundamental rights are public law features which have originated from public law and which only recently have tended to 'invade' private law by interpretation. It can be said that the nature and the maintenance of fundamental rights not only originate from public law; they have private law roots, at least as well.²¹ It is, therefore, questionable to see the influence of fundamental rights in private law as an issue of conflict of public and private law and it would be better to approach it as a matter of convergence: fundamental rights are of a universal nature that exceeds the distinction between the private and public law domains.

This, of course, brings us to an evaluation of the material influence of fundamental rights in private law. It does, however, also stress the importance of the issue of jurisdiction in a multi-level setting. The question is no longer primarily whether it is a civil court or an administrative court that has jurisdiction over a specific fundamental rights issue, but much more whether a traditional civil law or public law jurisdiction is influenced by a national or supranational court that is willing and able to guarantee fundamental rights and to place their vindication on its policy agenda. This aspect will be addressed later on.

4. The added value of a fundamental rights-approach in private law

Of a more normative nature than the question of how fundamental rights *can* find their way technically into the structure of private law debates is the question of whether, and to what extent, these rights *should* influence private law. In this respect, there seem to be 'believers' as well as 'non-believers'. Smits, for instance, advocates scepticism by arguing that private parties are, as a matter of principle, not bound by fundamental

²⁰ J.M. Smits, *Constitutionalising van het vermogensrecht*, Preadvies Nederlandse Vereniging voor Rechtsvergelijking nr. 64, Deventer: Kluwer 2003, p. 1-161; Jan Smits, *Private Law and Fundamental Rights: a Sceptical View*, in: *Constitutionalisation of Private Law* (Tom Barkhuysen & Siewert D. Lindenbergh, eds), Leiden/Boston: Martinus Nijhoff 2005, p. 9-22.

²¹ See on this thought: Stathis Banakis, *The constitutionalisation of private law in the UK: is there an emperor inside the new clothes?*, in: *Constitutionalisation of Private Law* (Tom Barkhuysen & Siewert D. Lindenbergh, eds), Leiden/Boston: Martinus Nijhoff 2005, p. 83-96.

rights, because these rights are by their origin and nature meant to protect the free sphere of private parties from state influence.²² Whether this is true or not, this view seems to be based on a rather traditional distinction between private and public law. The debate about the value of fundamental rights in private law precisely shows that the fundamental values enshrined in these rights are of profound influence and cannot be neglected in the private law debate. This is not altered by the fact that human rights may have a different meaning and effect in private law relationships from those in the relationship between the state and a citizen.²³

The added value of a fundamental rights approach in private law has been an - often unforeseen - change of perspective on rather classical private law issues. Fundamental rights thus primarily serve as a source of inspiration that can add new viewpoints to a more traditional dogmatic civil law approach. Looking at the above described cases, a fundamental rights argument offers, in each case, a surprising angle that has been of more or less influence on the solution of the conflict. It is primarily this aspect that shows the added value of fundamental rights in private law: an enrichment of legal discourse in private law.²⁴ This is not only a matter of argumentation; it also stresses the importance of essential values and interests that might, in a more patrimonial by oriented civil law model, otherwise be disregarded. Fundamental rights may thus serve as a source of inspiration for what is considered a just solution in society, as a signal of the seriousness of a case in which human dignity is at stake²⁵, and - if necessary - as a crowbar to vindicate these interests.

5. Constitutional and/or supranational courts as driving forces

There is little doubt that the establishment of courts that have the protection of fundamental rights as a more or less specific mission has been of unmistakable influence for the development of fundamental rights in private law. In Europe, the European Court of Human Rights, the European Court of Justice and the German Bundesverfassungsgericht each have shown that the interpretation and application of private law is no longer the sole domain of national civil courts. This can be seen as an aspect of globalization in the sense that external jurisdictions influence the development of domestic (private) law. In my opinion this development should be judged as beneficial. Fundamental values enshrined in fundamental rights can thus exceed the national territorial borders as well as the traditional boundaries of the legal domains of private law and public law. In this respect the law seems to have become more flexible; at least there has been a challenging appeal to its flexibility.

The reverse of this is that the relative success of fundamental rights in private law is, to a certain extent, dependent on the competence as well as the 'political' agenda of these courts.

²² Jan Smits, Private Law and Fundamental Rights: a Sceptical View, in: Constitutionalisation of Private Law (Tom Barkhuysen & Siewert D. Lindenbergh, eds), Leiden/Boston: Martinus Nijhoff 2005, p. 19.

²³ See on this issue in relation to the private sphere for example Andrew Clapham, Human Rights in the Private Sphere, Oxford, Clarendon Press 1993, p. 134: 'The State has no right to privacy; it has a claim to *secrecy*'.

²⁴ See also: Hans Nieuwenhuis, Fundamental Rights Talk, An enrichment of legal discourse in private law?, in: Constitutionalisation of Private Law (Tom Barkhuysen & Siewert D. Lindenbergh, eds), Leiden/Boston: Martinus Nijhoff 2005, p. 1-8.

²⁵ Cf. Jan Smits 2005, p. 22.

Although the above described case of the influence of Article 1 of the First Protocol of the ECHR on the limitation of liability exemplifies that national civil courts can allow influence to fundamental rights independently, it is not plausible that this would have happened had the European Court of Human Rights not stressed the importance of the Article in earlier decisions. This does not only emphasize the dependence of the development of fundamental rights in private law upon the existence of a supranational legal order; it also limits this development to the specific agendas of the courts in charge. The impact of this limitation must, however, not be overestimated. The supranational jurisdiction does not necessarily have to be one at a global level. Regional jurisdictions have, for instance in Europe, proved to be successful as well. Moreover, different jurisdictions in the same region, such as the German Bundesverfassungsgericht, the European Court of Human Rights and the European Court of Justice have had their effects in the same region.

6. Issues in relation to globalization

The influence of fundamental rights in private law typically crosses traditional theoretical distinctions as well as national borders and can, therefore, be seen as an example of legal globalization. As human rights often have their source in international treaties, the influence of human rights on private law can be seen as a globalizing influence on private law: the national private law jurisdiction does no longer own sovereignty in issues of private law. National private law is not only influenced by the explicit conversion of human rights treaties into national law, but also by a more 'sneaking' influence of human rights through judgments in which national courts apply fundamental rights with International origins in specific local private law matters. The above described examples show that human rights may offer inspiring viewpoints that offer new horizons. In Individual cases this may lead to favorable solutions on an *ad hoc* basis, but on a more fundamental level it raises questions about the role of the national legislator in relation to the international judiciary. Who is competent with regard to which issue and who decides eventually what the law is?

Human rights may also be from another perspective relevant in relation to globalization. In a globalizing world multinational corporations and other international organizations more and more seem to define the normative agenda that affects national citizens even in their most local setting. This raises the question of the democratic standard of such rules. From this perspective fundamental rights can possibly serve as proper tools to set aside rules that lack a sufficient democratic basis. They can, from an 'internal' or national perspective, serve as guards for the democratic standard of legal rules.

Both of the above described functions show the ability of private law to host fundamental rights as well as the flexibility of private law to apply these rights. The influence of fundamental rights in private law is however, also in relation to globalization, far from unproblematic.

In the first place fundamental rights usually consist of rather 'raw' legal material that offers little guidance.²⁶

²⁶ See for example on the already many different aspects of personal freedom Jill Marshall, *Personal Freedom through Human Rights Law?*, Leiden/Boston, Martinus Nijhoff Publishers 2009.

This makes the application as well as an outcome of the application of fundamental rights in private law situations unpredictable and it can therefore affect legal certainty. This also raises the question of whether the judiciary can sufficiently deal with the application of fundamental rights in individual cases and which cases are more suitable for the legislator to decide. The Dutch example of the strongly diverging amounts of the limits of liability in transportation cases (the court of The Hague chose 200000 euros; the Arnhem court thought 1 million euros to be adequate) illustrates that some issues would better be covered by the legislator in order to avoid arbitrariness.

In the second place the application of fundamental rights by an international court or institution may impose values that exceed or are contrary to locally approved values. The universality of fundamental rights seems to a certain extent to vary according to their nature as well as to the location of their application, and thus their weight may be valued differently in concrete situations. For example, the right to life and freedom will probably be valued as more fundamental than the right to economic development or the right to equal opportunity,²⁷ and the right to economic development will be valued differently in varying economic situations.²⁸ From this point of view the benefit of the concept of universality of fundamental rights in relation to globalization - fundamental rights are so fundamental that they can and should be applied everywhere and anytime - may prove to be a drawback: the fundamentality of these rights can be challenged in all places, at all times and in every specific situation.

7. A different perspective: private law as a tool for protection of fundamental rights

With respect to fundamental rights private law may, however, have something else to offer that can be of importance in a globalizing legal order. Recently, attention has been paid to the question of how private law can help to provide rules to present incentives for companies to respect fundamental rights in their production and trade, both in their country of origin and elsewhere. Van Dam, for instance, advocates the application of the tort concept of negligence to companies in order to motivate them to respect fundamental rights.²⁹ Thus a company should apply due diligence with regard to fundamental rights, not only in its own actions but also in relation to its daughter-companies and business partners. It must be said that the tools for plaintiffs to vindicate their rights in an international setting are yet limited, but for instance the American Alien Tort Claims Act illustrates that claims with regard to human rights can be heard in a foreign jurisdiction.³⁰

Moreover, the violation of fundamental rights by companies may call for regulation to protect the level playing field of competition,

²⁷ See on the latter Peter Benson, Equality of Opportunity and Private Law, in: Daniel Friedmann & Daphne Barak-Erez (eds.), *Human Rights in Private Law*, Oxford, Hart Publishing 2001, p. 201 ff.

²⁸ See for instance on 'freedom rights' versus 'social rights' Martijn W. Hesselink, *The New European Private Law, Essays on the Future of Private Law in Europe*, The Hague/London/New York, Kluwer Law International 2002, p. 177 ff.

²⁹ See Cees van Dam, *Onderneming en mensenrechten, zorgvuldigheidsnormen voor ondernemingen ter voorkoming van betrokkenheid bij schending van mensenrechten*. Inaugural lecture Utrecht University, The Hague: Boom Juridische Uitgevers 2008.

³⁰ In Europe this possibility is yet very limited. See Liesbeth Zegveld, *Rechtsherstel voor slachtoffers van schending van het internationale humanitaire recht*, Inaugural lecture University of Leiden 2008.

since the production of companies obeying fundamental rights may be more expensive than that of companies which disregard and violate fundamental rights. In this way protection of the economic market may serve as a vehicle that results in protection of fundamental rights.³¹

Furthermore, private law may play a role in - indirect - vindication of fundamental rights through consumer law. If consumers derive and vindicate rights from fair trade labels, this may influence company behaviour with respect to fundamental rights.³²

These aspects throw a new light on the function of private law with respect to fundamental rights in a globalizing world: not only may they serve as anchors for the interpretation of private law, but also national private law may become a tool to protect fundamental rights elsewhere in the world. If one cannot export fairness by directly imposing fundamental rights elsewhere, one can impose it indirectly by importing it.

8. Concluding remarks

The development of fundamental rights in private law seems to be an inspiring example of fundamental values presenting incentives as well as tools to exceed traditional national structures of both private and public law. Furthermore, the development of supranational jurisdictions, which have stimulated the development of fundamental rights profoundly, has formed an important aspect of globalization of the legal arena. In this respect fundamental rights have the characteristics of potentially successful carriers of legal development in a globalizing legal order.

These characteristics, however, have their reverse side as well. As described above, the development and influence of fundamental rights in private law seems to a large extent dependent on the existence and power of supranational jurisdictions. Furthermore, fundamental rights are, at least in their original structure, rather vague and undetermined, which makes their direct implementation difficult. And, finally - this may be the most difficult characteristic - in a global setting, the universality of fundamental rights may not be so self-evident. What is considered fundamental, and which specific consequences this fundamentality should have in a certain case, seems to a large extent to be dependent on the region in which the question is raised. For instance, the right to equal treatment of men and women may in several areas of the world be considered fundamental, but it is not at all obvious that this will, or perhaps should, lead to the outcome of the earlier described case of Wiebke Bush wherever such a case is brought before a court. Therefore, although fundamental rights are often presented as carriers of universal values, their weight may be assessed differently in varying countries and cultures. It will be a serious challenge for the global legal order to account for and deal with this fundamental problem.

³¹ Van Dam 2008, p. 52.

³² See on this A.G. Castermans, *De burger in het burgerlijk recht*, Inaugural lecture, University of Leiden, forthcoming.

References

Banakis, S. (2005), 'The Constitutionalisation of Private Law in the UK: Is There an Emperor Inside the New Clothes?', in T. Bakhuijsen and S.D. Lindenberg (eds), *Constitutionalisation of Private Law*, Leiden/Boston; Martinus Nijhoff, pp. 83-96

Barkhuysen, T., M.L. van Emmerik and H.D. Ploeger (2005), *De Eigendomsbescherming van Artikel 1 bij het Eerste Protocol bij het EVRM en het Nederlandse Burgerlijk Recht*, Preadvies Vereniging voor Burgerlijk Recht, Deventer: Kluwer

Benson, P. (2001), 'Equality of Opportunity and Private Law', in D. Friedman and D. Barak-Erez (eds), *Human Rights in Private Law*, Oxford: Hart Publishing, pp. 201 ff.

Castermans, A.G. (2008), *De Burger in het Burgerlijk Recht*, inaugural lecture, University of Leiden.

Clapman, A. (ed.) (1993), *Human Rights in the Private Sphere*, Oxford: Clarendon Press, p. 134

Ganten, T.O. (ed.) (2000), *Die Drittwirkung der Grundfreiheiten*, Berlin: Duncker & Humblot

Heldrich, A. and G.M. rehm (2001), 'Importing Constitutional Values through Blanket Clauses', in D. Friedmann and D. Barak-Erez (eds), *Human Rights in Private Law*, Oxford: Hart Publishing, pp. 113 ff.

Hesselink, M.W. (ed.) (2002), *The New European Private Law: Essays on the Future of Private Law in Europe*, The Hague/London/New York: Kluwer Law International, pp. 177 ff.

Lindenberg, S.D. (1999), 'De Positie en Handhaving van Persoonlijkheidsrechten in het Nederlands Privaatrecht', *Tijdschrift voor Privaatrecht*, pp. 1665-1707

Loof, J.P. (ed.) (2000), *The Right to Property*, Maastricht, Shaker Publishing

Mak, Ch. (ed.) (2007), *Fundamental Rights In European Contract Law: A. Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England*, Alphen aan den Rijn: Kluwer Law International, pp. 46 ff.

Marshall, J. (ed.) (2009), *Personal Freedom through Human Rights Law?* Leiden/Boston: Martinus Nijhoff Publishers

Mostert, H. (2003), 'De Invloed van die Grondwetlike Eigendomsklausule op die Eigendomskonsep in die Suid-Afrikaanse Reg', in J. Smits and G. Lubbe (eds), *Remedies in Zuid-Afrika en Europa: Bijdragen over Privaatrecht en Constitutioneel Recht in Zuid-Afrika, Nederland en België*, Antwerp Intersentia, p. 119

Nehmelman, R. (ed.) (2001), *Het Algemeen Persoonlijkheidsrecht*, dissertation, University of Utrecht; Deventer: W.E.J. Tjeenk Willink

Nieuwenhuis, H. (2005), 'Fundamental Rights Talk, An Enrichment of Legal Discourse in Private Law', in T. Barkhuysen and S.D. Lindenbergh (eds), *Constitutionalisation of Private Law*, Leiden/Boston: Martinus Nijhoff, pp. 1-8

Nipperdey, H. (1950), 'Gleicher Lohn der Frau für gleiche Leistung', *Recht der Arbeit*, pp. 121-128

Smits, J.M. (2005), 'Private Law and Fundamental Rights: a Sceptical View', in T. Barkhuysen and S.D. Lindenbergh (eds), *Constitutionalisation of Private Law*, Leiden/Boston: Martinus Nijhoff, pp. 9-22

Van Dam, C. (2008), *Onderneming en Mensenrechten, Zorgvuldigheidsnormen voor Ondernemingen ter Voorkoming van Betrokkenheid bij Schending van Mensenrechten*, Inaugural lecture, Utrecht University, The Hague: Boom Juridische Uitgevers

Van der Walt, A.J. (ed.) (1999), *Constitutional Property Clauses*, Cape Town: Jutta

Van der Walt, A.J. (2002), 'Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Model to Evaluate South African Land-Reform Legislation', *Tydskrif vir die Suid-Afrikaanse Reg (TSAR)*, pp. 254 ff.

Van der Walt, A.J. (2003), 'N Nuwe, Grondwetlike, Ius Commune?', in J. Smits and G. Lubbe (eds), *Remedies in Zuid-Afrika en Europa: Bijdragen over Privaatrecht en Constitutioneel Recht in Zuid-Afrika, Nederland en België*, Antwerpen: Intersentia

Zegveld, L. (2008), 'Rechtsherstel voor Slachtoffers van Schending van het International Humanitair Recht', inaugural lecture, University of Leiden

Zwalve, W.J. (2005), 'What a Condition Would Man Be In!' (Three cases on prescription and adverse possession), *Stellenbosch Law Review Regtydskrif*, **16**, p. 336