GENERAL REPORT: The influence of human rights and basic rights in private law

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1. INTRODUCTION

1.1 General Matters and Terminology Issues

The aim of this general report is to identify the role and the influence of human rights and basic rights in private law across different jurisdictions. Nineteen national reports on the countries from all over the world contributed to this end.¹ The general report’s structure follows the particular pattern. As regards the content, it focuses on the influence of human rights and basic rights in the selected fields of private law, i.e. in contract, tort, property, and family law. Separately, it deals with narrow issues of the significant importance for this topic – the right to privacy and personality rights, which are examined at the end of the report. Concerning the structure of different parts, the report will always start with mapping general principles of the particular field of private law, and continue with looking into different jurisdictions and the potential influence of human rights and basic rights in private law there. This will be followed by the sketch of the influence of fundamental rights in the European Union (hereinafter EU). This aims to be an international report which is not limited to the influence of fundamental rights in private law solely in the EU, but tends to cover also non-European and non-European Union jurisdictions.

The concept of human rights or fundamental rights is rarely legally defined across the participating states. Ostensibly, the notion of fundamental rights is less frequently used in the legislation and jurisprudence of different jurisdictions, however, it is the notion employed in the EU legal discourse. Legal scholars sometimes tend to differentiate the legal nature of human rights and fundamental rights. As it can be derived from the Austrian report², majority of Austrian scholars distinguish between the notion of fundamental rights and the notion of human rights, with the fundamental rights widely seen as positive national law, and human rights mostly regarded as

¹ The report includes some of the EU Member States’ reports (German, Austrian, Croatian, French, Greek, Hungarian, Italian, Dutch, Polish, Portuguese, English, Slovenian and the Czech reports), as well as the Argentinean, Brazilian, Quebeçois, the United States’, Japanese, and Norwegian reports.
meta-positive, natural or positive-international law.\textsuperscript{3} As it is stressed in the Czech report, their approach is grounded on the natural law approach to the human rights, \textit{i.e.} inviolability of the natural rights of humans, based on a belief that each human is a specific being which has natural rights that follow from the nature of man and the world.\textsuperscript{4} In this report, the notions of human rights and fundamental rights are used interchangeably, unless stated otherwise.

This report does not focus on different definitions and legal concepts associated with the human and basic rights and their influence in the private law discourse. Rather, it tries to demonstrate the factual influence in the courts’ case law and potential changes in the legislation, trying to identify and map out the common underpinning principles and thematic similarities in the jurisprudence perplexed with the fundamental rights influence.

1.2 Some Historical Highlights

When talking about human rights and basic rights in general, the first significant statutes comprising human rights are found in English law, namely \textit{Magna Carta} from 1215 and the \textit{Bill of Rights} from 1689.\textsuperscript{5} \textit{Magna Carta} was the first document imposed upon a King of England by his feudal barons, with the aim to limit King’s powers by law and protect their rights. The \textit{Bill of Rights} was enacted by the Parliament. It has asserted the supremacy of Parliament over the monarch and contains a number of fundamental rights and liberties.

Another significant document that represents the key milestone in the history of human rights is the \textit{French Declaration of the Rights of Man and of the Citizen} (\textit{Déclaration des droits de l’Homme et du citoyen}), enacted by the French Parliament in 1789.\textsuperscript{6} Generally, with an exception of England, the first early approaches towards implementing the protection of the human rights in the legislation can be identified at the end of the 18\textsuperscript{th} century and the beginning of the 19\textsuperscript{th} century, although they were mainly declaratory and with no binding force. However, as regards the first appearance of the binding concept of fundamental rights in different legal systems, it seems at the first glance that there are several common denominators – from the development of the modern constitutional systems of the states, to the end of the Second World War, as well as the fall of the Iron Curtain and related events in the end of 1980s and the beginning of the 1990s.

In Germany, already the Paulskirchenverfassung following the March Revolution of 1848 adopted the idea of the modern constitutional state, which is based on the sovereignty of the people and acknowledges basic rights as unalienable. However, this constitution never came into effect. It was not until the \textit{Weimarer Reichsverfassung} of 1919 that Germany became a constitutional state in a modern

\textsuperscript{3} Berka, \textit{Grundrechte} 14 et seq.; \textit{id.}, Verfassungsrecht 3 Rz 1157 et seq., see fn. 1 in the Austrian report.
\textsuperscript{5} See R. Youngs, ‘English report on the influence of human rights and basic rights in private law’, IACL Congress 2014 (hereinafter English report) 1, noting that these statutes could be repealed like other statute law.
sense with an extensive catalogue of fundamental rights; nonetheless, the legal meaning of these basic rights was highly disputed.\textsuperscript{7} However, the German \textit{Grundgesetz} (GG) of 1949 put the catalogue of basic rights at its very beginning: it emphasizes human dignity (Art. 1 I GG) and human rights (Art. 1 II GG) and it clarifies that all branches of government are bound by these rights (Art. 1 III GG).\textsuperscript{8} Similarly, in Japan the \textit{Constitution} ensuring the respect of human rights was enacted in 1946.\textsuperscript{9}

The Kingdom of the Netherlands (hereinafter the Netherlands) has a long-standing experience with the protection of fundamental rights, with the major sources of fundamental rights in the Dutch legal order being the \textit{Dutch Constitution}, on the one hand, and international and supranational treaties to which the Netherlands is party, on the other.\textsuperscript{10} This is the pattern that can be found across all the jurisdictions. In France, the first substantial introduction of the concept of human rights found its way into \textit{La Déclaration des droits de l'homme et du citoyen} (hereinafter DDHC) in 1789.\textsuperscript{11} In Portugal, the first Portuguese Constitution of 1822 introduced the concept of human rights through the provision governing the protection of the freedom of opinion.\textsuperscript{12} After the period of 150 years it reappeared in the Constitution of 1976. In Greece, the notion of human rights has been introduced with the \textit{Constitution} of 1975, in which the principle of human dignity is acknowledged for the first time\textsuperscript{13} referring to both citizens and humans and is signified by the adoption and practical implementation of the \textit{European Convention of Human Rights and Fundamental Freedoms} (hereinafter \textit{ECHR}) in the Greek legal order.\textsuperscript{14} Only few years later, in 1982, Canada has embraced the constitutional protection of the \textit{Charte canadienne des droits et libertés}, founded on the respect of human dignity, protecting fundamental rights of citizens in relation to the state.\textsuperscript{15} Similarly, in Brazil, it was only with the \textit{Constitution} of 1988 that the constitutional laws were endowed with normative force (having been, previously simply considered political-philosophical dispositions).\textsuperscript{16} In Argentina, this notion was first introduced in the speeches of the candidate for the governor of the province Cordoba, Amadeo Sabattini, in 1935, whereas the Supreme Court referred to them for the first time in the case law in 1958 by the Supreme Court.\textsuperscript{17}

\textsuperscript{7} D. Looschelders & M. Makowsky, ‘German report on the influence of human rights and basic rights in private law’, IACL Congress 2014 (hereinafter German report) 1.
\textsuperscript{8} ibid.
\textsuperscript{11} French report 4.
\textsuperscript{13} Art. 2 para. 1 GC: ‘1. Respect and protection of the value of human being constitute the primary obligations of the state’.
\textsuperscript{14} C. Deliyanni-Dimitrakou & C. M. Akrivopoulou, ‘Greek report on the influence of human rights and basic rights in private law’, IACL Congress 2014 (hereinafter Greek report) 5-6.
\textsuperscript{16} G. Tepedino, ‘Brazilian report on the influence of human rights and basic rights in private law’, IACL Congress 2014 (hereinafter Brazilian report) 2.
\textsuperscript{17} A. C. Belluscio, ‘Argentinian report on the influence of human rights and basic rights in private law’, IACL Congress 2014 (hereinafter Argentinean report) 2.
In England, formally human rights were introduced only on 2nd October 2000 when the Human Rights Act 1998 (HRA) took effect and incorporated the ECHR into English law.\textsuperscript{18}

In socialist countries formed after the Second World War, many human rights protection standards were merely declaratory. This was due to the lack of the will to implement them, and, as it can be read for instance in the Hungarian and the Polish report, due to the shortage of institutional background which made it impossible for these regulations to take full effect, and a lack of instruments and procedures enabling a specific human being to use them in her defence.\textsuperscript{19} As it is noted in the Polish report, they had only “façade-like character”. The first court rulings invoking human rights acts in Poland come from the 1990s.\textsuperscript{20} The Polish report considers Polish courts as rather conservative and not really familiar with the application of the ECHR or the Constitution.\textsuperscript{21}

In Hungary, the legal system for the protection of fundamental rights was established with the democratic revolution of 1989. It was for the first time that this was not merely a declaration, but an actual safeguard, with institutional foundations, guaranteed by the state, for every individual to exercise his or her rights, as regulated by the provisions of the Constitution.\textsuperscript{22} Similarly, it was only after the ‘velvet revolution’ that the Czech Republic, as a post-communist country, has returned to the democratic system and started searching for a fundamental circumscription of human rights and it inquired into the role of human rights in the system of law.\textsuperscript{23} Likewise, also Croatia and Slovenia, gaining independence in 1991, first introduced the modern concept of human and basic rights in the Constitutions in 1990.\textsuperscript{24}

The position of the United States of America (hereinafter also the US) is somewhat exceptional in this development of the influence of human rights and fundamental rights in private law. As submitted in the US report, the main factors that limit this influence are the strong liberal traditions of the US, the limited permeability of the US to international law thanks to its international power, and the federalism of the US Constitution.\textsuperscript{25} The US report refers to Ignatieff, emphasizing that ‘no other country consistently exempts itself from as many provisions of human rights treaties, uses such markedly double standards in human rights for friends compared with enemies, and insists so much on its domestic traditions’.\textsuperscript{26} As highlighted in the US report, the US constitutionalism largely excludes the possibility that a private actor may violate

\textsuperscript{18} English report 1.
\textsuperscript{20} Decision SC (Supreme Court) 9.9.1993, III ARN 45/93; SC 11.2.1993, III AZP 28/93.
\textsuperscript{21} Polish report 5.
\textsuperscript{22} Hungarian report 1.
\textsuperscript{23} Czech report 1.
\textsuperscript{25} USA report, p. 5.
constitutional rights, and Americans view fundamental rights as a question governing their relations with the government and not among each other. The US Supreme Court has developed State Action Doctrine, under which the constitutional rights will only be deemed violated when the wrongful conduct is that of the government, or of a private entity with such a close connection to the government that in practice the government is deemed to have acted. Moreover, recent Supreme Court decisions demonstrate a pull backwards from any notion that US courts have a role in the enforcement of international human rights. The identified exceptions to the extremely limited influence of the human rights in private law are non-discrimination and freedom of expression.

1.3 Sources of Fundamental Rights

Human rights and basic rights, in this report referred to also as fundamental rights, are typically enshrined in international human rights treaties and national constitutions, and are found in various sources at the international, regional and national level. At the international level, the most renowned human rights instrument is the United Nations’ Universal Declaration of Human Rights, adopted in 1948 as a result of the experience of the Second World War. At the end of the war the world leaders decided to set out a road map to guarantee the rights of every individual everywhere. It is non-binding instrument and there is no court to protect the rights enshrined in it.

At the regional level, the most influential human rights document proves to be the European Convention on Human Rights and Fundamental Freedoms (ECHR), adopted by the Council of Europe in 1950 and effective since 1953. Parties to the ECHR are 47 countries, all Council of Europe member states. With the adoption of the Lisbon Treaty the EU has taken steps to accede to the ECHR. Article 6(2) TEU provides that: ‘The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.’ The legal basis in the ECHR is provided for by Article 59(2) ECHR as amended by Protocol No. 14 to the ECHR which entered into force on 1 June 2010. The accession procedure is currently in progress.

The ECHR established the European Court of Human Rights (ECtHR) with the seat in Strasbourg, France. In contrast to the Universal Declaration of Human Rights, the rights granted by the ECHR enjoy the protection by the ECtHR. Any person who thinks that a state party has violated his or her rights under the ECHR can take a case to the ECtHR.

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29 US report 3.
32 This article reads: ‘the European Union may accede to this Convention’.
33 This court is often confused with the EU’s court in Luxembourg, The Court of Justice of the European Union.
In the European Union, the important sources are both Treaties, Treaty on the European Union (TEU) and Treaty on the Functioning of the European Union (TFEU). Important EU primary law source is also the EU Charter of Fundamental Rights (the Charter)\(^\text{34}\), which was enacted in 2000, but became legally binding only in 2009 with the Lisbon Treaty’s entry into force. Further, fundamental principles of the EU, some of them enshrined in the Treaties and some of them established by the Court of Justice of the European Union (hereinafter CJEU), also play an important role for this discourse. Some of this fundamental principles are pacta sunt servanda, clausula rebus sic stantibus, and legal certainty.\(^\text{35}\) Relevant provisions might be found also in the EU secondary legislation, in regulations and directives.

At the national level, the most important legal instruments are national constitutions. In some countries, the same constitutional character is ascribed also to constitutional laws. Alongside national constitutions and constitutional laws, the important sources for the purposes of identifying the influence on fundamental rights in private law are also provisions found in the laws of different countries. Moreover, and especially relevant for this report, the important source are also judgments of the courts, in some countries also judgments of the Constitutional Courts.

Most of the national reports indicate strong commitment of the states to protection of human rights and fundamental rights. Undoubtedly, all the participating European states are signatories of the ECHR of 1950, entering into force in 1958. Remarkably, the ECHR has the same status as the Constitution in some countries, like in Austria, whereas in the Netherlands it takes a higher rank than the Dutch Constitution itself.\(^\text{36}\) Besides, the participating EU Member States are parties to the EU Charter. Poland and the UK have signed the Protocol\(^\text{37}\) with the clarifications on the application of the EU Charter in their countries.\(^\text{38}\)

\(^{34}\) OJ C 83/389, 30.3.2010.


\(^{36}\) Austrian report 2.

\(^{37}\) Protocol (No 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom. The two Articles of the Protocol read as follows: Article 1: 1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.

Article 2: To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.

1.4 ‘Constitutionalisation’ of Private Law

Traditionally, the function of fundamental rights was limited to vertical relationship, and thus confined to public law. Primarily, the function that human rights and fundamental rights play in the particular legal system is that their role is principally one of defensive rights, protecting individual freedoms and privacy against state interference or illegitimate discrimination, some of them creating positive obligations of the state. Austrian Constitutional Court has acknowledged that positive obligations derive from fundamental rights. As noted by the Argentinean report, their primary role is often judicial review, as they are the basis for the invalidation of the legislation. However, today, there is an ongoing discourse on the growing influence of fundamental rights in private law, especially contract, tort, and property law.

The process of growing influence of fundamental rights on horizontal relationships is sometimes referred to as the ‘constitutionalisation of private law’. This ‘constitutionalisation’ is defined 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’. The question whether this influence is normatively desired does not engender a univocal answer. Although it is sometimes viewed as highly beneficial to allow fundamental rights to play a role in relationships between private persons, it also opens up doors to several issues and concerns.

Notwithstanding the fact that ‘constitutionalisation’ of private law in academic articles mainly encompasses solely the fields of contracts, tort, and property, this report comprises family law as well. Although family law is characterised by taking into account the high-level public policy considerations, in contrast to other fields where private autonomy is far more important, it is submitted that important influences of fundamental rights can be identified, especially concerning the right to equality in different scopes of family law, and also in the inheritance law.

40 Argentinean report 5.
43 J. M. Smits (n 42) 9.
44 ibid.
45 ibid. 10.
Often, fundamental rights play an important role in private law in the case law, through the interpretation of the private law rules in the light of fundamental rights, whereas the impact on the legislation seems to be rather limited. The impact on the legislation is normally seen through the legislative changes following the newly established line of case law influenced by fundamental rights. These influences can be described as a transplant of fundamental rights discourse of public law sphere into private law sphere.\(^\text{46}\) Some legal academics warn against the problems of transplantation and translation that such insertion of fundamental rights in private law generates.\(^\text{47}\) In private law discourses, fundamental rights might take on new meaning and might demand the transformation in their interpretation due to the shift in the moral foundation of fundamental rights.\(^\text{48}\)

### 1.5 Horizontal Effect of Fundamental Rights

The effect of fundamental rights can be vertical or horizontal. Fundamental rights have ‘vertical’ effect in a vertical relationship between a private party and a state, where fundamental rights are applicable to the state to protect the individual against the state.\(^\text{49}\) The effect of fundamental rights on relations between private parties, \(i.e.\) among individuals or individuals and companies or other legal entities of private law, is ‘horizontal’.\(^\text{50}\)

Horizontal effect can be direct or indirect. Some academics are cautious to differentiate it in this way. **Direct horizontal effect** is the application of fundamental rights directly to legal relations between private parties.\(^\text{51}\) Thus, certain fundamental right is not only directly binding upon public authorities, but to some extent also between private individuals.\(^\text{52}\)

**Indirect horizontal effect** entails the applicability of a fundamental right through the influence on the interpretation of private law rules.\(^\text{53}\) Hence, private law rule, such as general clauses of ‘good morals’ or ‘good faith’, is interpreted and applied in the light of a fundamental right.\(^\text{54}\)

The importance of the effect of fundamental rights on private law is reflected in the fact that fundamental rights, which have been traditionally created for protection against a state, operate in private law sphere and influence underpinning concepts and principles of private law. The typical fundamental right provision is vague and incomplete, therefore accepting the use of fundamental rights in this context leads to

\(^\text{47}\) H. Collins (n 46) 1.
\(^\text{48}\) ibid. 1.
\(^\text{51}\) Engle (n 49) 165.
\(^\text{52}\) Ciacci (n 50) 104.
\(^\text{54}\) See C. 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 (Kluwer Law International 2008) xxix.
huge empowerment of judges to determine *ad hoc* what conduct is ‘legal’ and ‘illegal’.  

One of the most prominent theories on the influence of human rights and basic rights in private law are the German theories of *unmittelbaren* and *mittelbaren* Driftwirkung, theory of direct and indirect effect on third parties. Those advocating for the direct third party effect claimed that the concept of constitutional rights should be directly applicable also in private law relations in approximately the same manner and to the same extent as in the relation with the government. However, this theory was never adopted. The theory that has been adopted in practice and is widely used is the idea of indirect horizontal effect of constitutional rights, developed in the Lüth case, pursuant to which the private law provision is not overridden by the constitutional rights, but only interpreted in the light thereof. In this case the court proclaimed the concept of constitutional rights as an over-arching system of values for the whole legal order. The influence of this theory is identified also in other countries, for instance in Greece this theory was introduced at first during the 1960s in the field of labour law and afterwards during the 1980s in the field of public law. As Austrian report emphasizes, also in Austria the concept of indirect horizontal effect of fundamental rights (*mittelbare Driftwirkung*) is followed, therefore the judiciary must take human rights into account when interpreting and applying the law, most notably when dealing with open texture norms or general clauses. Surprisingly, it is submitted in the Italian report that Italian courts take the step further and sometimes ‘pretend’ to apply the fundamental rights directly to the contract (*unmittelbare Driftwirkung*), if it is found to be in conflict with them. Dutch law distinguishes among three different ways of how fundamental rights influence private law: (i) through direct horizontal effect; (ii) through indirect horizontal effect; and (iii) through implicit indirect horizontal effect, without this being explicitly acknowledged.

It seems that there is a consensus across participating jurisdictions that fundamental rights so far have had only limited influence on the private law relationships, mainly having the indirect horizontal effect. They are influencing courts’ interpretation of the private law rules and principles, relating their application with the interpretation of norms and principles of private law, thus their role in influencing private law is seen especially through a ‘radiating effect’. Consequently, private law can sometimes be

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56 O. O. Cherednychenko (n 42) 5.
58 O. O. Cherednychenko (n 42) 5.
59 Dutch report 2.
61 For example, on the basis of the fundamental freedom granted by Art. 2 of the Italian Constitution, the Court of Appeal of Milan, 31 August 2012, in *Rivista critica diritto lavoro privato e pubblico*, 2012, p. 1044, extended the benefit of a health insurance fund to the same-sex partner of the employee. An example of an insurance company violating the insured party’s freedom of political association see Tribunal of Milan, 30 March 1994, in *FI*, 1994, I, c. 1572. See E. Navarretta & E. Bargelli, ‘Italian report on the influence of human rights and basic rights in private law’, IACL Congress 2014 (hereinafter Italian report).
62 O. O. Cherednychenko (n 42) 9.
63 J. M. Smits (n 42) 12; H. Collins (n 46) 6.
64 Greek report 11.
interpreted in the light of the fundamental rights, but private law rules still have priority over them. This process can be characterised as subsidiarity in reasoning.\textsuperscript{65}

In practice, this interpretation induced by the direct or indirect effect of fundamental rights can be illustrated for instance with the Greek experience, as the Areios Pagos (the Greek Supreme Court) has recently aligned with this view. In its 2159/2007 judgment, it has emphasized that the effect of fundamental rights and principles on the private relations is primarily indirect.\textsuperscript{66} Additionally, it held that a direct horizontal application of those provisions can be discussed only if private law is unable to offer a solution that meets the requirements that fundamental and human rights set out. Thus, only where there is no other alternative solution the direct application of fundamental rights can be suggested, reflecting the subsidiarity in reasoning theory.

In \textit{Slovenia}, Article 15 of the Slovenian Constitution, governing exercise and limitation of fundamental rights, provides that human rights and fundamental freedoms shall be exercised directly on the basis of the Constitution, and as the Supreme Court has held, this is true also for private relations.\textsuperscript{67} The same is true also in other countries, for example in Brazil\textsuperscript{68} or Portugal, where the Portuguese Constitution expressly provides that fundamental rights are binding directly upon private individuals as well, extending the traditional scope of the defensive function of fundamental rights.\textsuperscript{69}

The issue of the horizontal effect of fundamental rights is of special importance also in the EU, recently in particular as regards the horizontal applicability of the \textit{Charter}. Although certain rulings of the CJEU contain indications of direct applicability of general principles of EU law in relationships between individuals,\textsuperscript{70} the question of potential horizontal direct effect of EU fundamental rights remains unanswered.\textsuperscript{71} The CJEU has not yet expressly answered the crucial question of whether and, if so, under what conditions EU fundamental rights have horizontal direct effect.\textsuperscript{72} Article 51(1) of the \textit{Charter} provides that the provisions of the \textit{Charter} are addressed ‘to the Member States only when they are implementing Union law’.\textsuperscript{73}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{65} J. M. Smits (n 42) 12.
\item \textsuperscript{66} Greek report 11.
\item \textsuperscript{67} II Ips 737/2005, the Supreme Court decision of 03.04.2008.
\item \textsuperscript{68} Brazilian report 12.
\item \textsuperscript{69} Portuguese report 6.
\item \textsuperscript{70} See, in particular, Case C-43/75, \textit{Defrenne v SA Belge de Navigation Aerienne} (SABENA, where the CJEU accepted the direct applicability of the principle laid down in (now) art.157 TFEU that men and women should receive equal pay in relations between private individuals and private employers. Since the principle of equal pay is expressly confirmed in Art.23 of the Charter, the question arises whether, and if so, to what extent, the direct horizontal effect accepted by the CJEU in \textit{Defrenne} can be transposed to Art.23 of the Charter. See Trstenjak \& Beysen, ‘The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the Case Law of the CJEU’ (2013) 3 E.L. Rev. 308.
\item \textsuperscript{71} Trstenjak \& Beysen (n 70) 308.
\item \textsuperscript{72} The most important question is whether and, if so, to what extent, the rulings of the CJEU in \textit{Mangold v Helm} (C-144/04) and \textit{Kücükdeveci} (C-555/07)on the horizontal direct effect of the general principle of non-discrimination on grounds of age as given expression in Directive 2000/78 establishing a general framework for equal treatment in employment and occupation, can pave the way towards a more generalised acceptance of horizontal direct effect of the principle of non-discrimination as such, of other EU fundamental social rights or even of EU fundamental rights in general. See Trstenjak \& Beysen (n 70) 308.
\item \textsuperscript{73} Article 51 defines the Charter’s field of application in the following terms:
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\end{footnotesize}
CJEU’s settled case-law indeed states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law, but not outside such situations.\(^74\) An obligation of the EU and the Member States to actively intervene in order to protect fundamental rights in horizontal relations is implied in the wording of certain fundamental rights under the Charter, such as Art.3(2) concerning the fundamental right to the integrity of the person in the fields of medicine and biology, or Art.5(3) concerning the prohibition of trafficking in human beings.\(^75\)

The CJEU dealt with the interpretation of the Charter in the cases Åkerberg Fransson\(^76\) and Melloni\(^77\). In Melloni, the CJEU ruled that in principle Member States are allowed to apply (higher) national fundamental rights standards in matters falling within the reach of EU law, but only ‘provided that the level of protection provided for by the Charter, as interpreted by the CJEU, and the primacy, unity and effectiveness of EU law are not thereby compromised’.\(^78\) Further, in Åkerberg Fransson the CJEU explained the field of application of the Charter. The Court has decided for the broad interpretation of Article 51(1) of the Charter, as it effectively equated the scope of EU law and the scope of the application of fundamental rights, stating that the ‘applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter’.\(^79\)

The CJEU has further ascertained the applicability of the Charter in the preliminary reference procedure essentially asking whether the Charter can be applied in a dispute between private parties in the case AMS\(^80\). The case concerns the question of potential horizontal effect of the workers’ right to information and consultation enshrined in Article 27 of the Charter and implemented through Directive on a framework for informing and consulting employees in the EU\(^81\). The CJEU held again that ‘the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law’, which might potentially open doors for the Charter’s application also in private law relationships. For the Charter to apply in private law relationships, two hurdles need to be cleared. First, it has to be demonstrated that the situation before the court is ‘governed by European Union law’ as established in Åkerberg Fransson. Further, it needs to be established whether the

\(^1\) The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

\(^2\) The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

\(^74\) Case C-617/10, Aklagaren v Hans Åkerberg Fransson, ECLI:EU:C:2013:105, para. 19.

\(^75\) Trstenjak and Beysen (n 70) 308.

\(^76\) ibid.

\(^77\) Case C-399/11, Melloni, ECLI:EU:C:2013:107.

\(^78\) Case C-399/11, Melloni, ECLI:EU:C:2013:107, para. 60.

\(^79\) Case C-617/10, Aklagaren v Hans Åkerberg Fransson, ECLI:EU:C:2013:105, para. 21.

\(^80\) Case C-176/12, Association de médiation sociale (AMS), ECLI:EU:C:2014:2.

Charter is able to have horizontal direct effect. The answer given by the CJEU is ‘yes’ – however, not always and not in the case at hand. Thus, the decision in AMS paves the way for the potential horizontal application of Charter provisions, however, the exact practical implications remain to be further clarified by the CJEU.

Another European court, the ECtHR has also dealt with the question whether certain fundamental rights under the Charter can give rise to a duty of the Member States to ensure that those rights are also observed by private individuals. Its case-law acknowledges, under certain conditions, an obligation of the State to take measures in order to prevent violations of various fundamental rights by private individuals. For example, it has been ruled that the right to respect for private and family life under Art.8 ECHR – which is also guaranteed under Art.7 of the Charter – may give rise to positive obligations of the State in order to secure effective respect for private or family life, and that these obligations may involve the adoption of measures designed to secure their respect even in the private sphere among individuals themselves.

2. THE INFLUENCE OF FUNDAMENTAL RIGHTS IN CONTRACT LAW

2.1 General Principles of Contract Law

Contract law forms part of the law of obligations, together with tortious (‘delictual’ or ‘non-contractual’) obligations. It varies greatly from one jurisdiction to another, especially concerning differences among common law and civil law, and also across the jurisdictions that belong to the same legal family. The rules on contract usually encompass the law relating to the formation, performance and discharge of contractual obligations. There is no universally agreed definition of a contract, however there are basic principles of the law of contract that can be ascertained. To conclude a contract parties must reach an agreement and there must be an attention to create legal relations. The elements of a contract are ‘offer’ and ‘acceptance’ by persons. In England, an additional requirement, the ‘consideration’ has to be fulfilled for the contract to be concluded. The doctrine of consideration is a distinctive feature of English contract law, with the essence that something must be given in return for the promise in order to render that promise enforceable.

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83 ibid.
84 ibid.
90 ibid. 4.
91 ibid. 4.
The legal concept of contract law constantly evolves by expanding and revising its scope, rules and basic principles. These changes are prompted by the reception of new social policies and political ideas, and interactions with other fields of law.

The central principles of contract law are private autonomy or freedom of contract, dispositional character of contract law norms, and the equality of the parties to the contract. These principles derive also from the national reports. Contractual freedom is normally reflected in the principle of informality of contracts and in the dispositional (ius dispositivum) character of the contract law norms. As highlighted in the Japanese and French report, this freedom is decided in two sub-principles, the freedom to choose the contracting party and the freedom to determine the content of the contract.

National reports mention also other legal principles that are important for the contract law. Some of these principles are legal certainty, particularly concerning the protection of legitimate legal expectations of one party, the principle of equality of parties in commercial obligations, the principle of the contractual equivalent and the ethical power of sanctity of contracts, principle of non-mandatory legal provisions, principle of no required form of negotiation, and principle of respect for and fulfilment of contracts (pacta sunt servanda). Also the principle of good faith can be identified as a leading principle in contractual relations, particularly in civil law traditions.

The central principle of contract law, the **freedom of contract**, safeguards the **autonomy of private parties** and enables them to arrange their relationships in the way that suits them best. However, the freedom of contract is not unlimited. As an immediate observation, rules that would allow for the limitation of the freedom of contracting with the express objective of protecting human rights and basic rights are rare. In general, the general clauses of good faith, *bonos mores* and equity in contracts play a crucial and highly important role in limiting the economic freedom of the parties in favour of other rights or general principles (*e.g.* the protection of the weaker contracting party). The limitations in the form of general provisions or specific mandatory provisions are usually not considered as a matter of human rights or fundamental rights. However, as rightly noted in the Dutch report, such clauses may also serve as the gateways to the effect of fundamental rights in contractual relationships. These private law general clauses are usually open texture norms and judiciary might take human rights into account when interpreting and applying the law and thus the notions of good faith and public morals in many cases serve for the introduction of constitutional rights and freedoms in the field of private relations and

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93 Ibid. 3.
94 Informality has a common exception of property law where notary deeds are needed.
95 See for instance Greek report 20.
96 Japanese report 5; French report 14.
97 These principles are mentioned for instance in the following reports: Austrian report 7; Czech report 8; French report 14; Croatian report 10; Greek report 19-20; French report 13; Slovenian report; Brazilian report 6.
98 Art. 1385 of C.c.Q, see Quebeccois report 28; French report 14.
100 Greek report 20, Argentinien report 7.
101 Dutch report 6.
facilitate the balancing between the conflicting rights and interests of the individuals. 102 Thus, for instance, fundamental rights must be applied when interpreting the ‘gute Sitten’.103

As far as freedom of contract is concerned, understandings of the extent of this freedom differ. Nevertheless, the common denominator of all the participating countries is that their contract laws are grounded at least to a significant extent on the liberal tradition and that the freedom of contract is understood in a rather formal way.104 As derived from the Czech report, new Czech civil code, in force since 1 January 2014, seems to even strengthen the principle of freedom of contract, as it is based on a neoliberal approach, i.e. it prefers the autonomy of will and simultaneously limits the formal (but also material) statutory requirement in contractual relationships.105 Noteworthy trend can be observed in Norway. Although the second part of the nineteenth century and the most of the twentieth century, following the liberal period, was devoted to increasing the protection of weaker contracting parties, in line with the political will to intervene in markets for the sake of the general good, a market approach has again come to prevail.106 It is argued that in EU Member States in the last half century has seen a considerable growth in the range of ‘public policy’ qualifications on freedom of contract, notably for the protection of consumers, tenants and employees.107

Thus, the meaning of the principle of the contractual freedom is changing. The impact of the wide-ranging concern for at least limited protection of the weaker contracting parties can be observed across different jurisdictions, despite the general liberal stance of the contract laws. To illustrate, in Greek report the principle of protecting the economically weaker party has been expressly mentioned as a general principle of contract law.108 A noteworthy example of illiberal values in contract law is Brazilian principle of the social function of the contract, which requires that the parties promote, within the contractual scope, not only their own interests, but also socially useful interests.109 It can be said that the principle of the freedom of contract has been adapted in order to permit the real freedom of contract for all the parties to the contract,110 not solely those that are in economically stronger position and have more manoeuvre to bargain. In order to put weaker contracting parties in more equal position, the influence of human rights and basic rights have had at least to certain extent redefined the principle of freedom of contract in the stage of the formation as well as in the stage of the execution of the contract.111 As it is put in the Quebecois report, following the adoption of extensive legislation and provisions protecting

102 Perner, Grundfreiheiten, Grundrechte-Charta und Privatrecht 144 et seq. in: Austrian report 8; Greek report 23.
103 Austrian report 8.
104 Austrian report 7.
105 Czech report 8-9.
108 Greek report 20.
109 Brazilian report 6.
110 Quebecois report 21.
111 ibid.
consumers, the law of obligations has to be revisited to reflect these new concepts and ideas.\textsuperscript{112}

The prevention of imbalance and the protection of the weaker party in the case of imbalance are often achieved through separate contract law rules. Numerous rules for the elimination of imbalance among the parties can be found in national legislations, especially in countries that are members of the EU. This is particularly the case due to the vast secondary legislation and the CJEU’s case law that aim to protect the weaker party to the contract.\textsuperscript{113} It is often leading to different interpretation of the law in national courts and sometimes results also in a legislative change of the law, as it is apparent from the German report, with German courts being among those that the most frequently refer preliminary references on consumer law to the CJEU for interpretation. These decisions have binding effect in all 28 Member States. Normally, protection is ensured through the traditional mechanisms of protection, \textit{i.e.} through classical contract law instruments, such as nullity of contract due to lack of consent (threat, force, fraud), usurious contracts, \textit{clausula rebus sic stantibus}, \textit{laesio enormis}.\textsuperscript{114}

Aside the protection of the weaker contracting party, some participating states’ legislations expressly protect also special vulnerable individuals. For example, this is the case in \textit{Quebec}, with Article 48 of the \textit{Charte quebecoise} protecting elderly people and all handicapped persons against any form of exploitation, and in \textit{Brazil}, especially in the case of the consumer contracts and of the contracts of city real estate lease for residential purposes.\textsuperscript{115}

Sometimes, the limitations to the general principles of contract law may be deduced without an explicit wording in the legislation. For example, practice of courts in the \textit{Czech Republic} steadily adhere to the approach that the principles of private law do not have to be expressly stated in a legal norm, but they can be concluded from the natural essence and historical context of a democratic society.\textsuperscript{116}

Another principle limiting the contractual freedom is the prohibition of ‘\textbf{abuse of rights}'. In \textit{Greek Civil Code} the relevant provision reads as follows: ‘The exercise of a right is prohibited when it manifestly exceeds the limits of good faith or public morals or of the rights economic purpose’.\textsuperscript{117} Similarly, \textit{the Slovenian Code of Obligations} provides: ‘In exercising their rights, contractual parties must refrain from action by which the performance of the obligations of other parties would be rendered more difficult. Any action by which the holder of a right acts with the sole or clear intention of harming another shall be deemed as the abuse of the right.’\textsuperscript{118} The principle of the abuse of rights regulates the imbalances and sets limits in the enjoyment of the rights acknowledged in all fields of private law functioning as a principle of proportionality in the private sphere relations.\textsuperscript{119}

\textsuperscript{112} ibid. 20.
\textsuperscript{113} See the discussion in French report 16-19.
\textsuperscript{114} See for instance Croatian report 11.
\textsuperscript{115} Quebecois report 24; Brazilian report 8.
\textsuperscript{116} Czech report 9.
\textsuperscript{117} Art. 281 GCC, Greek report 23.
\textsuperscript{118} Art. 7 of the Slovenian Code of Obligations.
\textsuperscript{119} Greek report 23.
2.2 The Freedom of Contract and the Contractual Imbalance

The influence of fundamental rights in contract law in the case law is a typical example of the indirect horizontal effect of fundamental rights through the general clauses of private law. The judiciary explicitly takes the fundamental rights into account when examining the validity of the contract clauses, for instance, in Dutch courts, under Article 3:40 of the Dutch Civil Code concerning good morals and public order. As aforementioned, one of the thematic underpinning of the impact of the human rights and basic rights in contract law is their influence in the application of the blanket clauses and vague legal concepts. In so doing, courts consider fundamental rights as just one of the factors when balancing the competing interests of the contractual parties, and fundamental rights provisions are not directly applied.

In their application, human rights and basic rights usually tend to eliminate the imbalance between contracting parties. This is done primarily with the objective of protecting the weaker contracting party or to prevent discrimination. Usually contract laws contain special provisions dealing with the protection of weaker parties and vulnerable parties, thus the influence of fundamental rights in their adjudication is rather limited. However, as underlined in the Japan report, referencing to fundamental rights can sometimes give an impression that legal reasoning in judgments is more justifiable and convincing.

The influence of human rights and basic rights on contract imbalance is notable in the context of the review of a contract of surety, where a commercially inexperienced and impecunious person stood surety for a close family member although the debt greatly exceeded his financial capabilities. Their influence in this context can be seen for instance in Germany, Austria, and the Netherlands. German Bundesverfassungsgericht ruled that the civil courts are constitutionally obliged to control the content of such a contract with regard to the basic rights at stake. The references of the blanket clauses (§§ 138, 242 BGB) to morality, common usage and good faith require the courts to concretize with respect to objective values, which primarily deduce from the basic rights of the constitution. However, only a severe imbalance can justify a judicial interference with the contractual agreement.

As it is derived from the Austrian report, Austrian courts tend to be inspired by the German courts, and thus also by the case law on surety of close relatives. In 1995, the Austrian Supreme Court decided on the similar matter and followed the German Court’s opinion. The legislator followed up by enacting provisions designed to protect consumers in such cases. The treatments of non-professional sureties who guarantee

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120 Dutch report 7.
121 ibid.
122 German report 7.
124 German report 7.
125 BVerfGE 89, 214, 229 ff, in: German report 7.
127 BVerfGE 89, 214, 255, in: German report 7.
129 BGB I 11 1997/6; Austrian report, 9-10.
the borrowing of family members – the so-called family sureties – were decided upon also in the Dutch courts. An example given is Van Lanschot v. Bink case, which involved a mother who had acted as a surety for her son’s debts. In this case, contrary to German case law, the Dutch Supreme Court in civil matters did not seek resort to fundamental rights, as it relied its decision on the contract law concept of mistake and such reference to fundamental rights did not prove to be necessary in order to achieve a result comparable to that reached by the German Constitutional Court in Bürgschaft on the basis of fundamental rights.131

It is submitted in the Austrian report that it is seen from the case law on surety contracts of close relatives that the Austrian courts as well as the Austrian legislator understand private autonomy as a material concept rather than a formal one.132 The mere consent does not provide sufficient authority for a binding contract. To the contrary, the parties of the contract must be actually free in their decision. It is exactly this idea of empowering all the contracting parties to restore the balance in the contractual relationship, which underlines the need for consumer protection law.

Another example of the freedom of contract limitation is through tenancy, which is also a legitimate objective for the limitation of the property rights.133 In the Netherlands, already in 1948 the Arnhem Court of Appeal dealt with a situation where the parties to a lease contract had agreed that the contract would be terminated if the tenant had not made sufficient efforts to achieve the goals of the Protestant Church, which was the basis for the termination of the contract once the tenant has changed the religious belief.134 The Court of Appeal found the term in question to be contrary to good morals and public order because it seriously impaired the tenant’s freedom of religion.135

The indirect application of fundamental rights in tenancy case law can be observed also in Italy. For instance, it is demonstrated in the case concerning a clause of a residential tenancy contract prohibiting the tenant to host people other than family members for a longer period of time.136 This clause was held to be void for being in contrast with the ‘mandatory duties of social solidarity imposed by Art. 2 of the Constitution’.137 The impact of human right and basic rights on tenancy legislation is revealed also in Norway. Legislation protecting the tenant underground leases (thus protecting the right to housing) was found to violate the owner’s property rights under Article 1 Protocol 1 to the ECHR.138

The principle of freedom of contract can be limited also in cases when constitutional freedom of education is impaired. As derived from the Dutch report, a contractual clause which barred the person concerned from teaching for the rest of her life if she

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131 Dutch report 6.
132 Austrian report 10.
133 Pl. ÚS 42/03 in Czech report9; also in the Netherlands, see Dutch report 7.
134 Dutch report 7.
137 Italian report 8.
failed to obtain the required diploma was found void when tested against the compatibility with the public order and good morals in restricting the constitutional freedom of education.\textsuperscript{139}

As far as the direct application of fundamental rights in contract law is concerned, the furthest-reaching effect seems to be in the Dutch case in which the patient’s constitutional right to bodily integrity has been invoked as a reason for refusing to undergo AIDS testing, as explained below.\textsuperscript{140} Nevertheless, such direct horizontal effect might seem only apparent, in view of the fact that limitations upon the exercise of fundamental rights are found in open private law. As a result, ultimately, in order to resolve a conflict between the parties, the courts resort to balancing competing interests. For this purpose, they translate a fundamental right into a private law interest connected with the exercise of this right and then weigh it against another purely private law interest or an interest which, being protected by the fundamental right, is also translated into a private law interest.\textsuperscript{141} Under such circumstances, what formally can be considered the direct horizontal effect of fundamental rights, in substance comes down to the indirect horizontal effect of such rights.\textsuperscript{142}

As the Dutch report sets out, the dispute in this case arose out of the fact that during medical treatment the blood of a patient, who belonged to a group of persons with a higher risk of being infected with the HIV virus, had come into contact with the blood of a dentist.\textsuperscript{143} The latter requested a court order for the patient to undergo an AIDS test, as the patient claimed that the demanded blood test constituted a violation of his constitutionals rights to bodily integrity and privacy laid down in Article 11 and Article 10, respectively, of the Dutch Constitution. In its decision, the Dutch Supreme Court recognized the patient’s constitutional right to bodily integrity, which is limited by restrictions laid down by the Article 6:162 of the Dutch Civil Code on tort (onrechtmatige daad) as well as from the contract between the parties. Because the parties had concluded a medical treatment contract, they owed each other a duty of care. For this reason also after the termination of the contract, the patient could be required to do what is necessary to limit the damage suffered by the dentist at the time of the medical treatment. In balancing the competing interests of the parties, i.e. patient’s right to bodily integrity and dentist’s interest in knowing whether or not he had been infected with the HIV virus, the court concluded that the patient had failed to perform his obligations under the contract.\textsuperscript{144}

The issue that also needs to be addressed is whether the protection of fundamental rights has an impact also on the choice of the contracting party, especially in relation to the non-discrimination principle. An interesting case has been provided in the Japanese report. Public bathing (‘le bain public’) is very popular in Japan, with Japanese being familiar with the special rules to use it.\textsuperscript{145} However, as Russian

\textsuperscript{140} HR 12 December 2003, NJ 2004, 117 (Aidstest II).
\textsuperscript{141} Dutch report 7.
\textsuperscript{143} Dutch report 7.
\textsuperscript{144} Dutch report 7-8.
\textsuperscript{145} Japanese report 6.
marines started to use them as well, not being familiar with the special rules of usage, some of those bains have started to be advertised as for ‘Japanese only’. Consequently, a German and two American costumers brought an action before the court seeking the non-pecuniary damages. 146 The court has upheld their claims, qualifying this action as racial discrimination and deciding that such racial discrimination is forbidden also among private parties. 147

The Italian report focuses on the possibility to restrict the freedom of choice of the contracting party in the case of public offer. It claims that according to the most widespread opinion, the principle of non-discrimination is applicable only to proposals made in public advertisements. 148 It is uncertain the extent to which the perpetrator of discriminatory acts can be forced into a contract with the victim. Moreover, another controversy lies in the question whether the non-discrimination principle may restrict the freedom of choice of the contracting party even in the case of an offer made to one or more specific persons. 149

2.3 Remedies for the Breach of Contract or Failure to Perform

Under the principle pacta sunt servanda the primary obligation of the parties is the obligation to perform the contractual obligations. However, sometimes one party fails to fulfil an obligation under the contract through non-performance or defective performance (in civil law jurisdictions) or commits a breach of contract (in common law jurisdictions). 150

Although a breach of contract or failure to perform does not in itself discharge the performance obligations of the party in breach, the way in which the remedies operate does in practice often translate non-performance or defective performance into damages. 151 However, at least in civil law jurisdictions, the first option is for the non-performing party to be given the chance to complete their part of the contract. If non-performance is fundamental, there are various remedies for the applicant – damages, a reduction in the price of the product or service, and termination of the contract. Damages for breach of contract have the objective to put the claimant into the position in which he would have been if the contract had been properly performed – so-called ‘expectation interest’. 152 Such damages usually cover loss which the applicant has suffered and gain of which the applicant has been deprived. 153

146 ibid.
149 Italian report 9.
150 Cartwright (n 87) 247-248.
151 Cartwright (n 87) 248.
152 Cartwright (n 87) 262.
153 See for example Article 132 of the Slovenian Code of Obligations. See also Article 160 of the Proposal for a regulation on common European sales law (CESL).
In Portugal, the consumers’ right to the quality of goods and services and the right to damages are enshrined in the Constitution in Article 60(1). This elevation of the consumers’ right to damages to the constitutional level was at stake in the Constitutional Court’s decision in the judgment n° 153/90II, in which it verified the compatibility of the norm that limited civil liability of the postal company in the case of misappropriation of certified checks (*chèques postaux*).  

There are situations in which the contract aims to satisfy one contracting party’s fundamental right, violated by the breach of contractual duties. Concerning non-pecuniary damages in the case of breach of contract, the Italian report stresses that Italian courts are keen to award them as far as a fundamental right is infringed. Examples are given by medical malpractice, the infringement of holiday entitlement or the omission of precautionary measures necessary to avoid the employee’s exposure to health risks. Similarly, the case law in Portugal accepts that non-pecuniary damages may be awarded also in the field of contractual liability.

### 2.4 Other Influences in Contract Law

Aside the influence of human rights in the general contract law, national reports draw the attention to their influence in the labour law. In Argentina, a judgment of the Supreme Court declared unconstitutional an act imposing the maximum compensation for dismissal without cause because it undermined the protection of workers against the arbitrary dismissal, with the said protection being provided by the *Constitution* and several international conventions. The court fixed an increase in compensation in order to achieve a reasonable amount. In Germany, the Great Senate of the *Bundesarbeitsgericht* (Federal Labor Court) has justified the limitation of the liability of the employee to his employer with respect to damages that occur due to operational activities with an analogy of § 254 *BGB* (contributory negligence) with regard to the constitutionally guaranteed general right to freedom (Art. 2 I GG) and the basic right of professional freedom (Art. 12 I GG).

Moreover, in Greece the constitutional protection of personality and dignity of the employees stands as obstacles in the one-sided decision of their employer to dismiss them, when this decision cannot be justified by financial reasons or is not considered as a means to retain the viability of his enterprise, or in cases where his decision is obviously disproportionate compared to its scope.

### 2.5 Specifically on the Influence in the EU

#### 2.5.1 Harmonization in the EU

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154 Portuguese report 20.
155 Italian report 8.
156 See, for instance, Cass. 5 August 2013, no. 18626, in Italian report 8.
157 Portuguese report 36.
160 Greek report 29.
The field of contract law is in principle not harmonized at the EU level, however, there are specific aspects of contract law regulated in several regulations and directives. Especially important is the new Directive on Consumer Rights adopted in 2011 and effective since June 2014. It is provided in the preamble of the Directive on Consumer Rights that it ‘respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union’. Other noteworthy directives are in particular the Directive on unfair terms in consumer contracts, the Package Travel Directive, and the Directive on consumer goods and associated guarantees. Member States have a duty to transpose directives in the national law. Such implementation is not necessary for regulations, as they are directly applicable in all Member States. The important regulation dealing with the substantive law is Air Passengers Rights Regulation, which establishes common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights. From the perspective of the conflicts of laws, the important regulation is Rome I Regulation dealing with the law applicable to contractual obligations in civil and commercial matters.

These acts usually encompass several fields of contract law, often dealing with specific matters, e.g. rules on damage (e.g. Article 5 of the Directive on Package Travel), provisions on unfair contract terms (see Article 3 of the Directive on Unfair Terms in Consumer Contracts), and right of withdrawal in distance selling contracts (e.g. Article 6 of the Distance Selling Directive or Article 9 of the new Directive on Consumer Rights).

Due to the aspiration towards even greater harmonization the Commission adopted the Proposal for a Regulation on Common European Sales Law (CESL). CESL introduces the optional instrument to govern the cross-border sales contract, which parties would be able to choose by express agreement. As an optional instrument it is

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162 Recital 66 of the Preamble to the Directive on Consumer Rights.  
a single set of contract law rules which would stand as an alternative alongside the national contract law of each Member State.¹⁷⁰

The most important Charter provisions that potentially could have the impact on the freedom of contract are right to privacy (respect for private and family life in Article 7), the principle of equality (Article 20), consumer protection (Article 38), and right to an effective remedy and to a fair trial (Article 47).

2.5.2 The CJEU Case Law

The CJEU’s case law in the field of contract law is vast. It encompasses several cases in connection to contract formation, as well as the right of withdrawal and right to compensation in such cases. In what follows, some of these cases will be addressed.

The protection of the weaker party as a limitation to the freedom of contract is greatly emphasised in the EU. The EU Member States’ courts have a duty to be ex officio attentive to void provisions, duty developed by the CJEU in cases Océano Grupo¹⁷¹ and VB Pénzügyi Lízing dealing with the consumer protection, interpreting the Directive on Unfair Terms in Consumer Contracts. In these cases, the CJEU has developed a significant line of case law on the duties of national courts in cases concerning the judicial enforcement of individuals’ rights derived from the consumer protection directives.¹⁷² In the case Océano Grupo, adjudicating on the validity of the jurisdiction clause, the CJEU held that that a clause that obliges the consumer to submit to the exclusive jurisdiction of a court which maybe a long way from his domicile was unfair because it may hinder the consumer's right to take legal action. Remarkably, the CJEU held that the national court should ‘determine of its own motion whether a term of a contract before it is unfair when making its preliminary assessment as to whether a claim should be allowed to proceed before the national courts’.¹⁷³ The CJEU has further clarified this duty in Banco Español de Crédito¹⁷⁴, also interpreting the Directive on Unfair Terms in Consumer Contracts, where it held that a national court cannot revise the content of an unfair term in a contract concluded between a seller or supplier and a consumer, as it is required solely to set that term aside.

The weaker party protection is demonstrated also in case Pia Messner¹⁷⁵, in which the CJEU was asked to interpret whether, in the case of a right of withdrawal by a consumer within the revocation period, the provisions of the Distance Selling Directive allow the possibility for a seller to claim compensation for the value of the use of goods acquired under a distance contract in the case of the withdrawal from the contract. The CJEU held that a general requirement to pay compensation for the value of the goods acquired under a distance contract is incompatible with the

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¹⁷⁴ Case C-618/10, Banco Español de Crédito SA v Joaquín Calderón Camino.
¹⁷⁵ C-489/07 Pia Messner v Firma Stefan Krüger, judgment of 3 September 2009.
objectives of the Directive in question. However, the CJEU added that the Directive does not preclude, in principle, a legal provision of a Member State which requires a consumer to pay fair compensation in the case where he has made use of the goods acquired under a distance contract in a manner incompatible with the principles of civil law, such as those of good faith or unjust enrichment.

In the case Quelle\textsuperscript{176} the CJEU interpreted the obligation of consumers to pay for the use of the defective consumer goods until the replacement under the Directive on sale of consumer goods and associated guarantees\textsuperscript{177}. The CJEU held that the ‘free of charge’ requirement attaching to the seller’s obligation to bring the goods into conformity is intended to protect consumers from the risk of financial burdens which might dissuade them from asserting their rights in the absence of such protection. This is also consistent with the Directive’s aim to ensure a high level of consumer protection.

The important issue dealt with by the CJEU in the context of contract law is also the question of the availability of non-pecuniary damages in certain circumstances. The striking decision is found in the case Simone Leitner, concerning the Package Travel Directive.\textsuperscript{178} Package Travel Directive provided in Article 5(2) that ‘with regard to the damage resulting for the consumer from the failure to perform or the improper performance of a package travel contract, Member States shall take the necessary steps to ensure that the organiser and/or retailer is/are liable (…)’. In this case, referred for the preliminary reference procedure by Landesgericht Linz, the CJEU was asked whether or not the notion of ‘damages’ necessarily included non-material damages. The CJEU held that non-pecuniary damages, although not explicitly stated in the Package Travel Directive have to be compensated.

Another prominent decision by the CJEU was held in the case Rodríguez, dealing with the non-pecuniary damage suffered by the air passenger due to the cancellation of the flight, interpreting the Air Passengers Rights Regulation.\textsuperscript{179} The CJEU held that also an air passenger may claim compensation for non-material damage in the case of a flight cancellation.\textsuperscript{180}

The noteworthy decision dealing with the consumer contract law was held in the case Weber/Putz, interpreting the Directive on sale of consumer goods and associated guarantees.\textsuperscript{181} The preliminary references concern the interpretation of the obligation on the seller to bear the cost of removing the goods not in conformity and installing replacement goods. Further, they concern the question of the possibility for the seller to refuse to bear the cost of removing defective goods and installing replacement goods where the cost is disproportionate. The CJEU held that in the event of the replacement of defective consumer goods, the seller must remove the goods from where they have been installed in good faith by the consumer and install the replacement goods there, or bear the necessary cost of those operations. That

\textsuperscript{176} Case C-404/06 Quelle AG v. Bundesverband der Verbraucherzentralen und Verbraucherverbände.
\textsuperscript{178} C-168/00, Simone Leitner v TUI Deutschland GmbH & Co. KG, ECLI:EU:C:2002:163.
\textsuperscript{179} C-83/10, Aurora Sousa Rodriguez and Others v Air France SA, ECLI:EU:C:2011:652.
\textsuperscript{180} C-83/10, Aurora Sousa Rodriguez and Others v Air France SA, para. 34.
\textsuperscript{181} Joined Cases C-65/09 and C-87/09, Weber/Putz, ECLI:EU:C:2011:396.
obligation on the seller exists regardless of whether he was obliged under the contract of sale to install the consumer goods originally purchased.\textsuperscript{182} Reimbursement of the cost may, however, be limited to an amount proportionate to the value of goods in conformity and the significance of the lack of conformity.\textsuperscript{183}

The labour law should be mentioned as well. The CJEU often faces the interpretation of the rights laid down in the Charter also in these cases. In the case \textit{KHS}\textsuperscript{184} the CJEU dealt with the interpretation of the Working Time Directive\textsuperscript{185} and the question of the right to paid annual leave, more specifically with the lapse of right to paid annual leave not taken because of illness on the expiry of a period laid down by national rules. The right to paid annual leave is governed by Article 31(2) of the Charter, providing: ‘Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.’ The Court held that in light of the actual purpose of the right to paid annual leave directly conferred on every worker by EU law, a worker who is unfit for work for several consecutive years and who is prevented by national law from taking his paid annual leave during that period cannot have the right to accumulate, without any limit, entitlements to paid annual leave acquired during that period.\textsuperscript{186}

The decision worth mentioning is also very controversial decision in the field of insurance law, \textit{Test-Achats}.\textsuperscript{187} In this case the CJEU interpreted and annulled the Directive implementing the principle of equal treatment between men and women in the access to and supply of goods and services.\textsuperscript{188} The case concerned the insurance premiums and benefits in private life insurance contract, where the sex was a factor in the assessment of insurance risk. It held that an unlimited derogation from the principle of equal treatment between men and women in the field of insurance is unlawful. In its reasoning, it expressly mentioned that the content of this directive has to be assessed in the light of two rights found in the Charter, Article 21 on non-discrimination and Article 23 on equality between men and women, respectively.

\section*{3. THE INFLUENCE OF FUNDAMENTAL RIGHTS IN TORT LAW}

\subsection*{3.1 General Principles of Tort Law}

This general report employs the notion ‘tort’ as a synonym of ‘delict’ or ‘non-contractual liability’. In a legal sense, ‘tort’ is a typical common law term which does not have a true parallel in continental legal systems.\textsuperscript{189} However, numerous text books use the notion of ‘European tort law’, comprising both common and civil law regimes, and also Principles on European Tort Law (PETL) have been prepared by the European Group on Tort Law, containing the guidelines for the development of

\textsuperscript{182} Joined Cases C-65/09 and C-87/09, Weber/Putz, para. 62.
\textsuperscript{183} Joined Cases C-65/09 and C-87/09, Weber/Putz, para. 78.
\textsuperscript{184} Case C-214/10, KHS, ECLI:EU:C:2011:761.
\textsuperscript{186} Case C-214/10, KHS, ECLI:EU:C:2011:761, para. 34.
\textsuperscript{187} Case C-236/09, Test-Achats, ECLI:EU:C:2011:100.
\textsuperscript{189} C. van Dam, \textit{European Tort Law} (OUP 2013) 5.
national tort laws, both in common law and civil law. Thus, this report follows the common practice and employs the term ‘tort’ for ‘extra-contractual liability’.

A tort is a civil wrong, an act or omission by the defendant which causes damage to the claimant. Remedies for tort are either reparation in kind or damages. Damages are calculated so as to put the claimant into position in which he would have been if the tort had not been committed.

In general, tort law systems differ significantly in civil and common law jurisdictions. In England tort law consists of a collection of individual torts created by case law, and a few by statute law, with the most important being the tort of negligence, and those involving intentional and indirect harm to property. The characteristic of the common law is that it treats torts in a casuistic manner, while civil law systems regulate them through general clauses. The content of these clauses differs across different jurisdictions. While in French law of non-contractual liability there is a very general and broad clause in Art. 1382 of the French Civil Code, pursuant to which any harm has to be repaired regardless of the type of the loss incurred or the fault of the wrongdoer, some other systems contain rules providing that anyone culpably and unlawfully causing damage to any other person is obliged to repair any damage. For instance, in Germany, the tort law is limited to the protection against infringements of certain basic rights (life, body, health, property, freedom of movement), whereas pure economic losses are generally not protected.

Some clauses establish liability for damages on the principle of fault whereas others operate regardless of the fault of the wrongdoer (i.e. strict liability). Nowadays, majority of legal systems recognize at least some sort of strict liability. Usually, fault is the principle and strict liability is the exception. Although primarily they tend to rely on the principle of fault, the principle of strict liability is introduced in specifically provided cases in legislation, or with the strict liability developed by the case law as in Norway in the late nineteenth century for damage caused by industrial enterprises. In Slovenia, as well as in majority of other countries, for example in Portugal, the Code of Obligations governs general clause providing that any person that inflicts damage on another shall be obliged to reimburse it, unless it is proved that the damage was incurred without the culpability of the former. However, persons shall be liable irrespective of culpability for material damage and activities that result in major risk of damage to the environment, as well as in other cases defined by law. In France, tort comprises liability based on three principles: everyone is liable not only for its own personal fault, but also for the things that are in his keeping, and for persons for whom he is responsible.

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191 Cartwright (n 87) 262.
192 English report 5.
193 See for instance Art. 914 of the Greek Civil Code, Greek report 48;
194 German report 10.
195 See for instance Quebecois report 37; Japanese report 8.
196 German report 10; Norwegian report 4; Croatian report 14.
197 Portuguese report 29.
198 Article 131(1) of the Slovenian Code of Obligations.
199 Article 131(2) and (3) of the Slovenian Code of Obligations.
200 French report 21.
The most important strict liabilities are strict liability of the car owner and strict liability of the manufacturer of a product. As it is derived from the Argentinean report, in Argentinean law in nineteenth century solely subjective liability was found. It was with the reforms in 1968 that theory of risk has found its place into Argentinean law of obligations. Also in Greece, the provisions do not introduce a general rule according to which anyone culpably incurring loss to someone else has to repair it. There, strict liability is invoked through specific provisions of a case-by-case character foreseen in the Greek Civil Code or in special laws.

Some countries regulate both contractual and non-contractual liability together, for instance Hungary, and Portugal as far as the right to compensation is concerned, whereas others provide for distinct legal regimes for both types of liabilities. The prerequisite for the liability for damages to occur is most often the unlawful act or omission. Unlawfulness is a controversial notion. It is derived from the Greek report that in Greece the compromise led to the de lege ferenda version of the objective theory according to which, in order for unlawfulness to be substantiated, breached rules need not to be positive law provisions. They may simply belong to the unwritten rules of the legal order as well as to the constitutional norms protecting human rights, which govern private law relationships indirectly through the general principles and the abstract legal formulas.

Common underlying principles of tort law in different legal systems are the principle of full reparation, the liability for fraud or misconduct, and the recognition of material and non-pecuniary damages. As laid down in the French report, the principle of full reparation posses a double function, positive and negative. The positive function demands the reparation of the whole damage caused, whereas the negative function of this principle requires that only damage be repaired, as the civil liability cannot be a source of unjust enrichment. Some national reports emphasis other principles as well, such as principle of prevention and principle of prohibition of abuse of rights.

In the US, the special issue arising in the connection to tort concerns the incorporation of international human rights law into the US legal system in cases concerning the issue of the extraterritoriality of the Alien Tort Statue. The Alien Tort Statue

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201 See for instance the Japanese report 10.
203 They analyse the French notion of fault (faute) as follows: Art. 914 GCC provides that anyone culpably and unlawfully causing damage to any other person is obliged to repair any damage, while Art. 919 GCC further provides that any person causing damage to any other person intentionally and in a manner which violates the commands of morality is also obliged to repair any damage. Greek report 48.
204 Greek report 48.
205 Hungarian report 11.
206 Portuguese report 23.
207 See for instance GCC Art. 914.
208 Greek report 49.
209 Greek report 49.
210 See for instance German report 10; French report 21; Croatian report 14; Brazilian report 10.
211 See for instance Argentinean report 9.
212 Argentinean report 9.
213 See French report 21.
214 Czech report 14.
provides jurisdiction over tort actions in cases brought by non-US plaintiffs against non-US defendants for violations of customary international law, including war crimes and crimes against humanity, committed outside the US.\(^\text{215}\) Thus, it provides for a form of universal civil jurisdiction.\(^\text{216}\) As laid down in the US report, in the case *Sosa v. Alvarez Machain* in 2004, the Supreme Court held that under the Alien Tort Statute, a foreigner bringing an action for a tort committed in violation of the Law of Nations could use sufficiently specific and well-established norms of international law as the basis for an action.\(^\text{217}\) Such norms are then treated as part of US law for the purposes of such an action. However, in 2013, in *Kiobel v. Royal Dutch Petroleum (Kiobel)*, a case concerning the oil company Shell’s responsibility for its Nigerian subsidiary’s involvement in crimes committed by Nigerian authorities, the Supreme Court rejected the possibility that international human rights law could form the basis of a cause of action before a US court when the conduct has arisen outside of the US.\(^\text{218}\)

While this case primarily concerns the US and international law, the European Commission submitted an *amicus curiae* brief to the US Supreme Court. The brief sketches the EU’s position on the extraterritoriality issue, arguing that the US should exercise universal civil jurisdiction only in cases for which universal criminal jurisdiction would apply, and that the US’s exercise of this jurisdiction must be constrained by the procedural limits imposed by international law, in particular by an exhaustion requirement.\(^\text{219}\) Thus, claimants should be required to exhaust domestic and international remedies before the US courts may adjudicate these cases on the basis of universal jurisdiction.\(^\text{220}\) The Commission submits that the EU, committed to human rights, ‘has a concrete interest in ensuring that EU-based natural and legal persons are not at risk of being subjected to the laws of other States where extraterritorial application of laws does not respect the limits imposed by international law.’\(^\text{221}\)

### 3.2 Specifically on Non-pecuniary Damages

All the participating countries recognize awarding of the non-pecuniary damages at least to certain extent, although they are mostly rather restricted. This restrictive stance derives mostly from the difficulties posed by assessing the amount of these damages, as they are in principle not monetized.\(^\text{222}\) The types of the non-pecuniary losses vary across different jurisdictions and are briefly sketched in the following paragraphs. States govern them either through general clauses or expressly govern recoverable non-pecuniary losses by the law.


\(^{216}\) ibid.


\(^{220}\) ibid.

\(^{221}\) ibid.

In Portugal, non-pecuniary damage is regulated in Art. 496 of the Civil Code. The provision in this Article states: ‘For the determination of compensation, regard must be had to non-pecuniary damage which, due to its seriousness, deserves protection of the law.’\(^{223}\) Thus, as stressed in the Portuguese report, it is for the judiciary to decide what ‘deserves the protection of the law’.

Generally, it is more common for the legislator (or also judiciary in common law jurisdictions) to expressly set out non-pecuniary losses that are to be compensated, rather than enacting a general clause. In England, non-pecuniary damages are awarded for pain and suffering and loss of amenity (bodily function), misuse of private information\(^{224}\) and defamation.\(^{225}\) In Germany, § 253 I BGB provides for compensation for non-pecuniary damages only when the law expressly provides for such a compensation.\(^{226}\) The most important cases in which non-pecuniary damages are awarded, are regulated in § 253 II BGB: If a certain elementary right (body, health, freedom or sexual self-determination) is infringed, the victim can claim non-pecuniary damages, when the violator is liable according to contract or tort law.\(^{227}\) Interesting experience can be observed in Austria, where the ABGB has regulated compensation of non-pecuniary damages in a blanket clause,\(^{228}\) however, case law of the Austrian Supreme Court has nevertheless taken a more restrictive position, inspired by the German BGB.\(^{229}\) It has argued that compensation of non-pecuniary damage is only possible in cases expressly regulated by the legislation.\(^{230}\) In Slovenia, whose law of obligations is based on the Austrian ABGB, has the new Slovenian Code of Obligations since 2002, which provides that just monetary compensation shall pertain to the injured party for physical distress suffered, for mental distress suffered owing to a reduction in life activities, disfigurement, the defamation of good name or reputation, the truncation of freedom or a personal right, or the death of a close associate, and for fear.\(^{231}\) In Poland, where Polish law recognizes also the responsibility for nominal damages, material harm can be compensated and, moreover, also moral suffering and pain.\(^{232}\)

In Brazil, the protection of the basic and human rights played a fundamental part in the process of recognizing the right to non-patrimonial damages, since it was the acclaim of human dignity as the greatest value in the Brazilian legal system which allowed the understanding that the non-patrimonial interests should enjoy a privileged protection in relation to the patrimonial interests, including by means of compensation in case of damage.\(^{233}\)

\(^{223}\) Portuguese report 36.
\(^{224}\) Mosley v News Group Newspapers Ltd [2008] EWHC 1777 (QB); [2008] EMLR 20: £60,000.
\(^{225}\) English report 6.
\(^{226}\) German report 11.
\(^{227}\) ibid.
\(^{228}\) According to sections 1323 and 1324 ABGB, the tortfeasor must compensate non-pecuniary damage in the case of gross fault insofar as no special rules expand the compensation of non-pecuniary damage. In: Austrian report 13.
\(^{229}\) Austrian report 13.
\(^{231}\) Article 179(1) of the Slovenian Code of Obligations.
\(^{232}\) Polish report 17.
\(^{233}\) Brazilian report 11.
As stated in the *Czech report*, the Civil Code that was in force until 2014 stated that immaterial harm can only be compensated in connection to the breach of personality rights. However, *new Civil Code* lays down a general right to claim the compensation for immaterial loss without a requirement of interference with personality rights. In *Hungary*, the jurisprudence is awarding non-pecuniary damages on the basis of the general rules of damages. *New Civil Code*, in force since March 2014, introduces a new legal institution (injury award) to avoid conceptual problems. Injury award is also possible if there is no financially traceable harm, but the violation of the personality right is found.

An interesting point for the discussion is whether non-pecuniary damage sustained by third parties linked to the injured party by emotional ties can be repaired. In some countries, for example in *Greece*, this is not the case as the aforementioned persons are not considered to be directly injured bearers of the right injured by the tort and also because they do not fall under the protective scope of the legislation. In *Croatia*, in the event of death, or especially severe disability, the right to just pecuniary compensation belongs to the spouse or an extra-marital spouse, children and parents as the immediate family members. The same right belongs to brothers and sisters, grandparents and grandchildren if a more permanent co-habiting union existed between them and the deceased or injured person.

In *Portugal*, concerning non-pecuniary damages in case of death, three losses can be compensated: (1) ‘Loss of life’ of the victim; (2) Damage suffered by the victim before dying; and (3) Damage suffered by the relatives. However, only close relatives may receive compensation for their own non-pecuniary damage. In principle, as the *Portuguese report* submits, the ‘moral’ damage of those relatives should be proved, and courts tend to even presume that the surviving spouse and the children do suffer for the loss of the deceased.

The Portuguese Constitutional Court dealt with the right of an unmarried partner to obtain non-pecuniary damages for wrongful death in Decision no. 275/2002. In this case, A was condemned as author of a murder of X. A was held liable for the payment of compensation to the children and the partner of the victim. However, the partner had no right to receive compensation for her own pain and suffering caused by the death of her partner. The Civil Code only protected the spouses, descendants and other relatives. The Constitutional Court decided that this norm is unconstitutional.

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234 Czech report 17.
235 Hungarian report 12.
236 Hungarian report 13.
237 Hungarian report 13.
238 In Greece by Arts. 928 and 929 GCC, which recognize exceptionally in case of manslaughter or harm of the body or to the health of a person a claim for damages in regard to a third party who had by the law the right to claim by the victim alimony or a service and was deprived of it.
239 Croatian report 16.
240 Art. 1101.
241 This is a special damage compensated in Portuguese Law. The ground for this norm is the following: if all personality rights deserve protection and deserve compensation (for non-pecuniary damage), the same shall apply for the most important of all the personality rights: the right to life. See Portuguese report 39.
242 Portuguese report 39.
244 Portuguese report 40.
since it violates Art. 36 (1) (family) of the Portuguese Constitution and the principle of proportionality (Art. 18), as it discriminate a person who lives in a stable and durable partnership, in similar conditions to a matrimonial relationship. It considered Art. 496 of the Civil Code unconstitutional, as Art. 36 of the Constitution protects all kinds of families. In 2010, Art. 496 of the Act on de facto union (unmarried couples) was amended, with the new paragraph which reads as follows: ‘If the victim was living in a de facto union, the right to compensation provided in the previous paragraph shall be available in the first place to the person that lived with the victim together with the children and other descendants.’

In Greece, some Greek academics have supported the view that, in the event of a culpable death of an embryo, both the woman carrying it, as well as the man whose genetic material produced the embryo hold the right to claim monetary restitution for non-pecuniary damage, on the grounds that the embryo contains also his genetic material and thus constitutes an expression of his personality. Despite this progressive ideas, Greek courts and in particular the Supreme Court have proved to be very conservative when it comes to defining the persons that are entitles to receive damages for non-pecuniary loss in the event of death. Similarly, the fundamental rights arguments have so far not convinced the Dutch Supreme Court to enable relatives to claim the so-called emotional distress damages (affectieschade) caused by grief over the death or injury of a close relative.

The influence of the basic rights on the question of compensable damages has been demonstrated in Germany through the wrongful birth case law. The Second Senate of the Bundesverfassungsgericht held that human dignity (Art. 1 I GG) forbids regarding the existence of a child as source of damage.

Moreover, The Bundesverfassungsgericht has also approved a limitation of the principle of total reparation (comp. Part III a)) by means of § 242 BGB (good faith) with regard to the basic rights of minors which otherwise would face long-term and unbearable liabilities in tort.

In Poland, the influence of human rights and basic rights is visible in the changes concerning responsibility for harm caused by public authority, which was constitutionalised. Moreover, under the influence of the ECtHR decision, a special legal regime of compensations for court sluggishness was introduced. However, as it is emphasised in the Polish report, the consequential multitude of legislative activities show that the influence of human rights and basic right does not always result in solely positive effects.

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245 Portuguese report 40-41.
246 Portuguese report 42.
247 See K. Fountedaki, op. cit; in: Greek report 61.
248 Greek report 62.
249 Dutch report 11.
250 BVerfGE 88, 203, 296.
252 Polish report 17.
253 Kudla versus Poland.
254 Act of 17.6. 2004 on the complaint about the violation of the party’s right to have the case heard without undue delay; see Polish report 18.
255 Polish report 19.
Some participating states’ legislations are moving towards adopting ‘reduction clause’, a special clause of reduction of the duty to compensate, for example in the Austrian Reform Draft in section 1318. Section 1318 of the Austrian Reform Draft clearly states that the victim is usually due full compensation and only by way of exception, under consideration of various criteria, is a reduction possible. As noted in Austrian report, this reduction finds its general justification in the constitutional principle of proportionality. This is already the case in some countries, as in Art. 944 of the Brazilian Civil Code, which foresees that, should there be excessive disproportion between the gravity of guilt and the damage, the judge may reduce the compensation based on equity. Thus, the judge is allowed to fixate the amount of the indemnification based on equity. Similar provision is found in Portugal, enabling the possibility for a ad hoc reduction of compensation. Portuguese legislator introduced in 1967 the limitation of compensation in cases of mere fault: “Where liability is based on mere fault, compensation may be fixed equitably to an amount lower than that corresponding to the damage caused, provided that the degree of fault of the wrongdoer, the financial situation of the wrongdoer and of the injured party as well as the other circumstances of the case so justify.”

3.3 Specifically on the Influence in EU

3.3.1 HARMONIZATION

In EU law some regulations and directives partly regulate also the aspects of tort law, as well as specifically regulate damages for non-material harm. One of the most significant instruments is the Product Liability Directive. Further examples of partial harmonization of tort law are the Directive on Environmental Damage and the harmonization of civil liability for the damages caused by road-traffic accidents in the Directive on Motor Insurance.

3.3.2 THE CJEU CASE LAW

The important influence of the CJEU’s case law in the field of tort law can be seen in regulation of damages for non-material harm. Damages for non-material harm are in principle not regulated in regulations and directives. Only the notion ‘damages’ is mentioned, which the CJEU interprets broadly, to encompass also damages for non-

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256 Austrian report 16.
257 H. Koziol, Basic Questions of Tort Law 303 et seq. in: Austrian report 16.
258 Brazilian report 11.
259 Brazilian report 11.
260 Portuguese report 36.
261 Art. 494 of the Portuguese Civil Code.
material harm. The CJEU has opted for broad interpretation in cases *Leitner* and *Rodriguez*, discussed above in the subchapter on contract law.

The *Product Liability Directive* and the notion ‘damage’ have been interpreted in the case *Veedfald*265 (known also as the ‘Kidney Case’), concerning the local community’s refusal to meet its claim for damages following an unsuccessful kidney transplant operation performed in a hospital belonging to this local community. One of the questions referred to the CJEU asked how the expressions ‘damage caused by death or by personal injuries’ and ‘damage to, or destruction of, any item of property other than the defective product itself’ in Article 9 of the *Product Liability Directive* should be defined. The CJEU held that damage must cover both damage resulting from death or from personal injuries and damage to, or destruction of, an item of property.266 It further held that ‘although it is left to national legislatures to determine the precise content of those two heads of damage, nevertheless, save for non-material damage whose reparation is governed solely by national law, full and proper compensation for persons injured by a defective product must be available in the case of those two heads of damage’.267

The CJEU has developed the most extensive case law on civil liability for breach of EU competition rules. Article 101 TFEU prohibits anticompetitive agreements. It is a settled case law that any individual has a right to damages for loss sustained as a result of the breach of this provision ‘where there is a causal relationship between that harm and an agreement or practice prohibited under Article [101 TFEU]’.268

The CJEU has further clarified the scope of the potential plaintiffs in the decision *Otis*269, where it interpreted the notion ‘any individual’ to encompass also the EU itself. The referring court asked whether Article 47 of the Charter, governing the right to an effective remedy and fair trial, precludes the Commission from bringing an action, on behalf of the EU, before a national court for damages in respect of loss sustained by the EU as a result of the breach of this provision ‘where there is a causal relationship between that harm and an agreement or practice prohibited under Article [101 TFEU]’.270 The referring court had doubts as to whether, in such an action, the right to a fair hearing, laid down in Article 47 of the *Charter* and Article 6 of the *ECHR*, is infringed.271 The CJEU held that the *Charter* does not prevent the Commission from bringing an action, on behalf of the EU, before a national court for compensation for loss caused to the EU by an agreement or practice contrary to EU law.

The CJEU interpreted who can be potential plaintiff also in the recent case *Kone*272, in which the damage to the victim was caused by the undertaking non-party to the cartel, who inflicted higher prices as a result of the cartel and their artificial high prices (‘umbrella pricing’). The court held that where a cartel has the effect of leading competitors to raise their prices, the members of the cartel may be held liable for the

266 ibid., para. 26.
267 ibid., para. 27.
269 Case C-199/11, *Otis*.
270 ibid., para. 37.
271 ibid., para. 38.
272 Case C-557/12, *Kone*. 

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loss caused as a result, and the victim may claim compensation even in the absence of any contractual link with the members of the cartel.

4. THE INFLUENCE OF FUNDAMENTAL RIGHTS IN PROPERTY LAW

4.1 The Influence in Property Law

4.1.1. INTRODUCTORY ON PROPERTY LAW

Property is difficult to define, however, in legal terms it is generally understood as rights among people that concern things. It is concerned with the ownership of the objects, and one of its essential elements is the right to exclude others.273 The right to property is elevated to the constitutional level in the participating countries. Provisions on property law are found in special property laws or codes (e.g. Slovenian Law of Property Code), whereas in some countries it is regulated in civil codes (e.g. in German BGB and Austrian ABGB). The central right governed by the property law is the right to property, which is recognised as a human right by international and regional instruments. It is proclaimed in the Article 17 of the Universal Declaration of Human Rights, providing that everyone has the right to own property alone as well as in association with others.274 Further, it provides that no one shall be arbitrarily deprived of his property. Important instruments at international level recognising the right to property are also the International Convention on the Elimination of All Forms of Racial Discrimination (Article 5) and the Convention on the Elimination of All Forms of Discrimination against Women (Article 16). At the regional level, it is recognized by the Article 1 of the First Protocol to the ECHR providing ‘right to peaceful enjoyment of possessions’,275 and it is also enshrined in Article 17 of the EU Charter. It is governed also by Article 21 of the American Convention on Human Rights and Article 14 of the African Charter on Human and Peoples’ Rights.

The most general principle of property law is a limitation or the closed number of property rights (numerus clausus).276 Other general principles across jurisdictions are the principle of publicity, the principle of speciality, causation, and the principle of protection of legitimate expectations of third parties based on the entries in the public registry (bona fide protection).277 In some countries, also the principle of the priority, the principle superficies solo cedit, and the principle of causal tradition are regarded as general principles of the property law.278 Likewise, mandatory nature of absolute property rights in relation to third parties is also an important principle found in most of the participating countries’ legislations.279 Proprietary right or the rights in rem are generally considered to be the so-called absolute rights.280 As noted in the Polish report, private ownership is regarded as one of the grounds of the social market

275 http://www.hri.org/docs/ECHR50.html#P1.
276 Austrian report 16; Czech report 18; Hungarian report 14; Croatian report 20; Brazilian report 13.
277 Austrian report 16, Czech report 18; German report 15; Hungarian report 14; Croatian report 20.
278 See Croatian report 20.
279 Czech report 18; German report 14.
280 Czech report 19.
economy and the economic system of the Republic of Poland.\textsuperscript{281} As the Brazilian report emphasizes, the most important principle responsible for the overview of the traditional principles pertaining to property rights through the prism of fundamental rights is the principle of the social function of the property.\textsuperscript{282}

4.1.2 Property Rights Limitations

Despite the absolute nature of the property right, even this right has its limits. The external limits are usually grounded on the limitation of proprietary right anticipated by the Constitutions. In Poland, the Constitution specifies the conditions for justified limitations, stating in the third paragraph of Article 64: “The right to property may only be limited by means of a statute and only to the extent that it does not violate the core of such right.”\textsuperscript{283} In Germany, according to § 903 BGB, laws and rights of others limit the right of the owner to deal with his property at his discretion and to exclude others from any interference.\textsuperscript{284} In public law, many rules limit the property right aiming at the protection of human and basic rights. For example, there are many provisions in building and emission control laws that protect the neighbours’ property right as well as their basic right to health.\textsuperscript{285} In private law several blanket clauses (§§ 138, 242, 226, 826, 904 ff. BGB) allow an interpretation with respect to human and basic rights and can limit the property right.\textsuperscript{286} The property right may also come into conflict with someone else’s intellectual property right (e.g. the rights of an architect).\textsuperscript{287}

In the participating countries, the expropriation is regulated already on the constitutional level, providing that it is justifiable only for reasons of public interest, it has to be determined by the law and needs to be compensated.\textsuperscript{288} This is usually done in cases where buildings and highways are being built.\textsuperscript{289} As provided by the First Protocol to the ECHR, no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The second paragraph of Article 1 of this Protocol further states that the preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

In Norwegian report it was emphasised that the question has arisen as to the extent to which an owner must accept control of the use of his property without this being

\textsuperscript{281} According to Article 20 of the Polish Constitution: “A social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland.”, in: Polish report 2.

\textsuperscript{282} Brazilian report 13.

\textsuperscript{283} See Polish report 2.

\textsuperscript{284} German report 15.

\textsuperscript{285} Comp. MünchenerKommentar-BGB/Säcker, 6. ed. 2013, § 903 mn. 34.

\textsuperscript{286} MünchenerKommentar-BGB/Säcker, 6. ed. 2013, § 903 mn. 33.

\textsuperscript{287} BGH NJW 1974, 1381; 2008, 3784; Wandtke/Bullinger, Urheberrecht, 3. ed. 2009, § 44 mn. 7.

\textsuperscript{288} Argentinean Constitution provides in Article 17: “.... L’expropriation pour cause d’utilité publique doit être qualifiée par loi et prélablement indemnisée ... La confiscation de biens est effacée pour toujours du code pénal argentin ... ”; Norwegian report, p. 5; Polish Constitution in the second paragraph of Article 21: “Expropriation may be allowed solely for public purposes and for just compensation.”; Art. 6 of the Charte québécoise, in: Quebecian report, p. 33; Croatian report 21;

\textsuperscript{289} Czech report 19.
regarded as an expropriation, entitling the owner to compensation. The Norwegian Supreme Court held that the control of the use of property in the public interest did not, as a rule, entitle the owner to compensation. Moreover, as noted in the Croatian report, there are general statutory limitations to the right to property that are valid and effective in relation to every owner of individual things, based on the constitutional provision stating that general interests and other people’s interests that are not in contradiction with the owner’s right must be taken into consideration. This is the reflection of the prohibition of misusing the right to property or ownership.

As derived from the Dutch report, an example of an indirect horizontal effect of the provision in the First Protocol to the ECHR is the judgment of the Amsterdam Court of Appeal in a dispute between a woman who had suffered severe injuries as a result of the accident at the railway station and the Dutch railway company N.S. Reizigers B.V. While the company’s liability in this case was established, the company refused to award full compensation to the victim by invoking the provision limiting the liability of the carrier to Dfl. 300,000 (€ 145,000), which was many times lower than the amount of pecuniary and non-pecuniary damage incurred by the victim. The Court, applying the test used by the ECtHR, concluded that while the limitation of liability may serve a legitimate purpose, i.e. controllability of the entrepreneurial risk and their insurability, the general interest in enforcing this limitation did not outweigh the individual rights of the victim in the particular circumstances of the given case. Although Article 8:110 (1) of the Dutch Civil Code as such was not contrary to Article 1 of the First Protocol, according to the Court, it would be contrary to good faith interpreted in the light of this fundamental right if the company could invoke the limitation of liability against the victim in the case at hand.

As seen in the Quebeceois report, there are many decisions in which courts have concluded that it was justified to restrict the rights of the owner of a property to ensure respect for the right to equality. In the case Desroches, the owner of an apartment building argued that his right to the free enjoyment of property allowed him to adopt a policy limiting the number of occupants of the apartments to two persons. In finding that this policy had a discriminatory effect against people with children, the Court of Appeal of Quebec took into consideration the fact that the guarantee provided by Article 6 of the Charter contains an intrinsic limit. This intrinsic limit brought it to the conclusion that the right to equality took precedence over the rights of the owner.

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290 Norwegian report 5.
291 Rt. 1918, 403. The decision was held in a 1918 judgment concerning public regulation of the use of waterfalls for hydro-electric production. This was confirmed in a plenary judgment in 1970, concerning area planning which rendered a piece of land practically inexploitable for the owner. Norwegian report 5.
292 Croatian report 21.
293 Hof Amsterdam 12 augustus 2004, NJF 2004, 543 (NS Reizigers v. Mevrouw B); Dutch report 12.
294 Dutch report 12.
295 Quebec report 35.
296 Desroches c. Commission des droits de la personne, in Quebeceois report 35.
297 Quebeceois report 35. According to the Court, the rights protected by the Charter - including the right to equality - are part of the ‘limitations prescribed by law’ which, as permitted by Article 6, restrict the scope of property rights.
The Canadian Supreme Court has held that the right to property should be limited also to ensure the respect of the freedom of religion.298 In general, the right to the respect of the private life often limits it. It was decided that the right to property does not allow a landlord to infringe the right to privacy of the tenant by entering his home without his consent, by visiting without warning or an unnecessarily repeated visiting or by prohibiting smoking in its housing.299 Interesting judgments are held also on the issue of installing video surveillance cameras at the entrance to the accommodation with the reason of preventing vandalism.300

As far as privacy is concerned, the question of balancing it with the right to property is apparent also in cases when the employer provides premises and equipment used for the work of the employees. The courts in Quebec held that the right to privacy of the employee prevents filming the employee, recording his personal telephone conversations, searching his locker or conducting an investigation on the contents of the computer, which is owned by the employer.301

Dutch report cites cases in relation to property stricto sensu in which the freedom to receive information as guaranteed by Article 10 of the ECHR was granted indirect horizontal effect.302 The cases involved tenancy contracts prohibiting the installation of a satellite dish on a rented building without permission of a landlord or a letting agency. Having recognized the essential importance of the freedom to receive information in a free and democratic society, the courts had to balance the interest of the tenants protected thereby with the contractually protected interest of the landlords within the framework of private law. As noted by the Dutch report, whose interest ultimately prevails in this balancing exercise depends on the particular circumstances of each case.303 As submitted in the German report, the freedom to receive or impart information comes into play especially in tenancy law. The property right of the house owner generally has to give way to the tenant’s interest to install a television satellite onto the house.304

Interesting example from Germany shows that the right to protection of personal data in certain cases limits the owner’s right to sell his property containing personal information of others. For example, without the consent of the patients, a medical doctor may not sell his office containing the patients’ files.305

The jurisprudence of the ECtHR is of extreme importance for some European countries. For instance, it has delivered two very important judgments for Poland, as well as for the development of the system of the ECHR in Europe. The use of the pilot judgment procedure in Broniowski v. Poland,306 connected with the historical

298 Quebecois report 35.
299 ibid. 36.
300 ibid.
301 ibid.
303 Dutch report 13.
304 BVerfG NJW 1992, 493; German report 16.
305 BGH NJW 1992, 737, German report 16. Accordingly, lawyers or tax accountants may not sell their office with clients’ files, if the clients do not agree with the transfer.
transformation concerned the compensation for the property left beyond the Bug river, and in *Hutten-Czapska v. Poland*,307 dealing with rights of landlords of private houses *vis a vis* tenants of flats in those houses, resulted in adoption of schemes resolving general problems for thousands of people being in a similar position to the applicant.308

The special issue concerning property rights is private discrimination in housing, mentioned in the US report. The US Supreme Court delivered ground-breaking decision in the case *Shelley v. Kraemer* in 1948, in which it held that it was unconstitutional for courts to grant the relief to enforce a racially restrictive covenant.309 As stated in the US report, it ended the practice of homeowners maintaining the ethnic purity of their neighbourhood through provisions in their deeds that excluded African Americans and other minorities from purchasing or occupying homes. In 1968, Congress passed the Fair Housing Act as Title VIII of the Civil Rights Act.310 The Fair Housing Act initially prohibited discrimination in the sale or rental of real estate and the provision of related services because of race, colour, religion or national origin, and today it comprises also gender as a protected class, families with children and the disabled.311 Remedies include injunctive relief, damages, punitive damages and attorneys’ fees.

4.2 The Influence in the Intellectual Property Law

Intellectual property (IP) refers to creations of the mind, such as inventions, literary and artistic works, designs, and symbols, names and images used in commerce.312 It is divided into two categories, industrial property and copyright.313 Protection of IP is covered by many international conventions, most of which are implemented by the World Intellectual Property Organisation (WIPO) and the World Trade Organisation (WTO). The importance of IP was first recognized in the *Paris Convention for the Protection of Industrial Property* (1883) and the *Berne Convention for the Protection of Literary and Artistic Works* (1886). The countries usually govern it in special laws. It is protected as a fundamental right also by the EU Charter. IP is especially important in the constant development of internet in relation to new means of abuses, e.g. illegal downloading of the protected works. There were attempts to regulate this area at the global level with the Anti-Counterfeiting Trade Agreement (ACTA), with the purpose of establishing international standards for intellectual property rights enforcement, however, this attempt was unsuccessful, largely due to widespread protests across Europe which led to the European Parliament’s decline of consent.

Decisions 2005-IX. *Broniowski v. Poland* was the first pilot judgment issued by the ECHR. See Polish report 4.


308 Polish report 4-5.


311 US report 15.


313 ibid.
In the IP law, the territorial principles is very important, as well as the principle *numerus clausus*.\(^{314}\) *Portuguese report* also emphasises the principle of temporality, as the protection of the intellectual property is not perpetual.\(^{315}\) As noted in the *German report*, pursuant to the principle of unity, the intellectual property right is a unitary right, which serves the owner’s (material) interest of economic utilization as well as his (non-material) personal interests.\(^{316}\) The main general principle of the IP law is the absolute legal protection of intangible assets. Inside the IP law, the general principles of copyright are general principles of ownership, the principle of non-formality, the principle of national treatment, the principle of material publicity, the principle of formal reciprocity.\(^{317}\) The general principles of industrial property rights are the territorial principle of protection of industrial property rights, priority, and the principle of formality.\(^{318}\)

In *Hungary*, intellectual creations are not considered items of property under Hungarian law, but it allows economic rights under intellectual property law to be transferred and inherited.\(^{319}\) As noted in the *Hungarian report*, this brings such rights close to the status of property without actually making them property.\(^{320}\) Similarly, IP law has not for the most part been treated as property law in the civil law meaning of that term in *Norway*.\(^{321}\) The question of constitutional protection of intellectual property rights as property has never been put to the test.\(^{322}\) In some countries, like in *Portugal*, intellectual property is referred to in the legislation as a special kind of property,\(^{323}\) which includes authors’ rights and related rights (copyright) and industrial property rights. In Portugal, intellectual property is also considered a kind of property for purposes of the constitutional protection of the right of private property (Article 62 of the Portuguese Republic\(^ {324}\)). As derived from the *Croatian report*, even though the intellectual property rights are not part of property law in general in Croatia, some of the acts dealing with them specifically deal with ownership.\(^{325}\)

When the right to property, also IP, and other rights collide courts have to carry out balancing. Especially in IP law the right to *freedom of expression* (Art 10 *ECHR*) constitutes a human right, which allows deviation from general principles.\(^{326}\) The balancing tasks can be illustrated by the wording of the decision of the *Czech Supreme Court*, in which it held: “each citizen has a right to freedom of expression and presentation of his political ideas, but this right cannot cross the line when it turns to an attack against property or eventually it cannot continue further in such an aggressive way (impose threat on human health or life).”\(^ {327}\) In *Germany*, the freedom

\(^{314}\) Austrian report 16; Portuguese report 3.
\(^{315}\) Portuguese report 3.
\(^{316}\) German report 15.
\(^{317}\) Czech report 19.
\(^{318}\) Czech report 19.
\(^{319}\) Hungarian report 15.
\(^{320}\) Hungarian report 15.
\(^{321}\) Norwegian report 6.
\(^{323}\) Article 1303 of the Portuguese Civil Code (*Código Civil Português*), see Portugal IP report, p. 1.
\(^{324}\) Tribunal Constitucional, acórdão n."No 491/02 (Proc. No 310/99).
\(^{325}\) For example, the Copyright and Related Rights Act expressly states that copyright is independent of the ownership of the copyrighted work (Art. 77); see Croatian report 20.
\(^{326}\) Austrian report 17.
\(^{327}\) Czech report 20.
of expression may for example allow a party to project a parole against genetic engineering on the wall of a dairy factory. An infringement of the intellectual property right can under certain circumstances be justified by the freedom of expression, if there is an intellectual battle of opinions that is of great importance to the public.

The right to access to information can especially limit the intellectual property right. It can be justified that the copyright owner must tolerate copies without his consent and even without payment.

4.3 Specifically on the Influence in the EU

4.3.1 HARMONIZATION

The right to property is governed by the Charter in Article 17. Article 17(1) provides: “Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.” Article 17(2) of the Charter provides that IP shall be protected. The property law is the least uniform part of private law in Europe. In contrast, the field of the IP is harmonized to a significant extent.

As the Commission stresses, a uniform system of protection of IP rights, ranging from industrial property to copyright and related rights, constitutes the foundation for creativeness and innovation within the EU. The EU has two important bodies to carry out its mission: the Office for Harmonisation in the Internal Market (OHIM), which is responsible for the registration of Community trade marks and designs, and the European Patent Office (EPO). In the field of IP rights several harmonizing instruments can be found. For example, the Regulation on the Community Trade Mark, the Directive on Trade Marks, the Copyright in the Information Society Directive and the Directive on the Enforcement of IP Rights. Examples of other

328 OLG Dresden NJW 2005, 1871, German report 16.
329 OLG Stuttgart NJW-RR 2004, 619, 621 ff, German report 16. In a recent decision, the Bundesverfassungsgericht held that the freedom of assembly could justify assemblies on private ground.
330 German report 16.
333 ibid.
directives in this field are Directive on the Legal Protection of Designs,\textsuperscript{338} Directive on Biotechnological Inventions,\textsuperscript{339} and Directive on Topographies of Semiconductor Products.\textsuperscript{340}

In the field of patent law in 2012 Member States and the European Parliament agreed on the ‘patent package’ – a legislative initiative consisting of two Regulations and an international Agreement, laying grounds for the creation of unitary patent protection in the EU.\textsuperscript{341} The patent package implements enhanced cooperation between 25 Member States (all Member States except Italy and Spain), creating a European patent with unitary effect – a legal title ensuring uniform protection for an invention across 25 Member States on a one-stop shop basis, providing huge cost advantages and reducing administrative burdens.\textsuperscript{342} Moreover, also the Uniform Patent Court is to be established.

4.3.2. THE CJEU CASE LAW

As noted in the national reports of the Members States of the EU, the jurisprudence of the CJEU is not particularly relevant as regards the influence of fundamental rights on the right to property, since the proprietary right has not been harmonized at all in the EU.\textsuperscript{343} The CJEU has dealt with the right to property enshrined in Article 17 of the Charter in the case \textit{Sky Österreich},\textsuperscript{344} concerning the right of broadcasters to use short extracts from the transmitting broadcaster’s signal of events of high interest to the public for the purpose of short news reports, interpreting the Audiovisual Media Services Directive\textsuperscript{345}. In this case the CJEU balanced several rights governed by the Charter. It has held that the exclusive rights held by a broadcaster on a contractual basis could not confer an ‘established legal position’ which would enjoy the protection of the right to property under Article 17 of the Charter.\textsuperscript{346}

In contrast to the right to property, there is a substantial influence of the CJEU case law in the IP law. As noted also in the Portuguese report, the Charter codifies the jurisprudence of the CJEU, where it has considered that Article 1 of the First Protocol to the ECHR (which added private property to the rights enshrined in the ECHR) also applies to intellectual property (C-347/03, \textit{Tocai}).

However, the CJEU has emphasized that the principle of the protection of intellectual property as a fundamental right does not mean it is an absolute property but rather that it must be viewed in relation to its social function, \textit{i.e.} the CJEU stressed the social


\textsuperscript{342} ibid.

\textsuperscript{343} Czech report 20; Hungarian report 15.

\textsuperscript{344} Case C-283/11, Sky Österreich, ECLI:EU:C:2013:28.

\textsuperscript{345} Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, OJ L 95/1, 15.4.2010.

\textsuperscript{346} Case C-283/11, Sky Österreich, para. 38.
function of the kind of property. This approach has been consistently held in other judgments concerning the demand to strike a fair balance between intellectual property and other fundamental rights, notably personal data and freedom of information - e.g. judgments of 29 January 2008 (C-275/06, Promusicae), and of 24 November 2011 (C-70/10, Scarlet).

Recently, the CJEU has delivered the remarkable decision in the case UPC Telekabel Wien, interpreting the Copyright in the Information Society Directive, in which it held that an internet service provider may be ordered to block its customers’ access to a copyright-infringing website. The fundamental rights that needed to be balanced against each other were the intellectual property rights against the freedom to conduct a business and with the freedom of information of internet users.

5. THE INFLUENCE OF FUNDAMENTAL RIGHTS IN FAMILY LAW AND INHERITANCE LAW

5.1 General Principles of Family Law

The family law aims to regulate people’s intimate lives and governs family-related matters. In principle, this includes marriage, partnerships and civil unions, divorce, matters related to birth, including adoption and paternity issues.

General principles of family law that can be detected in the legislation of all the participating states is the principle of equality between a woman and a man and their mutual respect and support of all family members and the maxim of the welfare of the child and the protection of the child’s rights. Other principles that underpin the family law in certain jurisdictions are for instance in Croatia the responsibility of both parents for the child’s rearing and education and the principle of appropriate protection of parentless children and adults with mental difficulties. The important principle in several countries is also the principle of equality between legitimate and illegitimate children. Hungarian report emphasizes the freedom of marriage, the principle of monogamy, the general insolubility of marriage.

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347 Case C-347/03, Tocai, para. 119, ECLI:EU:C:2005:285.
349 See for example Austrian report 18; Croatian report 24; Czech report 21; Norwegian report 7; Greek report 77.
350 Croatian report 24.
351 Czech report 21; German report 18; Italian report 2; Portuguese report (part IV) 1; English report 11; Brazilian report 15; Article 4(2) of the Slovenian Inheritance Act. As Hungarian report notes, the duty of protecting the institution of marriage and family may not lead to direct or indirect discrimination against children on the basis of whether they are brought up by their parents in a marriage or in another form of cohabitation (Hungarian report 18). In Norway they have had equal rights since 1915, see Norwegian report 7. In Greece, the major reform that has been introduced by law 1329/1983 was the full equation of children born out of wedlock with those born in wedlock, a change that was combined with a symbolic change in the legal terminology which up until then stigmatized those children as bastards and illegitimate, see Greek report 76. In Japan the discrimination between children of married and unmarried couples was banned with the Supreme Court Judgment in 2013, see Japanese report 17. In England, The inability of illegitimate children to inherit property was removed by the Family Law Reform Act 1969 (see now the Family Law Reform Act 1987), English report 11.
352 BVerfGE 29, 166, 176; 76, 1, 42; BVerfGE 31, 58, 69; BVerfGE 10, 59, 66; German report 17-18.
emphasizes the protection of family relations, the principle of fairness, and the principle of protecting the weaker party.\textsuperscript{353}

Under the constitutional provisions on the protection of families, the family as a social institution of fundamental significance enjoys the state’s special protection in all areas of life in certain participating countries.\textsuperscript{354} Consequently, the state is obliged to protect and support this unity\textsuperscript{355} and is barred from any disadvantaging, as held by \textit{German Constitutional Court}.\textsuperscript{356} Unfortunately, this is not a universal practice, as for instance in \textit{Japan} there is no constitutional provision granting right to family life.\textsuperscript{357}

Definitions of the notion of ‘family’ differ from one jurisdiction to another. In recent years, it has been the source of the debates in several participating countries. For instance, in \textit{Hungary}, the Constitutional Court adopted a comprehensive decision in 2012 ruling that the rule that defines ‘family’ as a set of relationships creating an emotional and economic community of natural persons based on a marriage between a man and a woman, lineal kinship, or guardianship accepting the child into the family is unconstitutional.\textsuperscript{358} The Constitutional Court found the definition of ‘family’ in the new act on family law too narrow, depriving people of rights who have been living in a permanent emotion-based and economic community without entering into a marriage, while the legislator may not decrease the existing level of protection granted to consensual partnership forms.\textsuperscript{359} The \textit{Slovenian Marriage and Family Relations Act} of 1976 defines family as a community of parents and children, which enjoys special protection for the benefit of the child.\textsuperscript{360}

Only few decades ago, the general principle of equality between family members has not appeared as obvious as it deems to be today. In \textit{Greece}, it was not prior to the revision of family legislation in 1980s that old-fashioned institutions were abandoned and a new image for the Greek family was introduced, and produced a new model of marriage and family, having as its foundation the principles of equality and freedom among the family members.\textsuperscript{361} In this context, the child is recognized as a subject of rights, he/she has the right to the free choice of a surname, the threshold of adulthood and of full legal capacity is reduced from 21 to 18 years and he/she obtains the right to a paternity suit, a right that previously belonged exclusively to the father.\textsuperscript{362}

As provided in some of the national reports, marriage is a life union of a woman and a man regulated by law.\textsuperscript{363} The definitions of an extra-marital union differ across the jurisdictions. For instance, Croatian legislation defines it as a life union of an unmarried woman and an unmarried man lasting for at least three years, or less if the extra-marital partners have a common child.\textsuperscript{364} In \textit{Argentina}, the partnerships or

\begin{itemize}
    \item \textsuperscript{353} Hungarian report 17.
    \item \textsuperscript{354} Croatian report 25; German report 17; Greek report 77.
    \item \textsuperscript{355} BVerfGE 24, 119, 135.
    \item \textsuperscript{356} BVerfGE 6, 55, 76, in German report 17.
    \item \textsuperscript{357} Japanese report 16.
    \item \textsuperscript{358} Decision 43/2012 (XII. 20.) CC, Hungarian report 18.
    \item \textsuperscript{359} Hungarian report 18.
    \item \textsuperscript{360} Article 2 of the Marriage and Family Relations Act.
    \item \textsuperscript{361} Greek report 76.
    \item \textsuperscript{362} Greek report 76.
    \item \textsuperscript{363} Art. 5 of Croatian Family Act.
    \item \textsuperscript{364} Art. 5 of Croatian Family Act, see Croatian report 24.
\end{itemize}
unions of the ‘second order’ are not recognised. In contrast, in some countries, extra-marital unions exist without any registration. Moreover, in some jurisdictions, for example in Austria, Croatia, Czech Republic, and Slovenia, there are three main forms of life unions regulated in the legislation: marriage, extra-marital unions and same-sex unions.

English report highlights that contracts prejudicial to family life are contrary to public policy and void in common law. This covers contracts imposing a total restraint on marriage and marriage brokerage contracts and agreements interfering with the sanctity of marriage, for example an agreement by a married person to marry someone else when his spouse dies. Pre-nuptial agreements may however be taken into account in divorce proceedings.

5.2 Treatment of the Married and Unmarried Couples

Treatment of the married and unmarried couples substantially differs across most of the participating jurisdictions. The issues raised encompass the maintenance of obligations between unmarried partners, the problem that in some countries the civil or family law do not use the concept of cohabitation, the question of adoption, the inheritance law discussed below, common housing, determination of a child’s surname and parental responsibility.

The differences in treatment of married and unmarried couples are seen as regards the maintenance. For example, in Austria, only spouses (section 94 ABGB) have a right to maintenance, while the legislation does not grant such a right to unmarried partners. Similarly, in Germany, the provisions for maintenance during marriage (§§ 1360 ff. BGB) and after divorce (§§ 1569 ff. BGB) do not apply to unmarried couples. Each partner’s property and gains in fortune generally stay untouched by the relation; unmarried couples may, however, contractually arrange their financial affairs.

In 2008, the German Bundesgerichtshof set a turnaround to this jurisdiction and found that unmarried partners – as married spouses – generally perform relying upon the continuance of their relationship. Thus, the same claims for compensation for the performed services or payments with regard to the relationship as for married spouses (§§ 313 BGB, 812 ff. BGB) apply, when the relationship has ended contrary to this reliance.

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365 Argentinean report 18.
366 Croatian report 24; Czech report 21.
368 Hermann v Charlesworth [1905] 2 KB 123.
369 Wilson v Carnley [1908] 1 KB 729.
372 Austrian report 18;
373 German report 18.
375 BGH NJW 2008, 3277.
376 German report 18.
Interesting gaps in the treatment of different unions are seen also in the tenancy law. The treatment of unmarried couples has been improved in this field in the recent years in Austria. The tenancy legislation there provides that after the death of their partners, spouses as well as domestic partners are granted the right to take over the contract of tenancy.\textsuperscript{377}

In English law, the matrimonial legislation makes detailed provision for married couples’ rights in relation to property and children, whereas issues relating to cohabitants’ property are decided according to the law of trusts. They have to be proven.\textsuperscript{378} The Child Support Acts however apply to married and unmarried couples and the Children Act 1989 provides for unmarried father to obtain parental responsibility and other orders for their children.\textsuperscript{379}

Special traditional form of ‘family’ existed in Japan until the end of the Second World War, ‘ie’, giving the monopoly to the chief of the family and comprising several blood-related generations.\textsuperscript{380} In such families, there were restrictions on marriages, as the future chief of the family was not allowed to marry. Thus, numerous couples lived as ‘quasy-married’ and the legislator adopted certain provisions for the protection of such communities, for instance concerning social security legislation.\textsuperscript{381}

5.3 Same-sex Unions

A same-sex union as a civil union is recognised in the number of participating countries. In Germany, it was introduced in 2001.\textsuperscript{382} In Norway, registration of same-sex partnerships was allowed from 1993 and same-sex marriage from 2008.\textsuperscript{383} In France, same-sex marriage was legally recognised with the Law of 17 May 2013.\textsuperscript{384} Croatian legislation defines it as a life union of two persons of the same sex who are not married, who are not in a heterosexual or another same-sex union, and if it lasts for at least three years and is based on the principles of equality of partners, their mutual respect and help, as well as on emotional ties between partners.\textsuperscript{385} In England, the Marriage (Same Sex Couples) Act 2013 provides that same sex couples can enter into a legal marriage, although there are some differences compared to the institution of the marriage of the heterosexual couples.\textsuperscript{386} In Slovenia, the same-sex couples were granted limited spectrum of rights with The Registration of a Same-Sex Civil Partnership Act, which is in force since 2006. The new Family Code, which was supposed to bring equal rights to same-sex partners and families, was rejected by public referendum in March 2012.\textsuperscript{387} In the US, many States provide for non-
discrimination on the basis of sexual orientation, and the family law field is quickly moving to accept same-sex marriage, which is so far accepted in an over a dozen States, either as a result of judicial decisions or legislation.\textsuperscript{388}

In the \textit{Hungarian} law, the definition of a ‘life partner’\textsuperscript{389} no longer refers to the partner’s sex pursuant to the Decision no. 14/1995 (III. 13.) CC.\textsuperscript{390} Any couple can apply for the registration of their life partnership, regardless of their sex and sexual orientation and of that this registration must have certain legal effects. This makes it simpler for the parties to prove that they live together, and in the case of non-same sex couples it establishes the presumption of paternity for their children.\textsuperscript{391} However, in Decision no. 154/2008 (XII. 17.) CC, the Constitutional Court made it clear that the institution of marriage receives enhanced protection under the Constitution, and therefore registered partnership cannot have an identical content to the legal consequences of marriage.\textsuperscript{392}

This is in contrast with the jurisprudence of the \textit{German Bundesverfassungsgericht}, which in several recent decisions found that the denial of privileges to the civil union of homosexual partners (\textit{Lebenspartnerschaft}) cannot be justified with a mere reference to the constitutional protection of marriage in Art. 6 I GG.\textsuperscript{393} Since both, marriage and civil union are entered into as a lasting relationship with mutual care and responsibility, any legal differentiation is only admissible under strict premises with respect to the equality clause in Art. 3 I GG.

However, there are countries that do not permit same-sex unions, either in the form of a marriage or a partnership, for instance \textit{Poland}.\textsuperscript{394} Despite the lack of institutionalization of the same sex unions in Poland, they still enjoy a limited legal protection, based on the jurisdiction of the Supreme Court, influenced by the ECTHR.\textsuperscript{395} This limited protection can be seen in the tenancy law, whereby a spouse or a close person who had been living with a deceased tenant has a right to continue the lease.\textsuperscript{396} The Supreme Court has ruled that ‘the person remaining in permanent relationship with the tenant – in the sense of the article 691 § 1 of the Civil Code – is the person bound to the tenant through emotional, physical and economic ties; also a person of the same sex’.\textsuperscript{397} In \textit{England}, in \textit{Mendoza v Ghaidan}\textsuperscript{398} the House of Lords held that in the light of s 3 HRA a same sex partner of a deceased tenant should be regarded as a person who was living with that tenant ‘as his or her wife or husband’ for the purposes of \textit{the Rent Act 1977} Schedule 1 para 2(2) and could therefore

\begin{footnotes}
\item[388] CA, CT, IA, MA, NJ, and NM by court decision; DE, HI, IL, MN, NH, NY, RI, and VT by state legislation; ME, MD, WA by popular vote. See the US report 14, 19.
\item[389] Stated in Section 685/A of Act IV of 1959 on the Civil Code.
\item[390] In the official ministerial commentary of Act XXIX on Registered Partnership and on the Amendment of Related Laws Required for Facilitating the Verification of the Existence of a Partnership. See Hungarian report 17.
\item[391] Hungarian report 17.
\item[392] Hungarian report 17.
\item[393] BVerfGE 124, 199; 126, 400, 420; BVerfG NJW 2013, 847; DStR 2013, 1228; German report 21.
\item[394] Polish report 25.
\item[395] Polish report 25.
\item[396] Initially the Supreme Court refused to protect homosexual partners of a deceased tenant. In 2010 the ETHR ruled that Polish courts thus violated human rights (the case \textit{Kozak versus Poland}). Polish report 25.
\item[397] Verdict of 28.12. 20012, III CZP 65/12, Polish report 25.
\item[398] [2004] UKHL 30.
\end{footnotes}
succeed to the tenancy. There is now a Civil Partnerships Act 2004 giving property rights almost identical to marriage for same sex relationships.

ECtHR has in its recent judgment Vallianatos and others versus Greece condemned Greece for banning same-sex civil unions. The case concerned the Law 3719/2008, introducing civil unions in Greek legislation as an alternative to the institution of marriage, however, reserved only for heterosexual couples that share stable relationships, explicitly excluding homosexuals from its scope. As the ECtHR pointed out in its previous jurisprudence, homosexual stable relationships are included in the scope of family life according to Art. 8 ECHR (Shalk and Kopf versus Austria, No 30141/04). As the Court has observed in the Vallianatos case, there is a perfect analogy between heterosexual and homosexual couples as far as their needs for mutual assistance, companionship and care are concerned, therefore deeming that their banning from the legislatively acknowledged civil unions was not necessary to a democratic society. As noted in the Greek report, the ECtHR has underlined that only Lithuania and Greece have reserved the legislative acknowledgment of civil unions only for heterosexual couples. As highlighted in the Greek report, “Laws like 3719/2008 do not only discriminate against homosexuals in the field of their privacy and family life but are also infringing their very core of their dignity and personality as free, uncumbered individuals that have the right to be different and regulate autonomously their form of life.”

The Croatian legislation seems extremely progressive in the attempt to grant equal rights to all the forms of unions. With regard to legal relations in individual life unions, the principle of equality applies and it is exercised through the following specific principles: the same property regime for marriages, extra-marital unions and same-sex unions (Arts 247-258 FA, Arts 11-20 of the Same-Sex Unions Act), the equality of spouses/extra-marital partners/same-sex partners (Art. 2 FA, Art. 2 of the Same-Sex Unions Act), the same types of property (co-ownership of common property and individual property/ Arts 249, 258 FA, Art. 13 of the Same-Sex Unions Act), solidarity between the spouses/extra-marital partners/same sex partners (the obligation of support, mutual help/(Arts 217, 222 FA, Art. 6 of the Same-Sex Unions Act, party autonomy in the regulation of matrimonial property relations (matrimonial agreement/extra-marital agreement/same-sex unions agreement/ Arts 255-258 FA, Arts 19, 20 of the Same-Sex Unions Act), the protection of third-party rights (protection of bona fide acquirers, joint and several liability for debts (Art. 255/2 FA). However, they have also witnessed some tendencies in public to seek increased protection of marriage and to exclude the possibility of entering into homosexual marriages in Croatia. In December 2013, a national referendum was organised which resulted in an amendment to the Constitution whereby a new paragraph was

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399 English report 11.
400 Greek report 79.
401 Greek report 79.
402 Greek report 80.
403 Greek report 80.
404 Arts 247-258 of Croatian Family Act, Arts 11-20 of the Same-Sex Unions Act, see Croatian report 24.
405 Croatian report 26.
added to Article 62 of the Constitution stating the following: ‘Marriage is a life union of a woman and a man.’

In Portugal, Law 7/2001 gives some legal protection to heterosexual and same-sex partnerships, for people who have been living together, sharing “table, bed and roof”, for more than 2 years, and there is no need to register the partnership. The protection is given in the field of tax law, labour law, social security law, and also civil law, e.g., rent law and protection of the family home, in case of death or separation, however, there is no protection in the field of succession law.

**5.4 The Impact of the Right to Family Law on Legislation and Case Law**

The right to family life has an impact in many different areas. Their influence is detected in the area of housing (for example the protection of the living spouse and children in the case of death of the spouse who was the tenant). There influence in the area of the law of tort is seen for instance through the provision entitling family members to compensation for damage because of the death of a family member. It is most notably present in the area of succession law (for example the right of family members to compulsory parts).

The impact of the fundamental rights on family law is clearly seen in Italian family law. The reform of family law brought radically changed rules, inspired by a patriarchal and authoritarian concept of domestic relationships, which encroached on the fundamental rights of family members. Lately, recognition of the fundamental rights of the child, originally confined to international treaties and declarations (ECR, EU Charter), has given rise to dramatic changes in existing Italian legislation.

The Argentinean Supreme Court adjudicated the prominent case dealing with the influence of fundamental rights in family law in 1986, declaring as unconstitutional Art. 64 of the old law on civil marriage, which was prohibiting individuals to remarry, except in cases of the actual or presumable death of the marital partner. In adjudicating this case, the Supreme Court was applying the principle of evolutive interpretation of constitutional norms, and decided that this legal provision violated the right to human dignity.

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406 For more details see the Constitutional Court decision at http://www.usud.hr/uploads/OdluKa%20u%20povodu%20okon%C4%81anja%20postupka%20nadzora%20nad%20ustavno%C5%99u%20%20zakonito%C5%99u%20provodenja%20odr%C4%82anog%201.12.2013.pdf.

407 Portuguese report 41.

408 ibid.

409 Croatian report 25.

410 ibid.

411 ibid.

412 Law no. 151/1975, Italian report 1.

413 Italian report 2. As noted in the Italian report, after the Constitution came into force in 1948, the entire family law as enshrined in the Italian Civil Code was deemed contradictory to the principles of non-discrimination based on sex and birth (Arts. 29 and 30 of the Constitution).

The influence of the fundamental rights on family law is seen also in Norwegian legislation, especially concerning the right of same-sex couples to adopt children together and the acceptance of parental status for a female spouse of the mother (both these rights are secured under the 2008 reforms).\textsuperscript{415}

The impact is seen also in the legislation on the equality, especially equal treatment of women. Although in Norway both spouses were formally considered on equal footing (from 1927), in reality the wife has usually been the weaker party, in particular in economic matters. Case law in the 1970s recognised housework as a contribution to the acquisition of the common house.\textsuperscript{416} This change has significantly improved the women’s position in the case of the divorce. In Greece, the first legislative implementation of the constitutional requirement of the equality between men and women in private law took place in the 1980s.\textsuperscript{417}

The general principles of family law are limited to some extent in certain circumstances that justify such limitations. The most notable example is domestic violence. As derived from the Croatian report, in order to protect the family members exposed to domestic violence and to ensure their health and safety, the Protection against Family Violence Act provides for the possibility of imposing various protective measures some of which lead to certain deviations from the general family law principles.\textsuperscript{418} Such protective measures are among others the prohibited contacts with the victim of domestic violence, a protective measure of moving away from the flat the person who committed violence against co-habiting family members, a protective measure of ensuring protection of the person exposed to violence, etc.\textsuperscript{419}

There are also cases of special protection of the child, in which the general principles of the family law might be limited. For example, if parents manage and dispose of the child’s assets, the Croatian Family Act expressly provides that for the purpose of such disposition, an approval of the competent social welfare centre is needed.\textsuperscript{420}

The basic rights might also influence the family law with regard to the control of marriage contracts. The German Bundesverfassungsgericht held that the civil courts have control over the content of these contracts in order to avoid any disadvantages of the weaker spouse.\textsuperscript{421} As highlighted in the English report, disruption to family life may outweigh loss suffered by creditors by postponement of the sale of a family home in case of bankruptcy.\textsuperscript{422} Moreover, the right to family life under Art. 8 may also

\textsuperscript{415} Act on adoptions 28 February 1986 No. 8 (lov om adopsjon) sections 5 and 5 a; Act relating to children and their parents 8 April 1981 No. 7 (lov om barn og foreldre) section 3. See Norwegian report 7.
\textsuperscript{416} Norwegian report 7.
\textsuperscript{417} Greek report 75.
\textsuperscript{418} Croatian report 25
\textsuperscript{419} Croatian report 25
\textsuperscript{420} Arts 259, 260, 261 of Croatian Family Act, Croatian report 25.
\textsuperscript{421} BVerIG NJW 2001, 957, 958; Looschelders in: NomosKommentar, BGB, 2. ed. 2012, § 138 nn. 188; in German report 20. If the contract is valid according to the blanket clause of § 138 BGB, the courts may also prevent one spouse to invoke the contract pursuant to § 242 BGB, for example if a child was born or the other spouse became seriously ill.
\textsuperscript{422} Barca v Mears [2004] EWHC 2170 (Ch), see English report 9.
prevent the removal of asylum seekers from the country,\footnote{EM (Lebanon) v Secretary of State for the Home Department [2008] UKHL 64.} or affect a decision on an application for leave to remain within the country.\footnote{ZB (Pakistan) v Secretary of State for the Home Department [2009] EWCA Civ 834, see English report 9.}

In the European countries, huge influence of the ECtHR jurisprudence is noticed. One example is found in the custody law. Influence of the ECtHR case law has also taken a fundamental influence on the content of the family law especially with regard to the relation of the child to his biological father who is not married with the mother, as emphasized in German report.\footnote{Rauscher, Familienrecht, 2. ed. 2008, mn. 57a; German report 20.} In Austria, the cases Zaunegger v. Germany (2009) and Sporer v. Austria (2011) started a discussion about the conformity of Austrian custody law with Art. 8 ECHR. The Constitutional Court declared that the Austrian legal framework was unconstitutional as it did not provide for any judicial review that gives the father of a child born out of wedlock the right to obtain custody without the mother’s consent.\footnote{Austrian report 19.} The Court held that section 166 ABGB infringed \textbf{the father’s right to family life} under Art. 8 ECHR.

Important question in the family law is the limitation of fathers’ rights with relation to children, compared to the mother’s situation. This issue was especially striking in Poland, were some regulations of the \textit{Family and Guardianship Code} were deemed unconstitutional, for instance: the unconstitutionality of limiting the biological father’s right to judicial establishment of fatherhood; the non-constitutionality of the ban for a biological father to demand the annulment of recognition of his child by another man; the non-constitutionality of the ban on posthumous recognition of the child by the father.\footnote{Verdict of 28.4. 2003, K 18/02 CT verdict of 17.4. 2007, 20/05; CT verdict of 16.7.2007, SK 61/06.} Moreover, in the \textit{Różański versus Poland} case from 2006, the ECtHR questioned the lack of an efficient means enabling a biological father to claim his personal rights in regard to his child in Polish law.\footnote{Polish report 23.}

As noted in the Austrian report, the ‘modern’ Austrian family law has become far more liberal than it once was.\footnote{ibid. 20.} This comes from the fact that EU principle of mutual recognition leads to the obligation to accept foreign concepts, causing the need to reform Austrian law in order to avoid inverse discrimination.\footnote{ibid. 20.} The most prominent example of such shift in the policy choices is the \textit{Registered Partnership Act}, which allows same sex couples to enter a partnership that is similar to matrimony.\footnote{Austrian report 21.}

Also in Germany the basic rights of the Grundgesetz resulted in several reforms of the family law of the BGB. Most importantly, the stipulation of equality between men and women in Art. 3 II GG demanded the change of many provisions, with the elimination of the last ‘primacy’ of men concerning the family name by the Bundesverfassungsgericht in 1991.\footnote{BVerfGE 84, 9, German report 21.}
In the field of equality in the rights of reproduction between men and women, there is an interesting Greek case\textsuperscript{433}, in which the court held that not only women but also men have the right to reproduction and thus can have children by ovule donation and with the method of surrogacy.\textsuperscript{434}

As far as the question of abortion is concerned, surprisingly, not many national reports have included it in the discussion on the influence of the human rights and basic rights in family law. Polish report emphasises the fact that Poland is very conservative country and contrary to the situation before 1990 when abortion in Poland was allowed rather widely, now it is allowed solely in a case of risk to the mother’s life or health and genetic defects of the child.\textsuperscript{435} Unusually, even in these exceptional cases Polish doctors and courts are very reluctant to recognize the admissibility of an abortion.

It seems as there is a trend of increased protection of the family as a constitutional category both in the case law and in the legislation governing family law in the participating jurisdictions. As it is derived from the Croatian report, this is manifested in numerous separate acts providing for the protection of families in specific situations (e.g. domestic violence).\textsuperscript{436}

The theme that will be on the menu of family law reforms in different jurisdictions in the future is In Vitro Fertilisation.\textsuperscript{437} Artificial fertilisation for same-sex couples and surrogacy in particular still raise controversial questions across the participating jurisdictions.\textsuperscript{438} In Austria, the Austrian Supreme Court submitted a request to the Austrian Constitutional Court as regards the exclusion of homosexual couples from medically assisted reproduction.\textsuperscript{439}

In Germany, the general right of personality has begun to take some influence on the family law, especially regarding the question of paternity of the child. The Bundesverfassungsgericht held in several decisions that a child has the right to know its paternity.\textsuperscript{440} On the other hand, the child’s claim to information against its own mother is of course limited by her general right of personality as well.\textsuperscript{441}

The frequent issue on the agenda when discussing family law is the protection of family life in case of third country nationals. This is extremely controversial topic, as seen also through numerous decisions held on this topic by the European courts, and it has been argued in the Norwegian report that protection of family life and the rights of the child should not permit circumvention of immigration restrictions.\textsuperscript{442}

\textsuperscript{434} Greek report 84.
\textsuperscript{435} Polish report 24.
\textsuperscript{436} Croatian report 26.
\textsuperscript{437} Austrian report 21.
\textsuperscript{438} See for instance Norwegian report 7.
\textsuperscript{439} Austrian report 21.
\textsuperscript{439} BVerfGE 79, 256; 96, 56; BVerfG NJW 2010, 37721, German report 22.
\textsuperscript{440} BVerfGE 96, 56, German report 22.
\textsuperscript{441} Norwegian report 8.
5.5 Specifically on the Influence in the Inheritance law

The inheritance law or the law of succession deals with the passing on property and rights and obligations upon the death of an individual. Inheritance is implemented on the basis of the law or the last will.

The right to succeed is important question raised in relation to different types of unions. In most of the countries, extra-marital partners do not enjoy equal right to succeed by law as spouses. This is the case in Austria, where solely spouses enjoy a right to succeed by law after their partner’s death. In Norway, there are some provisions securing partners’ rights after a separation and, as from 2009, unmarried couples with children have some rights under inheritance law.

In some countries, extra-marital partners enjoy the same right to succeed as spouses. For example, in Croatia, the Succession Act of 2003 for the first time laid down that an extra-marital partner was a statutory heir. Prior to this Act, an extra-marital partner could only be a testamentary heir. Under the current Croatian succession law, same-sex partners are not considered as intestate (legal) heirs. They may inherit from each other only on the basis of wills, as testamentary heirs. Also in Slovenia, both heterosexual unities by and large enjoy equal rights, and they are equally protected on the general basis, as the special laws put them on the equal footing, for instance the Inheritance Act provides that couple living in long-term relationship inherit under the same rules as married couple, if no reasons exists that would render their potential marriage invalid.

Regarding the inheritance rights of the same-sex partners, the remarkable decision was held by the Slovenian Constitutional Court in 2013. It held that the Inheritance Act is incompatible with the Slovenian Constitution, due to the unequal treatment of same-sex partners in comparison to different sex partners in access to inheritance rights. It ruled that unregistered same-sex partners living in a long term relationships are entitled to the same rights as unmarried different-sex couples. The Constitutional Court held that until the elimination of inconsistencies the same rules apply for same-sex partners as for inheritance between spouses under the Inheritance Act.

5.6 Specifically on the Influence in the EU

5.6.1 HARMONIZATION

As far as the EU countries are concerned, the influence of the EU law seems trivial at the first glance, especially due to the lack of competence of the EU for the substantive family law. However, the rights of the child are recognised as fundamental rights

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443 Section 757 et seq ABGB Austrian report 18.
444 Inheritance Act 3 March No. 5 (lov om arv m.m.) chapter III a. See Norwegian report, p. 7, noting that the paradox is that many unmarried couples have chosen this form of relationship precisely because they do not want to be included in the legal protection and regulation relating to married couples.
445 Croatian report 25.
446 Article 10(2) of the Slovenian Inheritance Act.
447 U-I-425/06.
governed by Article 24 of the Charter, whereas the right to respect for private and family life is governed by Article 7 of the Charter.

Although the substantive family law remains under the sole competence of EU countries, the EU is empowered to take measures concerning family law with cross-border implications. The notable regulation applicable in conflict of laws cases is Brussels II Regulation dealing with jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. This regulation is effective since 2005. It provides in the preamble that the grounds of jurisdiction in matters of parental responsibility ‘are shaped in the light of the best interests of the child, in particular on the criterion of proximity. This means that jurisdiction should lie in the first place with the Member State of the child’s habitual residence, except for certain cases of a change in the child’s residence or pursuant to an agreement between the holders of parental responsibility.’ As regards the determination of the substantive national law the courts must apply, Rome III Regulation, dealing with the law applicable to divorce and legal separation was adopted in through enhanced cooperation in 2010. In the cross-border matters related to children, rules on the parental responsibility are found in Brussels II Regulation, whereas the maintenance claims are governed by the Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations.

In the matters of cross-border succession, Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession was adopted in 2012.

In the field of property effects of marriage and registered partnership, the Commission proposed two separate regulations, one on matrimonial property regimes to implement rules for married couples, and another on patrimonial property to implement rules for registered partnerships. Their aim is to enhance legal certainty and increase predictability for international couples in identifying competent court and applicable law.

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450 Enhanced co-operation mechanism allows a minimum of nine EU Member States to establish advanced integration or cooperation in an area within EU structures but without all members being involved.
One of directive that plays an important role in the EU Member States’ family laws is the Equal Treatment Directive and the principle of equality between men and women and equal pay. In Greece, this jurisprudence led to the practice of positively extending the distribution of family allowances to the excluded categories, namely woman employees.455

5.6.2 THE CJEU CASE LAW

The CJEU has expressly grounded its reasoning on the fundamental right governed by the Charter in case Detiček 456, in which it interpreted Brussels II Regulation provisions on jurisdiction to grant custody of the child. In this case the CJEU noted that one of the fundamental rights of the child is the right, set out in the Charter, to maintain a personal relationship and direct contact, on a regular basis, with both parents, and respect for that right is undeniably in the best interests of any child.457

The CJEU held that a court of a Member State in which a child is present cannot provisionally grant custody of the child to one parent if a court of another Member State, which has jurisdiction as to the substance of the case, has already given custody to the other parent.

In the case Rinau458, concerning non-recognition of a decision requiring the return of a child wrongfully retained in another Member State, the CJEU also expressly referred to the Charter. It noted that the Brussels II Regulation is based on the idea that the best interests of the child must prevail and that it seeks to ensure respect for the fundamental rights of the child, as set out in Article 24 of the Charter.459

As regards sexual orientation discrimination, the CJEU also delivered some of the important judgments in which it referred to the Charter, most notably the non-discrimination principle now governed by the Article 21 of the Charter. One of the cases is K.B.460, dealing with the right to inherit pension after deceased transsexual partner when this possibility is lacking due to the fact that the law did not provide for entering into marriage for a person after the change of sex, in which the Equal Pay Directive461 was interpreted. The CJEU held that ‘in a situation such as that before the national court, there is inequality of treatment which, although it does not directly undermine enjoyment of a right protected by [EU] law, affects one of the conditions for the grant of that right. As the Advocate General noted in point 74 of his Opinion, the inequality of treatment does not relate to the award of a widower's pension but to a necessary precondition for the grant of such a pension: namely, the capacity to marry.’462

455 Greek report 82.
456 Case C-403/09 PPU, Jasna Detiček v Maurizio Sgueglia, ECLI
457 Case C-403/09 PPU, Jasna Detiček v Maurizio Sgueglia, para. 54.
458 C-195/08 PPU, Rinau, ECLI
459 C-195/08 PPU, Rinau, para. 51.
460 C-117/01, K.B. v. National Health Service, ECLI
Another case in the field of family law and sexual orientation discrimination is the case Römer,\textsuperscript{463} interpreting the Equal Treatment Directive.\textsuperscript{464} The case dealt with the method of calculating the occupational pension scheme in the form of a supplementary retirement pension for former employees of a local authority and their survivors, which was favouring married recipients over those living in a registered life partnership. The CJEU held that difference in treatment between a person who has entered into a life partnership with another person of the same sex and a married person can constitute discrimination based on sexual orientation if the partners are in a legal and factual situation comparable to that of marriage.\textsuperscript{465} Further, the CJEU specifies that the right to equal treatment can be claimed directly by an individual in case when provisions of a directive are not transposed into national law.

Important lines of cases with the implications for the family law are dealing with Union citizens and their rights to family reunification and other rights based on the free movement provisions or directly on EU primary law. The most notable example concerns the rights of citizens and their family members who are third country nationals.\textsuperscript{466} In the case O&S the CJEU noted that Article 7 of the Charter, which contains rights corresponding to those guaranteed by Article 8(1) of the ECHR, recognises the right to respect for private and family life.\textsuperscript{467} The CJEU held that ‘that provision of the Charter must also be read in conjunction with the obligation to have regard to the child’s best interests, recognised in Article 24(2) of the Charter, and with account being taken of the need, expressed in Article 24(3), for a child to maintain on a regular basis a personal relationship with both parents’.\textsuperscript{468} It held that Directive on the right to family reunification\textsuperscript{469} cannot be interpreted and applied in such a manner that its application would disregard the fundamental rights set out in those provisions of the Charter. What is more, ‘the Member States must not only interpret their national law in a manner consistent with EU law but also make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the legal order of the EU’.\textsuperscript{470}

6. THE INFLUENCE OF FUNDAMENTAL RIGHTS IN OTHER AREAS

6.1 The Right to Privacy

Participating states’ tort laws tend to recognize a right to privacy, although in some jurisdictions it is not specifically stated as such in the legislation.\textsuperscript{471} In Argentina,\textsuperscript{472}
where it is better known as the right to intimacy, it is protected by the Constitution already since 1853. In some countries, the right to privacy is an extremely comprehensive right, for example in Greece it is characterized by the legal theory as a ‘general’ right because of its ability to embrace the many aspects of the individual’s private, social and public autonomy. In Germany, the Bundesgerichtshof in 1954 ruled in its famous ‘Leserbrief’ decision that the right to privacy is a constitutionally guaranteed basic right which has to be qualified as an ‘other right’ in § 823 I BGB and is protected as such by the general clause of tort law. Thus, the claim for immaterial damages caused by infringements of the right to privacy is directly derived from the constitution; a claim is only accepted in the case of a severe infringement that cannot be compensated otherwise. In France, the right to privacy is not governed by the DDHC, and was introduced in French legislation through penal law of 1868. In 1944 new provision was introduced in the law of 1881 concerning freedom of press, providing that the truthfulness of the defamatory acts can always be proven, except in certain exceptions laid down by the law, one of them being if the allegation concerns someone’s private life. In private law, the most important legal instrument protecting the right to privacy was Article 1382 of the Civil Code, stating in a general manner that if someone causes harm to another person is liable to compensate it. After the introduction of the autonomous protection of the private life in Article 9 of the Civil Code, the case law established that the sole breach of the right to privacy grants the victim the right to compensation, while fault and damage are presumed, thus the victim is entitled to compensation even if no harm has been suffered.

As held in the Czech Constitutional Court’s decision, the right to a private life comprises the guarantee of self-determination in the sense of making crucial decisions about oneself. The court ruled that the passive era of a private life covers the personal sphere, which is imminent to humanity itself, such as human dignity, personal honour, good reputation, and also internal need of social contact and social integration. Therefore private life encompasses ‘not only internum, but also externum’, which applies also to business, work or social activities. Covering the sphere of intimacy, the sexual life of the individual is its very core.

The main characteristic of the right of privacy is that it functions as a womb for the creation of new rights that are adapted by the jurisprudence in a case-to-case basis. Moreover, it functions as a ‘window’ to the constitutional rights protecting the private and personal sphere of the individual, e.g. dignity, free development of personality, religious freedom, privacy and data protection. Interestingly, the law of privacy in

472 Argentinian report, p. 10.
473 Greek report 55.
475 Art. 1 I, 2 I GG.
476 BGHZ 128, 1, 12, in German report 11.
477 French report 22.
478 See French report 23.
480 IUS 1586/09, dated March 6, 2012, in Czech report 14; see also French report 23.
481 Greek report 55.
482 ibid.
483 Greek report 55.
England grew from the concept of the breach of confidence under the influence of Art 8 ECHR.  

6.2 Balancing the Right to Privacy and the Right to Freedom of Expression

The freedom of expression sets limits to the protection of the right to privacy. Both rights need to be balanced one against another. Criteria normally used for the purposes of balancing of those two rights, set out in the Brazilian report, has to do with the notoriety of the bearer of the right of privacy, the place in which the fact occurred (public or private), the purpose of divulging the information, the social interest in the divulging of the information, among others.

The most famous decision emanates from a decision of the ECtHR of 2004 regarding the protection of celebrities against violations of their right to privacy. In its famous ruling concerning the press release of pictures showing Princess Caroline of Monaco the ECtHR criticized the criteria that have been developed by the German jurisdiction to protect the right to privacy against unauthorized photographs. As submitted in the German report, until then, persons of prominent position (monarchs, politicians, artists, or athletes) were qualified as figures of contemporary society ‘par excellence’ and pictures of them could generally be published without their consent, with the exception in cases, where the person concerned retreated to his domestic area or a remote place. In this case, the ECtHR emphasised that photos of the applicant in the various German magazines show her in scenes from her daily life, involving activities of a purely private nature such as engaging in sport, out walking, leaving a restaurant or on holiday. The ECtHR considered that the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photographs and articles made to a debate of general interest. It ruled that ‘it is clear in the instant case that they made no such contribution, since the applicant exercises no official function and the photos and articles related exclusively to details of her private life’. Following this ruling, the Bundesgerichtshof has – with approval of the Bundesverfassungsgericht – revised its jurisdiction and dismissed the concept of figures of contemporary society ‘par excellence’.

In relation to public figures, the noteworthy decision was delivered by the Portuguese Supreme Court. The case dealt with a famous person and his two brothers who claimed damages from the newspaper that published some alleged facts concerning inheritance discussions within the family. The Supreme Court held that also public figures have the right to privacy, and news without any public interest that damages the honour and reputation of a public figure is wrongful.

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484 English report 5-6.
485 Brazilian report 10.
488 Case of Von Hannover V. Germany (Application no. 59320/00), 24.06.2004, para. 61.
489 Case of Von Hannover V. Germany (Application no. 59320/00), 24.06.2004, para. 76.
490 ibid.
492 The Supreme Court of Justice decision of 14 January 2010, in Portuguese report 35.
493 Portuguese report 35.
In *Greece* a characteristic case of clash between privacy and freedom of speech is that of the decision no 65/2004 of the One Member Civil Court of Athens concerning the dispute that arose when a well known journalist published letters, illegally intercepted by a hacker, from the mother of a former Prime Minister of Greece, in which she advised her son on how to act in order to become Prime Minister. The Greek court vindicated the journalist, giving precedence to the freedom of the press over the right to privacy, invoking the highly political nature of the letters - which made their publication not only justified, but even imperative, however the Court of Appeal of Athens in its ruling no 9909/2005 overturned the first-instance decision.

In *Hungary*, the personality rights and the limits of freedom of expression has always been controversial and hence the legislator found it necessary to implement two new clauses into the Civil Code right before its final vote. Accordingly, from March 2014 two new clauses regulate freedom of expression, namely one, which is quite controversial on the limits of offensive speech towards a public figure and the other one is on collective defamation.

In balancing these two constitutionally protected rights, the *Czech Constitutional Court* held that freedom of expression does not apply to any giving out information if it was dominantly motivated by a desire to harm the person defamed if a purveyor of information himself did not believe this information or if it was supplier recklessly without paying attention to whether or not the information is based on truth. The *Japanese supreme court* awarded damages for the harm of reputation and the violation of privacy to a woman whose aspects of private life were revealed in a special genre of literature, ‘Shi-shôsetu’, in which the author describes his private life with certain modifications, and possibly revealing also aspects of the private life of another persons.

In *Portugal*, the Portuguese Supreme Court’s decision from 2006 showed that also politicians have the right to good name and reputation and that the rights to free speech and critic, crucial in a democratic society, have limits. The case dealt with the problem of defamation and the right to honour of a politician. In this case the plaintiff, an architect and a member of the municipality ‘government’ sued the defendant, as he expressed opinions with the intent to damage his honour and reputation during a public meeting at the Town Hall. The applicant claimed that the mass media has reproduced the offensive statements and caused him losses when he returned to his professional activity as architect. He claimed a compensation for non-pecuniary losses. The Supreme Court of Justice explained that the right to good name and reputation and the right to honour are protected by the Constitution as well as by the Civil Code, and that the statements in question included suspicions, allegations and opinions that could only be understood as an offence to personality rights of the

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494 Greek report 56.
495 ibid.
496 Hungarian report 12.
499 The European Court on Human Rights condemned the Portuguese State for violation of Article 10 of the Convention (freedom of speech), in the decision of 23 January 2007 *Almeida Azevedo vs. Portugal*, however the facts of the case were substantially different. See Portuguese report 34.
500 Portuguese report 34.
plaintiff. It held that there are limits to freedom of expression also in cases of politicians who enjoy lower protection of their right to reputation.

Further on politicians and freedom of expression, the ECtHR delivered remarkable decision in drawing the limits of the freedom of expression in the case Mladina d.d. Ljubljana vs. Slovenia, in the case of the journal article, commenting the conduct of a certain Member of the Parliament in the Parliament and describing it as that of a “cerebral bankrupt”. The ECtHR reminded that impugned statement was made in the context of a political debate on a question of public interest, where only few restrictions are acceptable under Article 10 § 2 of the ECHR, and was directed against a politician. It has emphasized on many occasions that a politician must in this regard display a greater degree of tolerance than a private individual, especially when he himself makes public statements that are susceptible of criticism. In this connection, the ECtHR held that it “reiterates that journalistic freedom also covers possible recourse to a degree of exaggeration or even provocation, or in other words, somewhat immoderate statements”.

The ECtHR case law has had an immense influence on the issue of balancing the right to privacy and the freedom of expression in the European countries. This influence is sometimes leading judges to balance these rights too vigorously in favour of the freedom of expression. Therefore, in a recent case, the ECtHR even held that the Norwegian Supreme Court had given too much weight to the protection of freedom of expression and as such had violated Art. 8 on privacy.

Freedom of expression affects private law also in the US, where horizontal effect of fundamental rights is rare, limited to the principle of non-discrimination and freedom of expression. Freedom of expression affects private law in the areas of defamation and infliction of emotional distress. As noted in the US report, the justification leading the free speech to supersede traditional private law’s protection of personal reputation lies in societal needs and not in the notion of a fundamental right inherent in individual human needs. The landmark decision was held in the case New York Times v. Sullivan, in which the court ruled the value expressed in the freedom of expression is ‘[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means.’ It held that a defamation action by a public official relating to official conduct requires proof ‘that the statement was made with ‘actual malice’ – that is, with knowledge that it was false or with reckless disregard of whether it was false or not’. This standard has been further expanded to apply to public figures generally and to the tort of intentional infliction of emotional distress.
6.3 The Influence of Fundamental Rights in Other Areas

Important influence on private law is seen also in the cases concerning personality rights. As noted in the Dutch report, tort law is more receptive to the influence of the fundamental rights, particularly because it traditionally protects personality rights, which, in their turn, are closely connected with fundamental rights. Courts have started to adjudicate on this right fairly recently in some countries, such as France, where it is said to have accompanied the development of the protection of human dignity.

In Slovenia, the Article 35 of the Constitution provides rules on both the protection of the rights to privacy and personality rights. Moreover, the Code of Obligations governs the kind of civil penalty in Article 134, providing rules on request to cease infringement of personal rights. It provides that all persons shall have the right to request the court or any other relevant authority to order that action that infringes the inviolability of the human person, personal and family life or any other personal right be ceased, that such action be prevented or that the consequences of such action be eliminated. Further, this Article provides that the court or other relevant authority may order that the infringer cease such action, with failure to do so resulting in the mandatory payment of a monetary sum to the person affected, levied in total or per time unit.

In Croatia, The Obligations Act, effective since 1 January 2006, introduced a new concept of liability for non-material damage – the so-called objective concept of non-material damage based on the principle of the protection of personality rights. As explained in the Croatian report, the objective concept of non-material damage is based on the rule that any violation of personality rights, independent of the degree and duration of the physical and mental pain and fear caused by the violation, in itself constitutes non-material damage. Such an objective concept of redress for non-material damage has significantly extended the protection of violated human rights and fundamental freedoms. Personality rights are understood to be the right to life, to physical and mental health, reputation, honour, dignity, name, privacy of personal and family life, freedom and other rights. Both natural and legal persons are entitled to these personality rights.

In the Netherlands, the close link between personality rights and fundamental rights in private law was most strikingly shown by the 1994 judgment of the Dutch Supreme

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511 Art. 57 of the Greek Civil Code: “Whoever is unlawfully offended in his/her personality has the right to claim the violation to be waived and be omitted in the future. If the violation refers the personality of an individual who has died this right can be claimed by the spouse, the descendants, the ascendants, the brothers and his/her heirs of will. A claim for compensation according to the general tort provisions cannot be excluded in cases where the infringement of personality raises beyond moral injury pecuniary damage”.
512 Dutch report 8.
513 French report 22.
514 Article 134(1) of the Slovenian Code of Obligations.
515 Article 134(2) of the Slovenian Code of Obligations.
516 In Article 19, the Obligations Act expressly provides that any natural person or legal entity is entitled to the protection of its personality rights under the conditions provided by law. See Croatian report 15.
517 Croatian report 15.
518 Croatian report 15.
Court in civil matters in the Valkenhorst case.\footnote{HR 15 April 1994, NJ 1994, 608 (Valkenhorst), in Dutch report 9.} The case concerned a claim by the child born out of wedlock in a Roman Catholic institution providing support for unmarried mothers, against the Valkenhorst foundation that had taken over the functions of the institution in which she was born. The child claimed that Valkenhorst owed her a duty to disclose information provided by her mother, which would reveal the identity of the father. Valkenhorst rejected this claim on the ground that it owed a duty of confidentiality to the mother. Whereas the lower court ruled against the child by holding that the duty of confidentiality owed by Valkenhorst towards the mother prevailed over the interest of the child to know her paternity, the Supreme Court overturned this decision and accepted the claim of the child against Valkenhorst.\footnote{According to the Court: ‘The point of departure for deciding the case is that the general right to personality, which lies at the roots of such constitutional rights as the right to respect for one’s private life, the right to freedom of thought, conscience and religion and the right to freedom of expression, also includes the right to know one’s parents. This right also found international recognition in Article 7 of the Convention on the Rights of the Child of 20 November 1989 which has not yet been ratified by the Netherlands. This right gives a person in circumstances such as those ... [in the present case] a claim against the foundation such as Valkenhorst as to the disclosure, at her request, of the information known to the foundation about her parents.’, in Dutch report 9.}

As demonstrated by the Dutch case law, fundamental rights may serve as a means of assistance in tracing the unwritten general principles of law from which, in their turn, new personality rights of a private law nature can be derived in disputes between private parties.\footnote{Dutch report 9.} The general right to personality was used by the Dutch Supreme Court as a legal basis for the recognition of the right to know one’s origin, which was considered controversial at the time the judgment was made, but ten years later this right was embedded in the legislation.\footnote{ibid.} Another Dutch case in which the general right to personality served again as the foundation for the establishment of another new personality right in private law was the case Parool – this time the right to be left alone.\footnote{HR 6 January 1995, NJ 1995, 422 (Parool), in Dutch report, p. 9-10.}

Another interesting example of the right to personality acting as a ‘womb’ for the creation of new rights is illustrated in Greece in cases referring to the protection of environment as specific quality and interest of the right of personality.\footnote{Greek report, p. 57, see also Japanese report, p. 11.} In a recent case\footnote{See Case 349/2001 MPrTrik, NoV 2002, 153. See also Ch. Akrivopoulou, , op.cit. n. 66.} the Greek courts were confronted with a controversy between a famous Greek singer and the monastic community of Meteora. The singer used the audio-visual material from the performance in the Meteora to promote her music. The monks claimed that these activities breached their private right of personality. The court accepted their arguments, interpreting article 57 GCC in the light of Art 24(1) Constitution, protecting the cultural environment as a civil and social right.\footnote{See also the critical comments of K. Fountedaki, op. cit., n. 136, p 235, n. 350; in: Greek report 57.} What is characteristic in this case is the fact that a collective and constitutionally protected interest, such as the environment, can acquire an intensive individualistic dimension when it is combined with a right of the private law.\footnote{Greek report 57.}
The interesting balancing of the right of personality with human rights or basic rights is balancing it against the right to scientific freedom. The Greek court recognized the football club supporters, which were referred to as ‘boulgaros (=bulgarian)’ interpreted in the dictionary as “supporter or player of the team of Thessaloniki (especially of PAOK)” and found it as offensive to the personality of the supporters of the team, as collective subjects of the civil right of personality (Art. 57 GCC), aspect of which is nationality as “a determinant element of the identity of an individual”. On the other hand, the activity of the lexicographer was considered to be a protected expression of the scientific freedom (Art. 16 para. 1 GC) and freedom of speech (Art 14 para. 1 GC). The collision and the necessity of balancing between the competing rights of both sides, lead the majority to rank them hierarchically in favour of the scientific freedom which was deemed as aiming at safeguarding some of the “highest social interests” and thus evaluated them as superior as opposed to the civil right of personality.

6.4 Specifically on the Right to Privacy and Personality Rights in the EU

6.4.1 HARMONIZATION

For both a right to privacy and for personality rights is relevant Article 7 of the Charter which reads as follows: ‘Everyone has the right to respect for his or her private and family life, home and communications.’ The right to freedom of expression is governed by Article 11 of the Charter, providing that this right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. It also provides that the freedom and pluralism of the media shall be respected.

Concerning internet data privacy, data protection is a fundamental right enshrined in Article 8 of the Charter. This sets the Charter apart from other major human rights documents which, for the most part, treat the protection of personal data as an extension of the right to privacy. After the CJEU’s ruling in case Google Spain, in which it held that the right to be forgotten on Internet exists, the Commission proposed new Data Protection Regulation which aims to strike the right balance between the protection of personal data on the one hand and freedom of expression on the other hand.

6.4.2 THE CJEU CASE LAW

Lately, the importance of the fundamental rights at the EU level has been demonstrated in several high profile cases related to the right of privacy. For instance,
the CJEU has declared the Data Retention Directive⁵³⁵ invalid, as it entails a wide-ranging and particularly serious interference with the fundamental rights to respect for private life and to the protection of personal data, without that interference being limited to what is strictly necessary, thus not meeting the principle of proportionality.⁵³⁶ Remarkably, the CJEU has not limited the temporal effect of its judgment, thus the declaration of invalidity has taken effect from the date on which the directive entered into force.

The CJEU also went far in protecting the right to respect for private life and personal data protection, governed by Article 7 and 8 of the Charter, with the judgment of an immense impact on the Internet browser that is widely used across the whole world, Google. In its decision in the case Google Spain⁵³⁷ the CJEU pronounced the right to be forgotten on the Internet. The case dealt with the interpretation of the Data Protection Directive⁵³⁸ and Article 7 and 8 of the Charter. The request for preliminary ruling has been made in proceedings between, on the one hand, ‘Google Spain’ and Google Inc. and, on the other, the Agencia Española de Protección de Datos (Spanish Data Protection Agency; ‘the AEPD’) and Mr Costeja González concerning a decision by the AEPD upholding the complaint lodged by Mr Costeja González against those two companies and ordering Google Inc. to adopt the measures necessary to withdraw personal data relating to Mr Costeja González from its index and to prevent access to the data in the future.⁵³⁹ When an internet user entered his name in the search engine of the Google group (‘Google Search’), the list of results would display links to two pages of a newspaper from 1998. Those pages in particular contained an announcement for a real-estate auction organised following attachment proceedings for the recovery of social security debts owed by Mr Costeja González. Advocate General Jääskinen referred to four different rights laid down in the Charter in his Opinion, aside of Article 7 and 8 also Article 11, governing freedom of expression and information, and Article 16, governing freedom to conduct a business.⁵⁴⁰ The CJEU held that the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public on account of its inclusion in such a list of results, and that those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject’s name, unless the interference with his fundamental rights is justified for particular reason, such as the role played by the data subject in public life.⁵⁴¹

⁵³⁶ Judgment in Joined Cases C-293/12 and C-594/12, Digital Rights Ireland and Seitlinger and Others, 8 April 2014.
⁵⁴⁰ Opinion of AG Jääskinen in Case C-131/12, Google Spain SL, ECLI:EU:C:2013:424.
⁵⁴¹ ibid, para. 99.
Concerning the personality rights, the CJEU has developed the case law dealing with the issue of the right to write a name in certain way. One of the cases, Grunkin-Paul, is dealing with private international law on surnames, concerning non-recognition in the Member State of which a person is a national of the surname acquired in the Member State of birth and residence. The case concerns a child who was born in Denmark having, as well as his parents, only German nationality. The child was registered in Denmark – in accordance with Danish law – under the compound surname Grunkin-Paul combining the name of his father (Grunkin) and the name of his mother (Paul), who did not use a common married name. After moving to Germany, German authorities refused to recognise the surname of the child as it had been determined in Denmark. In her Opinion, Advocate General Sharpston referred to the consideration of best interest of the child enshrined in Article 24(2) of the Charter. The CJEU held that having to use a surname, in the Member State of which the person concerned is a national, that is different from that conferred and registered in the Member State of birth and residence is liable to hamper the exercise of the right, established in then Article 21 TFEU, to move and reside freely within the territory of the Member States.

The CJEU decided on the right to use a title of nobility and nobiliary particle forming part of the surname in relation to the right to respect for private and family life governed by Article 7 of the Charter and equality before the law governed by Article 20 of the Charter in the case Sayn-Wittgenstein. The case dealt with the public authority decision to correct the entry in the register of civil status of the family name ‘Fürstin von Sayn-Wittgenstein’ acquired in Germany, and to replace it with the name ‘Sayn-Wittgenstein’, as the Austrian Law on the abolition of the nobility abolished the use of titles of nobility, with the objective to that implement the more general principle of equality before the law of all Austrian citizens. The CJEU noted that ‘a person’s name is a constituent element of his identity and of his private life, the protection of which is enshrined in Article 7 of the Charter and in Article 8 of the ECHR. Even though Article 8 of that convention does not refer to it explicitly, a person’s name, as a means of personal identification and a link to a family, none the less concerns his or her private and family life’.

7. CONCLUSION

As this brief summary of the substance of the national reports has shown, the influence of the fundamental rights in different spheres of private law is, though limited and predominately indirect, existing in various fields of horizontal relationships. It is shown through the influence of fundamental rights on the interpretation of different private law concepts and legal rules, as the fundamental rights are applied to private law clauses as the interpretative measures, influencing their content.

542 C-353/06, Grunkin-Paul v Standesamt Niebüll, ECLI:EU:C:2008:559.
543 Opinion of AG Sharpston in Case C-353/06, Grunkin-Paul v Standesamt Niebüll, ECLI:EU:C:2008:246, para. 9.
544 C-353/06, Grunkin-Paul v Standesamt Niebüll, ECLI:EU:C:2008:559, para. 22.
545 Case C-208/09, Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien, ECLI:EU:C:2010:806.
546 Case C-208/09, Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien, para. 52.
This general report focuses especially on the application and influence of the fundamental rights in private law as reflected in the case law and the legislation. In so doing, several trends can be identified. In contract law, the ‘radiating effect’ of the fundamental rights is particularly evident through limitations to the principle of freedom of contract, with the role of restoring the balance among the contracting parties, thus with the aim of the weaker contracting party protection, most notably in consumer protection law. Also, the influence of fundamental rights is grasped in cases concerning surety and tenancy. In tort law, the influence of fundamental rights is most notable in the protection of personality rights. In property law, the fundamental rights influence is mostly linked to the limitations of the right to property with different objectives, for example to ensure respect for the right to equality, freedom of expression, freedom of religion, and in general the right to privacy, and also freedom to receive information. Lastly, in family law the influence of fundamental rights is especially relevant for the private law discourse as regards the role of the principle of equality in granting rights to different civil unions, and the scope of the father’s rights.
APPENDIX: Questionnaire to provide guidance to national reporters

Session II A. Droit civil / Civil law

Sujet/ Subject: Le rayonnement des droits de l’Homme et des droits fondamentaux en droit privé / The influence of human rights and basic rights in private law

Questionnaire

Part I: Introduction

a) When has the concept of human rights and basic rights (fundamental rights) first appeared in jurisprudence, legal literature and legislation in your country and with which meaning?

b) What is the position of your country towards international conventions on human rights? What are the reasons for full or partial reluctance to participate in international and regional conventions on human rights?

c) Does a legal definition of human rights and basic rights exist in your country? Is there a legal text which deals with all or certain types of rights? What are the sources of human rights and basic rights in your country?

d) What is the major function of human rights and basic rights in your country?

e) Which human rights and basic rights are most commonly litigated before the courts and tribunals in your country?

f) Are there any legal limits (from your constitution or from another legal source) to the protection of human rights and basic rights? If so, what are they and what are the justifications of these limits?

g) Is there a possibility to review the legislation, jurisprudence and other acts on the basis of human rights and basic rights?

h) Is there an independent and autonomous body exercising constitutional review in your country? What are the conditions for the standing of private individuals?

Part II: The influence of human rights and basic rights in contract law

a) What are the general principles of the contract law in your country (e.g. freedom of contract)?

b) Is there any rule in the legislation or case law that allows deviation from those general principles in order to protect human rights and basic rights? Is there any possibility to limit the freedom of contract with the use of human rights and basic rights? How have these rules developed in your country?

c) Is there any possibility to eliminate the imbalance between the parties (e.g. possibility to protect the weaker party)?

d) To what extent does the case law on human rights and basic rights of the regional and international courts influence the content of the contract law in your country? If coming from EU member state country, pay special attention to the Court of Justice of the EU case law and its impact on the contract law via rules, changes in legislation and the activity of the national courts.

e) What are general trends and solutions in the case law and legislation on contract law with respect to human rights and basic rights?
f) Are human rights and basic rights that are transplanted into private law modified and adapted to the private law?
g) Are there any *de lege ferenda* suggestions for changes in contract law that would reflect the influence of human rights and basic rights?

Part III: The influence of human rights and basic rights in tort law

a) What are the general principles of the tort law in your country?
b) Elaborate on a right to privacy in your country. Is there any requirement in legislation or case law for a right to privacy to be balanced against freedom of expression?
c) Does a right to non-pecuniary damages exist in your country? What kind of non-pecuniary damages? Are human rights and basic rights influencing the scope of those damages?
d) Is there any rule in the legislation or case law that allows deviation from the general principles of the tort law in order to protect human rights and basic rights? How have these rules developed?
h) To what extent does the case law on human rights and basic rights of the regional and international courts influence the content of the tort law in your country? If coming from EU member state country, pay special attention to the Court of Justice of the EU case law and its impact on the tort law via rules, changes in legislation and the activity of the national courts.
e) What are general trends and solutions in the case law and legislation on tort law with respect to human rights and basic rights?
f) Are human rights and basic rights that are transplanted into private law modified and adapted to the private law?
g) Are there any *de lege ferenda* suggestions for changes in tort law that would reflect the influence of human rights and basic rights?

Part IV: The influence of human rights and basic rights in property law

a) What are the general principles of the property law in your country? Elaborate also on intellectual property law.
b) Is there any rule in the legislation or case law that allows deviation from those general principles in order to protect human rights and basic rights? Concentrate, among others, also on freedom of expression, access to information, the right to protection of personal data and the freedom to receive or impart information.
i) To what extent does the case law on human rights and basic rights of the regional and international courts influence the content of the property law in your country? If coming from EU member state country, pay special attention to the Court of Justice of the EU case law and its impact on the property law via rules, changes in legislation and the activity of the national courts.
c) What are general trends and solutions in the case law and legislation on property law with respect to human rights and basic rights?
d) Are there any *de lege ferenda* suggestions for changes in property law that would reflect the influence of human rights and basic rights?

Part IV: The influence of human rights and basic rights in family law

a) What are the general principles of the family law in your country?
b) Is there different legal treatment of married and unmarried couples in your country? Elaborate on legislation and case law.

c) Is there any impact of the right to family life on the legislation and case law in your country?

d) Is there any rule in the legislation or case law that allows deviation from the general principles of family law in order to protect human rights and basic rights?

e) To what extent does the case law on human rights and basic rights of the regional and international courts influence the content of the family law in your country?

f) If coming from EU member state country, pay special attention to the Court of Justice of the EU case law and its impact on the family law via rules, changes in legislation and the activity of the national courts.

g) What are general trends and solutions in the case law and legislation on family law with respect to human rights and basic rights?

h) Are there any de lege ferenda suggestions for changes in family law that would reflect the influence of human rights and basic rights?

Part V: The influence of human rights and basic rights in other fields of private law

a) Elaborate on the influence of human rights and basic rights on the content of copyright law, especially in the connection with the development of information society.

b) Elaborate on the influence of human rights and basic rights on the position of consumers and the consumer protection in your country.

c) Elaborate on the influence of human rights and basic rights on personality rights.

d) Elaborate on the influence of human rights and basic rights on inheritance law.

e) Elaborate on any other relevant influence of human rights and basic rights in private law in your country.