The 'Contractual Enforcement' of Human Rights in Europe

Roberto Cippitani

1 Introduction

The notion of the contract was established to achieve patrimonial objectives (i.e. property protection) not least in relation to the transfer of key rights between individuals. However today domestic and transnational legislation, as well as case law, does generally recognise the importance, and the impacts, of human rights law, as it relates to contractual matters, especially in respect of the following areas: social services, public administration, informed consent to health treatments and research activities, and the protection of privacy. This chapter looks specifically at changing legal perceptions of 'the contract' in relation to the protection of human rights in Europe, and argues that the blurring of the various distinctions between the fields of public and private law has enabled domestic judges to actively embed more fully fundamental human rights protections.

2 The Function of Contracts in Traditional Civil Law

Private law traditionally concerns 'patrimony,' in other words, those sets of civil obligations and property rights which can be measured in monetary terms.[1] This approach was formalised by European continental civil codes in the nineteenth and twentieth centuries, based upon the work of the Pandectist scholars who 'recovered' Roman law and founded modern private law.[2] Within this context, contract law,

[1] See *Relazione al Re* to the Italian Civil Code (para 23).

[2] See for example Savigny (1840), Windscheid (1900), Domat (1689), and Pothier (1819).

R. Cippitani (✉)
Università degli Studi di Perugia, Perugia, Italy
e-mail: roberto.cippitani@unipg.it

A. Diver, J. Miller (eds.), *Justiciability of Human Rights Law in Domestic Jurisdictions*, DOI 10.1007/978-3-319-24016-9_13

together with the notion of legal succession, provided the main legal frameworks for the regulation of property circulation.[3] The parties in such relationships were considered to be formally equal with domestic laws and customs on contract generally being underpinned by the notion of bi-lateral exchange.[4] Whatever the national law might be, the notion of 'the contract' is clearly based upon this concept of *exchange*, which can be expressed in various ways: for example as '*corrispettività*' and '*onerosità*' in the Italian *Codice Civile*[5]; '*bilateralité*' and '*onerosité*' under French Law,[6] or as bilateral contracts in accordance with the common law. The function of other types of obligation (e.g. tort, delict, unjust enrichment, *negotiorum gestio*[7]) is to ensure and maintain patrimonial equilibrium between those involved in a legal relationship, for example via indemnity and liability for compensation. This may be achieved through the use of such concepts as rights in *rem,* tortious liability, unjust enrichment or *negotiorum gestio*. The difference between contractual and non-contractual obligations is largely to do with the free will of the individuals concerned: obligations arising from contracts are based on presumed agreement between the parties, whilst non-contractual obligations tend to arise from 'non-legal' conduct such as a wilfully reckless act or

[3] Caprioli (2008) and Halperin (1992).

[4] As Portalis (1891) argued on the draft of the Napoleonic Civil Code, '*Les contrats et les successions sont les grands moyens d'acquérir ce qu'on n'a point encore*.' ('Contracts and successions are the main means of acquiring what one has not yet'). On this ground, according to Article 1101 of Code Civil: '*Le contrat est une convention par laquelle une ou plusieurs personnes s'obligent, envers une ou plusieurs autres, à donner, à faire ou à ne pas faire quelques chose'*. ('The contract is an agreement by which one or more persons undertake, as regards one or more others, to give, to do or not to do something'). Similarly, the Italian Codice Civile defines contracts as agreements aimed at establishing, modifying or ending patrimonial relationships (see Article 1321 Codice Civile). Article 1254 of the Spanish Código Civil states that: '*El contrato existe desde que una o varias personas consienten en obligarse, respecto de otra u otras, a dar alguna cosa o prestar algun servicio*.' ('The contract exists where one or more persons agree to be bound, for another or others, to give something or provide some service').

[5] Both concepts considered in the Italian Civil Code refer to exchange, but from two differing viewpoints. The *corrispettività* means an exchange of performances between parties to the same contract. A lack of *corrispettività* (e.g. in case of breach, force majeure or hardship) leads to termination of the contract. *Onerosità* however, refers to patrimonial equilibrium between two parties, which can be achieved via *corrispettività* (exchange of performances) or through a series of contracts which, considered together, achieve patrimonial equilibrium. Lack of *onerosità* may class an act or relationship as gratuitous. Gratuitous acts, including donations, may amount to patrimonial disequilibrium between parties, prejudicing creditors, or decreasing the patrimony of the debtor (see Article 809 of the Italian Civil Code).

[6] According to the French Civil Code '*bilateralité*' is an exchange not of performances, but of obligations. The concept of *onerosité* is similar to that of *onerosità* within the Italian Civil Code.

[7] '*Negotiourm gestio*' refers to non-contractual obligations, 'arising out of an act performed without due authority in connection with the affairs of another person' (See further Article 11 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007, OJ 2007 L 199/40) for example where one 'interferes in the business transaction of another person in that person's absence, done without authority but out of concern or friendship.' Under *negotiorum gestio* the actor is entitled to be reimbursed for any expenses incurred.

negligence, or from some event which results in unjust enrichment of one of the parties.[8]

3 National and International Constitutionalism

From the second half of the nineteenth century, the social and ideological context of private law changed significantly. Under Catholic doctrine,[9] the notion of charity moved towards the social or public sphere, through such concepts as 'social solidarity,'[10] which began to appear in the discourses of various human sciences, such as sociology and economics.[11] Especially relevant were the theories of those French 'solidarists'[12] who adopted, with some significant changes, the ideas of the Revolution, inspired by affirmations of individualism and equality. Solidarism thus influenced thinking on social rights as they emerged from Catholic and socialist co-operativist theories, with political, ideological, religious, and scientific debates then being reflected in legal discourse. The first field of application for the concept of solidarity was within administrative law, to develop tools for enabling early social insurance schemes and other forms of public protection. Civil law began to be considered from a social rights perspective: as authors such as Menger and Renner observed, highlighting the social functions of private law.[13] Menger, during the debate on the new German Civil Code, demonstrated how much private law in Germany and Austria favoured the interests of the wealthy, and argued the need to draft a civil code, which would maintain societal peace.[14] Moreover two other factors changed the fate of private law: constitutionalisation and European integration. Constitutions embedded the fundamental rights of all persons, and endorsed the rule of law,[15] underscoring the State's legal obligations to actively protect

[8] See further Jansen (2010). For a critical overview of the topic see Jhering (1972) on how contract law, rather than simply amounting to an expression of egoism, might more accurately be seen as representing a 'wonder of humankind' by allowing for individualised self-interests to be re-organised into common goals, which should ultimately satisfy the needs or interests of all concerned.

[9] See the encyclical Rerum Novarum of Leo XIII of 15 May 1891.

[10] See the encyclical *Mater et Magistra* of John XXIII in 1961, which refers explicitly for the first time to the term 'solidarity'; see further http://w2.vatican.va/content/john-xxiii/en/encyclicals/documents/hf_j-xxiii_enc_15051961_mater.html (accessed 06.06.15).

[11] See for example the work of economists of the *Verein für Socialpolitik* (the Association of Social Policy).

[12] See for example Bourgeois (1911, 1919) and Duguit (1908).

[13] See Renner (1929) and Menger (1908).

[14] Ibid.

[15] Sepúlveda Iguíniz (2013), pp. 239–244.

political, civil and social rights, through solidarity and substantive equality.[16] Constitutions thus attribute 'social' character to the State,[17] with the protection of individual rights furthered through international law principles, and the establishment of 'global constitutionalism;'[18] this in turn promotes further development of national constitutions.[19] Several international law conventions are especially relevant: the UN Charter of 1945, for example, aimed 'to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind,' stressing the need 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women' in order 'to promote social progress and better standards of life.'[20]

Regional protections also exist in respect of Europe and America, via transnational Courts, whilst the process of European integration particularly detracts from the argument that private law is only truly concerned with domestic relationships. The community 'market,' as an area without borders, and in which there is free movement of persons, goods, services and capital, is recognised and protected. This market is not merely economic in nature, but also gives rise to a legal system,[21] which provides precedent relevant to civil matters, including those arising under the laws of contract and obligations. Civil matters thus serve as a sort of cornerstone,[22] with European integration having a profound impact on traditional notions of the contractual relationship. This occurs via legislative intervention (regulating directly

[16] See Cippitani (2013), pp. 642–649; Cippitani (2010); Pérez Luño (1991), p. 19; Rawls (1980), pp. 4–7.

[17] See for example Article 1 of the French Constitution of 1958, which provides that 'France shall be an indivisible, secular, democratic and social Republic.' (available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html, accessed 06.06.15); Article 20 (1) of the German Grundgesetz, setting out that 'Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.' (available http://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0079, accessed 06.06.15); Article 1 (3) of the Romanian Constitution ('Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed'(available http://www.cdep.ro/pls/dic/site.page?den=act2_2&par1=1#t1c0s0sba1, accessed 06.06.15); Article 2 of the Constitution of Slovenia: 'Slovenia is a state governed by the rule of law and a social state' (available http://www.us-rs.si/en/about-the-court/legal-basis/, accessed 06.06.15).

[18] See Bobbio (1984) and Espinoza de los Monteros Sánchez (2010).

[19] See Pernice (1999), p. 703; Häberle (2002), p. 455; Cardone (2011).

[20] Charter of the United Nations: Preamble (available at http://www.un.org/en/documents/charter/, accessed 06.06.15).

[21] ECJ, Case 26/62 *Van Gend en Loos* ECR [1963] *ECR* 1, p. 3; ECJ, Case 6/64 *Costa* [1964] *ECR* 585; ECJ, Case 155/79 *AM & S Limited* [1982] *ECR* 1575, para 18.

[22] See Chapter VII of the Presidency Conclusions of the Tampere European Council 15 and 16 October 1999.

such matters as contracts between professionals and consumers; agreements between enterprises; public procurements) and non-legislative actions through the elaboration of common principles, for example, those provided in the Draft of the Common Frame of Reference ('DCFR').[23] European Union law also includes among its primary objectives the protection of human rights,[24] especially in the wake of the Lisbon Treaty, which constitutionalised the Charter of Fundamental Rights ('EU Charter'). The Communication of the European Commission, accompanying the Charter of Fundamental Rights, provided that all legislative and other proposals of the Commission would have to be assessed, taking into account their compliance with the EU Charter.[25]

4 The Impact of Human Rights Law on the Law of Contract

When the various Constitutions entered into force, they had a profound impact on contract law. Initially such 'direct effect' was denied,[26] with any reference to fundamental rights only really applying to public acts carried out by the State;[27] provisions relating to constitutional rights, whether social, political, or economic, were not viewed as having immediate effect,[28] nor were they regarded as enforceable in court.[29] The situation began to change post-Weimar Constitution,[30] when a general rule of 'good faith'[31] was argued (on the basis of constitutional principles) to protect employee salaries against inflation. Since the 1960s, the tendency to interpret traditional civil laws, especially those enshrined in Civil Codes, using a fundamental rights perspective has gradually become accepted. This is not only so in respect of family law, which was the initial field of application for constitutional principles, but also in relation to patrimonial relationships.[32] Equating a right to property with having absolute power over the goods in question (as occurs for example in Article 832 of the Italian Civil Code) had implications for the principles

[23] See in particular von Bar et al. (2009). For an overview of the DCFR, see Fuchs (2008), pp. S1–S6; Clive (2008), pp. S13–S31.

[24] See ECJ, Case 29/69 *Stauder* [1969] *ECR* 419.

[25] See Rodotà (2005), pp. 21 ff.

[26] Ost (1990), p. 161.

[27] Crisafulli (1952), p. 135; Barettoni Arleri (1975), pp. 410 ff.

[28] Calamandrei (1950), pp. 28 ff.; Lucifredi (1952), p. 275.

[29] See Lega (1952, 1969); Chiarelli (1957), p. 10.

[30] Costa (2002), Vol. IV; Mortati (1946).

[31] See section 242 BGB (Performance in good faith): "An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration" (available at http://www.gesetze-im-internet.de/englisch_bgb, accessed 06.06.15).

[32] Rodotà (1990).

of social utility,[33] especially in relation to such key common interests as environmental protection.[34]

[33] See Article 151 Weimer Constitution (1919) which, although it granted economic freedom, also provided that economic relationships had to respect fundamental rights principles and grant dignity. Common interest was also key, under Article 153 (see http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=3937, accessed 06.06.15) See also Article 33(1) Spanish Constitution, which refers to the social function of property and which places limitations on the ground of the social utility; see also the social aims of economic relationships outlined in Article 80 of the Portuguese Constitution, and Article 74 of the Slovenian Constitution which provides that trade enterprises cannot be carried out in opposition to public interests. (See also Spanish Constitution (1978) at http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf, accessed 06.06.15). The German *Grundgesetz* S.14 (2) implicitly quotes the Weimar Constitution '*Eigentum verpflichtet. Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen'* ('Property entails obligations. Its use shall also serve the public good' available http://www.gesetze-im-internet.de/englisch_gg, accessed 06.06.15) Article 43 (1) of the Irish Constitution similarly states that 'The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.' 43(2) notes that 'The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.' (The principles of social justice are also referred to, as is the common good.). (See http://www.irishstatutebook.ie/en/constitution, accessed 06.06.15). Article 9 of the Preamble to the French Constitution (1946) further states '*Tout bien, toute entreprise, dont l'exploitation a ou acquiert les caractères d'un service public national ou d'un monopole de fait, doit devenir la propriété de la collectivité*.' ('All goods, any company whose operation has or acquires the character of a national public service or a monopoly in fact must become the property of the community.') See http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/la-constitution/les-constitutions-de-la-france/constitution-de-1946-ive-republique.5109.html (accessed 06.06.15). Article 11 (2) of the Charter of the Fundamental Rights and Fundamental Freedoms of the Czech Republic establishes also that law must frame legal ownership with respect to the needs of society as a whole (see http://www.usoud.cz/en/charter-of-fundamental-rights-and-freedoms, accessed 06.06.15).

[34] See the French *Charte de l'Environnement* (2004) Article 6 '*Les politiques publiques doivent promouvoir un développement durable. A cet effet, elles concilient la protection et la mise en valeur de l'environnement, le développement économique et le progrès social*' ('Public policies shall promote sustainable development. To this end they shall reconcile the protection and enhancement of the environment, economic development and social progress') http://www.legifrance.gouv.fr/Droit-francais/Constitution/Charte-de-l-environnement-de-2004, accessed 06.06.15); Article 9 (2) of the Italian Constitution (1948) '*Tutela il paesaggio e il patrimonio storico e artistico della Nazione*' ('It [the Italian Republic]safeguards the landscape and the historical and artistic heritage of the Nation') (http://www.governo.it/Governo/Costituzione/principi.html, accessed 06.06.15); Article 37 of the European Charter of Human Rights (on environmental protection) establishes that 'A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.' (http://www.europarl.europa.eu/charter/pdf/text_en.pdf, accessed 06.06.15). Article 23 of Belgium's Constitution also sets out 'le droit à la protection d'un environnement sain' ('the right to protection of a healthy environment' http://www.senate.be/doc/const_fr.html, accessed 06.06.15) See also Article 21 of the Constitution of The Netherlands (stating that 'It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment.' http://www.government.nl/documents-and-publications/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008.htm, accessed 06.06.15) and Article 20 of Finland's Constitution, on how 'Nature

Legal systems shaped by Constitutions are thus no longer focused only on the regulation of patrimonial issues.[35] Fundamental rights, as recognised and protected by Constitutions, are applied to vertical relationships (between citizens and public authorities) and to horizontal relationships (between individuals). Particular attention has however been devoted to the constitutional interpretation of contract law.[36] The first field of application for fundamental rights was within employment contracts, where the rights of the worker were not limited to the payment of a salary, but also included such non-patrimonial issues as the right to strike.[37] Other particularly relevant issues include equality between the contracting parties, and the concept of respect.

4.1 Substantive Equality of Contracting Parties

Whether parties to contracts are always on an equal footing remains doubtful. Weaker parties often require protection, as *Berliner Verkehrsbetriebe* (BVG) [1993][38] established. Although individual autonomy is recognised by the German constitution, the court observed that contracts could create significant power imbalances: judicial oversight might be needed to investigate the existence of such disparities, and perhaps provide redress for these. At the supranational level, the European Court of Justice, via the *Courage* judgement,[39] pointed out how one party may be in a situation of 'serious inferiority' through contractual limitations, and a lack of information. That said, a general right *to be informed* is provided under Article 11 of the EU Charter.[40] Several directives foresaw the need to offer a wide range of pre-contractual information. In addition to the information required by

---

and its biodiversity, the environment and the national heritage are the responsibility of everyone. The public authorities shall endeavour to guarantee for everyone the right to a healthy environment and for everyone the possibility to influence the decisions that concern their own living environment' at https://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf, accessed 06.06.15).

[35] Carbonnier (2004), p. 97 on solidarity in private relationships.

[36] Cédras (2003) available at https://www.courdecassation.fr/publications_26/rapport_annuel_36/rapport_2003_37/deuxieme_partie_tudes_documents_40/tudes_diverses_43/doctrine_devant_6260.html (accessed 6.6.15).

[37] See Article L. 120-2 of the French Code du travail. See also, for example, the judgments of the *Cour de Cassation*, Soc., 13 March 2001, in Bull. 2001, V, no 87, p. 66; Soc., 28 May 2003, no 02-40.273, concerning the unfairness of the dismissal in case of violation of fundamental rights.

[38] Berliner Verkehrsbetriebe (BVG) [1993], judg. in *Foro Italiano,* 1995, IV, 88 ff., with the commentary of Barenghi.

[39] ECJ, Case C-453/99 *Courage Ltd.* [2001] *ECR* I-6297.

[40] Article 11 (1) of the Charter of Fundamental Rights (Freedom of expression and information) provides that 'Everyone has the right to freedom of expression'. The right includes 'freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.' See http://www.europarl.europa.eu/charter/pdf/text_en.pdf (accessed 06.6.2015).

consumer contracts, Directive 97/5/EC on cross-border bank transfers included the obligation to provide information on execution times and transaction expenses.[41] Directive 2000/31/EC (on electronic commerce) requires the communication of information regarding the different technical steps needed to conclude the contract, storage information systems, languages in which the contract can be concluded, as well as the possible presence of codes of conduct.[42] Directive 87/344/EEC (on legal protections in the insurance sector) requires insurers to inform customers of their right to request arbitration,[43] whilst Article 4 (2) of Directive 90/314/EEC (on package travel) sets out that the text of the contract has to include specific information.[44]

Under Directive 92/96/EEC Article 31 (2) and Annex II (on life insurance) insurers must provide the insured with updated information on their insurance company and the policy conditions.[45] Similarly, Directive 87/102/EEC Article 6 (2) (on consumer credit) requires that the consumer must be informed of any change in the annual rate of interest and other applicable charges.[46] Directive 97/5/EC Article 4 (on cross border bank transfers) provides that after payment, the bank is obliged to provide the customer with the necessary information to identify the transaction, the initial amount, the fees and expenses.[47] Article 12 of Directive 86/653/EEC (on self-employed commercial agents) requires that the commercial agent be supplied with a statement of the commissions earned, along with the essential elements upon which the calculation was based. Such 'formalism' also serves to verify whether or not a contract has met its legal obligations. As Jannarelli argued, formalism here also performs the same function as a product label, showing the characteristics of the contract.[48]

---

[41] See Article 3 (Prior information on conditions) of Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers, OJ 1997, L 043, p. 25.

[42] See in particular Article 10 (Information to be provided), paras 1 and 2 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ 2000, L 178, p. 1.

[43] See the text of Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance, OJ 1987, L 185, p. 77.

[44] See Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ 1990, L 158, p. 59.

[45] See Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance Directive), OJ 1992, L 360, p. 1.

[46] Council Directive 87/102/EEC of 22 December 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, OJ 1987, L 042, p. 48.

[47] See Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers, OJ 1997, L 043, p. 25.

[48] Jannarelli (2002). This approach is also evident in the DCFR where a list is provided of pre-contractual information that the parties should exchange *inter se*, either in general, or with

4.2 The Obligation to Respect Fundamental Rights

In sum, private law relationships can claim fundamental rights protections. As the German Constitutional Court (*Bundesverfassungsgericht*) confirmed in the case of *Parabolantenne* (interpreting the § 242 of the BGB in the light of § 5 (1) Basic Law), the right to freedom of information prevented a landlord from refusing a tenant permission to install a satellite antenna.[49] Another example is provided by EU law, according to which, grants provided by the European Commission have to comply with environmental protection rights and equality between women and men.[50] Perhaps most significantly, contractual relationships must also protect human dignity, a concept which is core to fundamental human rights.[51] As highlighted by the Advocate General Christine Stix-Hackl in the *Omega* case,[52] 'human dignity' is an expression of the respect to be attributed to each human being on account of his or her humanity. It is concerned with protection of the essence or nature of the human being *per se*—that is to say, the 'substance' of mankind. Mankind itself is therefore reflected in the concept of human dignity; it is what distinguishes him from other creatures. However, this substance of human dignity is ultimately determined by a particular 'conception of man.'[53] Thus dignity is considered to be a sort of 'concept-matrix' needed to protect humanity, not least those who are most vulnerable to suffering rights violations.[54]

In accordance with the Article 1 of the EU Charter (see also Section 1 of German *Grundgesetz*), human dignity has to be not only respected, but also actively protected by States and indeed by international and supranational organizations.[55] For that reason, public administrations are entitled to intervene if private relationships might affect human dignity or infringe fundamental rights, as affirmed within

---

reference to particular contracts such as those concerning consumers, or those between professionals (Articles 14–29 DCFR). The consequence of violating obligation of information is compensation not only for loss of interest, but also for having concluded the contract on differing terms to those that were accepted (Article 30 DCFR).

[49] BVerfG 9 February 1994, BVerfGE 90, 27 (Parabolantenne).

[50] ECJ, Case C-44/96 *Mannesmann Anlagenbau Austria AG et oth v Strohal Rotationsdruck GesmbH* [1998] *ECR* I-73.

[51] See the Preamble to the Charter of Fundamental Rights of the European Union and Article 16 French Civil Code. On the concept of dignity within the EU Charter, see also Jones (2012); for dignity in bioethics see Andorno (2009).

[52] See the opinions of Advocate General Christine Stix-Hackl, submitted 18 March 2004 and concerning ECJ, Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH/ Oberbürgermeisterin der Bundesstadt Bonn* [2004] *ECR* I-9609.

[53] Ibid., para 75.

[54] Mislawski (2010).

[55] Sanz Caballero (2013), pp. 466–474. See also the case-law of the Court of Justice of the European Union affirming the need for states to respect fundamental rights: ECJ, Case C-2/92, *Bostock* [1994] *ECR* I-955, para 16; ECJ, Case C-292/97, *Karlsson et oth.* [2000] *ECR* I-2737, para 37; ECJ, Case C-442/00 *Rodríguez Caballero* [2002] *ECR* I-11915, para 30.

Omega by the Court of Justice.[56] The autonomy of parties to a contract cannot be pleaded to justify violations of fundamental human rights, as recognized also by the Committee on the International Covenant on the Civil and Political Rights ('ICCPR').[57]

This rights-led perspective, with respect to traditional private law fields, is particularly evident within the DCFR.[58] Article I.-1:102 provides that the rules contained therein must be interpreted and applied in the light of fundamental rights and freedoms. The DCFR has also 'privatised' fundamental rights, recognising the 'overriding nature' of such principles as solidarity and the promotion of social responsibility, the preservation of cultural and linguistic diversity, and the protection and promotion of welfare within domestic markets.[59]

4.3 The Consequences of Non-compliance with Human Rights

The violation of human rights in relation to contracts leads to nullity of the agreement, as national case law has confirmed, for example, in relation to discrimination on grounds of nationality or ethnicity.[60] In particular, Article VI.-2:203 states that

> loss caused to a natural person as a result of infringement of his or her right to respect for his or her dignity, such as the rights to liberty and privacy, and the injury as such are legally relevant damage.

The violation of these rights carries sanctions under civil law: Article II.-7:301 of the DCFR also states that

> a contract is void to the extent that: (a) it infringes a principle recognised as fundamental in the laws of the Member States of the European Union; and (b) nullity is required to give effect to that principle.

Compensation does not refer only to patrimonial rights damages, as established for example by the Court of Justice in *Leitner,* in relation to Article 5 of the Directive on package travel.[61] The consequences of non-compliance with

[56] ECJ, Case C-36/02, *Omega* [2004] *op cit*. n 52.

[57] See Communication No. 854/1999: France. 26/07/2002. CCPR/C/75/D/854/1999, especially para 7.(4) in respect of the ban by the French authorities of the activity known as 'dwarf throwing'. See also Wilkinson (2003), p. 42; Millins (1996), pp. 375 ff.

[58] Cherednychenko (2010), p. 42; see also Hesselink (2003), p. 119; Colombi Ciacchi (2006), p. 167.

[59] See von Bar et al. (2009), paras 14–17.

[60] See Tribunal of Padua, order of 19 May 2005 '*Giurisprudenza italiana*' (2006), p. 5, with the commentary of Maffeis. Furthermore the relevance of human rights to contract law is evident within the DCFR, books II and III, and in some of the provisions of Book VI (on torts.).

[61] ECJ, Case C-168/00 *Leitner v TUI Deutschland* [2002] *ECR* I-2631.

fundamental rights principles may also be relevant to grant agreements, for example in respect of the Horizon 2020 Programme, which is the main instrument of the European Union for funding scientific research.[62] In EU research grants, any violation of ethical principles results in termination of the agreement between the Commission and the beneficiaries.[63]

4.4 'General Clauses' as Expressions of Fundamental Rights Principles

In contrast to domestic Civil Codes (which aim to avoid references to the more vague notions found in some contracts, i.e. 'good faith,' 'equity,' and 'correctness'), case law may frequently look to generally wording.[64] 'Good faith' is considered to be the main and most general expression of the duty of solidarity within private law[65] as shown by the Italian *Corte di Cassazione*,[66] in relation to Article 2 of the Constitution.[67] The Court's approach to such issues as unlimited liability in performance bonds ('fideiussione *omnibus*'[68]), unfair penalty clauses,[69] failure to honour contractual obligations,[70] and arbitrary withdrawal,[71] bears this out. At a wider level, the DCFR also refers to such general concepts as 'reasonableness' (Article I-1: 104) and 'basic principles infringing contracts' (Article II.-7: 301). The concept of 'good faith' is also seen in Directive 1986/653 in respect of fulfilling

[62] See the paragraph 29 of the Preamble of the Regulation (EU) 1291/2013 of the European Parliament and of the Council of 11 December 2013, establishing the Programme Horizon 2020, OJ 2013, L347, p. 104. See also Articles 14 (2), Article 18 (6) and Article 23(9) of Regulation (EU) 1290/2013 of the European Parliament and of the Council of 11 December 2013, providing the rules of participation to the Programme Horizon 2020, OJ 2013, L 347, p. 81.

[63] See Article 34 of the Model Grant Agreement of Horizon 2020, available at http://ec.europa.eu/research/participants/data/ref/h2020/mga/gga/h2020-mga-gga-multi_en.pdf (accessed 06.06.15).

[64] Rodotà (1991).

[65] See Natoli (1974); Rodotà (2004), p. 168; Siccherio (1993), pp. 2132 ff.

[66] See in particular the judgments of the Italian *Cassazione* as follows: 11 February 2005, n. 2855 '*Responsabilità civile*' (2005), p. 881; 9 July 2004, no. 12685 '*Foro italiano*' (2005), 1, c. 3429; 24 February 2004, no. 3610 '*Guida al diritto*' (2004), 16, p. 50; 5 November 1999, n. 12310 '*Massimario Giurisprudenza italiana*' (1999).

[67] See *Cassazione* of 30 July 2004, no. 14605 '*Massimario Giurisprudenza italiana*' (2004).

[68] Before the Italian legislation established limitation of the performance bond (in accordance with the law 17 February 1992, no. 154), see *Cassazione*, judg. 18 July 1989, no. 3362; *Cassazione*, judg. 15 March 1991, no. 2790.

[69] See especially *Cassazione* (United Sections), judg. 13 September 2005, no. 18128, in *Obbligazioni e contratti*, 2005, 2, p. 103; see also *Cassazione* 24 September 1999, no. 10511, '*Foro italiano*' (2000), I, c. 1929.

[70] *Cassazione*, judg. 4 March 2003, no. 3185, '*Giurisprudenza italiana*' (2005) II, p. 958.

[71] *Cassazione*, judg. 6 August 2008, n. 21250, in www.leggiditaliaprofessionale.it (accessed 06.06.15).

obligations as an agent or employer. The notion of good faith is also taken into consideration where unfair clauses agreed to by the parties might lead to a power imbalance, even where the clause was itself initially drafted in good faith.[72] Within EU law, the principle of good faith is more widely seen than in national law,[73] not only with respect to the various legal systems of continental law, but also in relation to common law, where the concept was perhaps more traditionally 'avoided.'[74]

Another important principle is that of 'equity', seen for example in Article 8 of Directive 87/102 (on consumer credit) which establishes the right to an equitable reduction in the total cost of credit, if the consumer exercises his right of early redemption. Under Article 6 of Directive 1986/653 (18 December 1986), in the absence of agreements, standards or customs, an agent shall be entitled to 'reasonable remuneration;' Article 3 (3) of the Directive on Late Payments (Directive 2000/35/EC) also provides for compensation for damages in the case of delayed payments. This principle is widely seen in the case-law of the Court of Justice[75]; it generally serves to 'adapt' the rules to the case in question, as occurred in medieval courts, based on the '*aequitas singularis*' (application of justice to individual cases).[76]

5 The Contract as a Protector of Human Rights

5.1 Implementation of Public Policies

Arguably, contract law, and the law of obligations, may be considered key to the implementation and protection of human rights. Today, the contract is a key instrument in implementing public policies aimed at protecting personal and

[72] See for example Article 3 (1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993, L 095, p. 29. Also see De Nova (1994), pp. 693 ff.; Rizzo (1996).

[73] ECFI, Case T-115/94 *Opel Austria v Conseil* [1997] ECR II-39. The EU Judge normally elaborates upon the notion of 'good faith', making reference to international law. See the case-law of the International Court of Justice, the judgment of 25 May 1926, *Intérêts allemands en Haute-Silésie polanaise*, CPJI, series A, n. 7, pp. 30, 39, afterwards included in the Wiener Convention on the International Treaties of 1969.

[74] See the decision of the *House of Lords*, *Director General of Fair Trading vs. First National Bank* [2001] UKHL 52 (25th October 2001) on the application of Directive 93/13/EEC *op cit*. n 72 in the English legal system. On the application of the principle of good faith in European Countries, see also Whittaker and Zimmermann (2000).

[75] See ECJ, Case C-446/93 *SEIM* [1996] *ECR* I-73, para 41; ECJ, Case C-58/86, *Coopérative agricole d'approvisionnement des Avirons*, [1987] *ECR* 1525, para 22; ECJ, Case C-283/82, *Schoellershammer/Commission*, [1983] *ECR* 4219, para 7; ECFI, Case T-239/00 *SCI UK/Commission* [2002] *ECR* II-2957, paras 44 and 50.

[76] See Sassi (2005).

collective rights and interests.[77] For example, at the supranational level (according to the White Paper on *European Governance*[78]), the EU should adopt 'a less top-down approach... complementing its policy tools more effectively with non-legislative instruments.'[79] In fields concerning fundamental rights (e.g. privacy, research on humans) domestic legislation usually provides for the establishment of several types of codes of conduct,[80] and agreements that complete or implement supranational or national policy.[81] Codes of conduct and other negotiated instruments (e.g. the opinions of ethical committees) provide scope for some degree of fairness in cases where conflicts between constitutional interests might occur, for example where economic and scientific activities may impact upon individual rights or the protection of the environment. Education policies provide another example: the Bologna Process and the EU's higher education policy led to the Higher Education Area, establishing joint degrees and recognising training periods,[82] and putting in place opportunities for technology transfer between universities, research institutions and enterprises.[83] Agreements between local public authorities may also be significant, with European law controlling agreements between sub-regional or local authorities and municipalities, regions or other kinds of administrative bodies, depending on the structure of the each State. In respect of local authorities, the White Paper of the Committee of European Regions on Multilevel Governance ('Building Europe in partnership' of 17 June 2009) affirms that:

> By recognising the contribution of territorial governance and decentralised co-operation, international and European institutions have in recent years strengthened the role of local and regional authorities in global governance.[84]

Collaboration between transnational non-state entities has constitutional relevance, via the principle of subsidiarity and the implementation of the cohesion policy (e.g. Article 174 of the TFEU). The main means of implementing policies on economic, social and territorial cohesion may be via the Structural and Cohesion Funds.[85] One area where such collaboration is very significant is that of cross-border

[77] Lipari (1987).

[78] Communication of the Commission, *European Governance*, COM (2001) 428 final/2, of 5 August 2001.

[79] Ibid., p. 4.

[80] Galgano (2001), p. 215.

[81] Zagreblesky (1992), pp. 45 ff.

[82] Cippitani and Gatt (2009), pp. 85–397.

[83] Commission Recommendation of 10 April 2008 on the management of intellectual property in knowledge transfer activities and Code of Practice for universities and other public research organizations (notified under document number C (2008) 1329).

[84] See para 1.3. See also the Communication of the European Commission, Local Authorities: Actors for development, (SEC (2008) 2570).

[85] Armstrong (1995); Barro and Sala-I-Martin (1991), pp. 107–182; De La Fuente and Domenéch (1999); López-Bazo et al. (1999), pp. 257–370.

co-operation, enabled by liaison between the local authorities of different states, especially in relation to border territories.[86,87]

5.2 Social Services

Constitutions have clearly acknowledged socio-economic rights[88] especially the right to receive social services (which characterises the welfare State[89]) both at national and supranational levels.[90] From a traditional patrimonial viewpoint, social rights would not however be considered truly enforceable: that argument is contradicted however by the fact that many Constitutional provisions and domestic statutes include reference to 'rights' or similar. In Spanish Law for example the above mentioned Law no. 39/2006 article 1 provides that citizens have a 'subjective right [. . .] to promote the personal autonomy and care for people in situations of dependency.' In the French *Code de l'action sociale et des familles,*[91] the first chapter of Title I is entitled '*Droit à l'aide sociale*'. In other provisions of this Code the word '*droit*' or some equivalent is used.[92] Under Italian law, Article 2 (2) of Law 328/2000 ('Diritto alle prestazioni', i.e. right to social services)[93] concerns an integrated system of social services by the State, the Regions and local authorities. At the supranational level, Article 34 of the EU Charter also clearly recognises the right of access to social security benefits. In particular, paragraph 2 provides that 'Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices' while paragraph 3 sets out 'the right to social and

[86] Perkmann (2003), pp. 153–171.

[87] Council of Europe, *Practical Guide to Transfrontier Co-operation*, (2006) 3 available at http://www.espaces-transfrontaliers.org/fileadmin/user_upload/documents/Documents_MOT/Etudes_Publications_MOT/Practical_guide_COE_MOT_EN.pdf, accessed 28/6/2015. In Europe, cross-border co-operation arose spontaneously after World War II, especially through twinning agreements between towns and other local authorities. In the 1980s, those forms of collaboration were recognised by the Council of Europe, through the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities ('Madrid Agreement' of 21 May 1980, see at http://conventions.coe.int/Treaty/EN/Treaties/Html/106.htm).

[88] Mazziotti (1964), vol. XII.

[89] Marshall (1998).

[90] See European Commission, *White Paper on Services of General Interest*, COM (2004) 374 of 12 Mary 2004.

[91] The *Code de l'action sociale et des familles* ('Code of Social Action and Families') is available at http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006074069.

[92] See, for example, Article L114-1 and L114-1-1 of the Code de l'action sociale et des familles.

[93] Available at http://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:legge:2000-11-08;328, accessed 05.05.15.

housing assistance so as to ensure a decent existence for all those who lack sufficient resources.'[94]

The enforceability of social rights is also clearly endorsed by supranational judges.[95] Such rights may be the subject of contractual relationships and can thus also be protected in domestic, civil law courts.[96] In other words, socio-economic rights may be implemented via contracts, for example for the provision of social services: EU law regards them as protecting services of general economic interest (Article 36 Charter of Fundamental Rights).[97] Article 6 (1) of the European Convention gives the Strasbourg court ('ECtHR') jurisdiction over such 'civil law' disputes, that is to say those which may affect the socio-economic rights and interests of the recipients of such services,[98] as seen in *Mennitto v Italy* (2000) which concerned services provided by the Region of Campania for the families of disabled children. According to the Court, those social services fit perfectly into the arena of 'private law human rights.'[99] The protection of such rights via private or civil law is clearly not excluded just because they are provided for by public authorities.[100]

5.3 Informed Consent

Via contracts, individuals may give consent to participate in activities which might affect his/her personal integrity or private life. Article 32 of The Italian *Costituzione* (1948) established an obligation to seek consent to medical treatment;[101] other Constitutions, directly or indirectly, also provide for this. For example, Article 7 of the Constitution of Finland, and paragraph 2 (2) of the German Constitution, both recognise the right to personal liberty.[102] More recently, consent has also been required for involving an individual in scientific research. Symbolically, the first such document in the field of research was adopted by the medical/scientific community in Nuremberg; the 'Nuremberg Code' concerning 'Permissible Medical Experiments' sets out as absolutely essential for medical experimentation, the

[94] Available http://www.europarl.europa.eu/charter/pdf/text_en.pdf (accessed 07.06.15).

[95] Sayn (2005).

[96] Peces-Barba Martínez (1986), p. 13; Álvarez Ledesma (1998), pp. 1 ff.

[97] ECJ, Case C-158/96, *Raymond Kohll*, [1998] *ECR* 1998 I-1931; ECJ, Case C-120/95, *Nicolas Decker* [1998] *ECR* I-1831; ECJ, Case C-67/96, *Albany International BV* [1999] *ECR* I-5751.

[98] Colcelli (2010).

[99] See among others *Salesi v. Italy* (App. No. 13023/87) [1993] ECHR 14, para 19.

[100] *Schuler-Zagraggen* v S*wistzterland* (App No. 14518/89) (1993) 16 EHRR 405.

[101] See Corte Costituzionale, 23 December 2008, No 438, in *Foro Italiano,* No 5, parte I, Bologna, 2009, p. 1.328.

[102] Nys et al. (2002).

voluntary consent of the person concerned.[103] However, the issue of informed consent has not been explicitly tied to scientific activity. Only the most recent, or recently modified, Constitutional charters take into consideration the issue of consent in the specific field of scientific research. This is a development that depends on cultural and legal sensitivity in respect of the importance and risks of techno-science (i.e. science impacting upon the world through technology). Thus, under the Swiss Constitution (Article 118b, entered into force 2010), informed consent is necessary for research involving humans.[104] The Constitutions of Bulgaria of 1991 (Article 29),[105] Slovenia (Article 18),[106] Hungary (Article III, para. 2)[107] and Croatia (Article 23)[108] also prohibit medical or scientific experimentation without the consent of the person concerned. Otherwise, at the level of national law, consent is covered by ordinary legislation or policy.

Amongst national legislation, French law devotes several provisions to the concept of consent in the scientific and health sectors. In particular, several laws have been approved in the field of bioethics, which has in turn modified the Civil Code.[109] In respect of the field of biomedicine, the French Code requires individual consent for all treatments (under Article 16-3, paragraph 2), for the collection of genetic information (under Articles 16-10, 16-11, 16-12 Civil Code) and brain imaging techniques (Civil Code Article 16-14).[110] The issue of informed consent is considered a pivotal aspect of European society[111] as shown by the EU Charter, which acts as a sort of a 'bioethics constitution' taking into consideration the need to protect fundamental rights interests within the framework of economic,

[103] Available http://www.hhs.gov/ohrp/archive/nurcode.html (accessed 06.06.15).

[104] See the translation in English of the Federal Constitution at https://www.admin.ch/ch/e/rs/1/101.en.pdf (accessed 06.06.15).

[105] See http://www.parliament.bg/en/const (accessed 06.06.15).

[106] See http://www.us-rs.si/en/about-the-court/legal-basis/ (accessed 06.06.15).

[107] For the translation of the Constitution of 2011 in English, see http://www.kormany.hu/download/e/02/00000/The%20New%20Fundamental%20Law%20of%20Hungary.pdf.

[108] See http://www.sabor.hr/Default.aspx?art=2405.

[109] French laws concerning bioethics include Law 94-548 of 1 July 1994 concerning 'traitement des données nominatives ayant pour fin la recherche dans le domaine de la santé'; Law no. 94-653 of 29 July 1994 related to the "respect du corps humain"; Law no. 94-654 also od the 29 July 1994 "don et à l'utilisation des éléments et produits du corps humain, à l'assistance médicale à la procréation et au diagnostic prénatal"; Law no. 2004-800 of 6 August 2004 concerning bioethics; the Law no. 2011-814 of 7 July 2011), modified the Civil Code, introducing in Book I 'Des personnes' Title I (De civils droits) the Chapter II 'Du respect du corps humain' (Articles 16 to 16-9), the chapter III 'De l'examination des caractéristiques Génétiques d'une personne et de l'identification d'une personne par ses empreintes Génétiques' (Article 16-10 to 16-13), and chapter IV 'De l'utilization des techniques d'imagerie cérébrale '(Article 16-14). With respect to the French legislation concerning bioethics see further Cippitani (2012a), pp. 1836–1865.

[110] For the Netherlands see the Civil Code, see Article 7:450.

[111] Sassi (2013), pp. 70–77.

therapeutic and scientific activities.[112] In particular, Article 3 of the EU Charter sets out that human dignity has to be respected in medicine and biology, noting especially that in such activities the free and informed consent of the person concerned is required, in the manner defined by domestic law. Informed consent is not directly controlled by the Convention of Rome, but the ECtHR looks for guidance to Article 8 ECHR (the right to respect for home, family and private life).

The Council of Europe has also set out a specific regional convention concerning biomedicine, namely the 'Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine' ('Oviedo Convention'[113]). The Institutions of the Council of Europe, such as the Committee of Ministers and the Parliamentary Assembly, also adopt instruments of 'soft law' such as recommendations and resolutions relating to the Oviedo Convention and its Additional Protocols. The Oviedo Convention in particular states the 'general rule' according to which 'an intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.' (Article 5). The need for consent is also provided for in respect of all matters regulated by the Oviedo Convention, such as scientific research (Article 15) and the donation of human organs or tissues (Article 19).[114]

Under European law, informed consent is not only a key consideration in biomedical fields; the protection of personal data also requires (for the lawful processing of such data) the consent of the persons concerned, in accordance with Article 8 (2) of the EU Charter, and Directive 95/46/EC of the European Parliament and Council (24th of October 1995) on the protection of individuals with regards to the treatment of personal data and the free movement of such data. Generally speaking, persons have the right to withhold consent in any situation where human activity might affect individual rights to health, integrity, and privacy.

[112] The European Union, in the last two decades, has developed the notion of a 'knowledge-based society' i.e. a society in which research and technology play a key role (see further Cippitani 2012b). EU law also addresses both the opportunities and risks of a society of based on research and technology.

[113] See http://conventions.coe.int/treaty/en/Treaties/Html/164.htm, accessed 6.6.15. The Convention was supplemented by additional protocols on specific topics: the additional Protocol concerning organ transplantation and tissues of human origin (Strasbourg, 24 January 2002); the additional Protocol concerning biomedical research (Strasbourg, 25 January 2005); the additional Protocol concerning genetic testing for health purposes (Strasbourg, 27 November 2008).

[114] Moreover, with regards to scientific research into bioethics, it is important to mention the Additional Protocol of 2005, particularly Article 13.

5.4 'Liability' as an Instrument to Protect Human Rights

Contracts and obligations may ensure that public authorities act consistently, in ways which respect the rights of individuals. Civil liability on the part of States is the result of a process of external and internal control over the concept of sovereignty: where there has been a failure to fulfil obligations (positive or negative) under EU law, for example, the Court of Justice will recognise state liability, irrespective of which organs of the state have caused such failure.[115] This is so whether action or inaction has led to liability, even when they are constitutionally independent,[116] for example, as local authorities or as the judiciary. As the EU Court stated in *Francovich:*

> It follows that the principle whereby a State must be liable for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty.[117]

The ECtHR also usually elaborates within its case-law on state liability under Article 41 ECHR, which provides that

> If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

Compensation is decided in order to enforce respect for human rights, even if these are not necessarily connected to the patrimonial sphere.[118] The ECtHR often makes reference to the protection of patrimonial rights, especially the right to not be deprived of one's property as recognised by Article 1 of First Protocol to the Convention. ('A1P1') In *Maurice v France* (2005)[119] the ECtHR found that French law no. 2002-203 (also known as '*loi anti-Perruche*'[120] which limits liability in medical negligence in the event of misdiagnosis of foetal malformation) offended against A1P1: the parents' right to sue therefore amounted to a valuable possession.

---

[115] See for example ECJ, Case C-34/89 *Italy v Commission* [1990] *ECR* I-3613, on EU grants.

[116] ECJ, Case C-129/2000 *Commission v Italy* [2003] *ECR* I-14672.

[117] ECJ, Case C-6/90 and C-9/90, *Francovich and Bonifaci v Italy*, [1991] *ECR* I-5357, paras 35 ff.

[118] See *Mennesson v. France* (App. No. 65192/11), judgement 26 Jun 2014, concerning the violation of the right to respect of family life (Article 8 ECHR) in relation to surrogacy.

[119] (App. No. 11810/03), (2006) 42 EHRR 42.

[120] See further the decision of the *Cour de Cassation* of the 17 November 2000, on indemnity where severe foetal abnormality is not detected during pregnancy, lack of information, and damages reflecting the costs involved in raising a child with a grave disability. See also Aynès (2001), pp. 492–496; '*Code civil Dalloz*' (2008) bibl., p. 1594.

6 Application of the Rules on Contracts

If human rights can impact upon contract law, and contract law can afford protection to human rights, this gives rise to legal issues which might never be fully resolved. Generally speaking, it has to be asked whether contract law, which had its origins in regulating patrimonial property interests and relationships, might be applied to situations where fundamental human rights are involved. A number of traditional rules within the laws of contract and obligations appear inconsistent with the furtherance of individual human rights. The concept of contractual capacity and the right to withdraw, are useful examples.

6.1 Capacity vs. Competence

Under most Civil Codes only persons above a specified age (usually 18 years) and who have not been declared incapable by the courts (via a severe mental disability or some penal sanction) may act as parties to a contract. Arguably, this mirrors to some extent the legal 'incapability' referred to in the International Ethical Guidelines for Biomedical Research Involving Human Subjects (2002) which excludes '*those who are relatively (or absolutely) incapable of protecting their own interests*.'[121] Such rules, if applied strictly, would lead to violation of key constitutional principles. Article 12 (2) of the UN Convention on the Rights of Persons with Disabilities establishes different rules, namely that 'persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.' This also applies to such issues as informed consent. The same provision stipulates (at paragraph 4) that the obligation of the State is to 'take appropriate measures to provide access for persons with disabilities to the support they may require in exercising their legal capacity' and that 'such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person.'[122] European systems of protection for human rights provide that such persons must be guaranteed the highest possible level of autonomy[123] and that any restrictions upon autonomy must be strictly necessary,[124] and respect the

[121] Council for International Organizations of Medical Sciences, http://www.cioms.ch/publications/layout_guide2002.pdf (accessed 06.06.15).

[122] In the European regional law in particular this principle is stated with regard to people with psychological disabilities. See the recommendations provide to the Commissioner of Human Rights of the Council of Europe in 'Who gets to decide? Right to legal capacity for persons with intellectual and psychosocial disabilities' of 20 February 2012 (at https://wcd.coe.int/ViewDoc.jsp?id=1908555) on consenting to therapeutic treatments.

[123] *Stanev v. Bulgaria* (App. No. 36760/06) (2012) ECHR 46.

[124] *Shtukaturov v. Russia* (App. No. 44009/05) [2008] ECHR 223, paras 90 and 93–95.

principle of proportionality.[125] Therefore, therapeutic treatments or other invasive practices cannot be carried out without the consent of the person, as in for example, *Shtukaturov v. Russia* (2008) where the Strasbourg Court declared unlawful the practice of coercive hospitalization.[126] In this context, a formal definition of capacity involves an objective approach based upon two substantial and dynamic notions: vulnerability and competence. Vulnerability serves to identify people in need of special protection[127] due to a situation of 'dependency'. Dependency is defined by the Committee of Ministers of the Council of Europe as the state in which those in need of help or assistance to perform activities of daily living, lack autonomy.[128] Dependency can be caused by various factors, for example 'arising from age, illness or disability, and linked to a lack or loss of physical, mental, intellectual or sensory autonomy.'[129] People who are in a vulnerable situation still have the right to withhold consent.

In relation to dependency, competence[130] is a key issue e.g. to understand relevant information and to give true consent. Competence can be defined as an ability 'to understand relevant information, to evaluate that information and make a reasoned decision, to decide without undue influence, and to communicate consent or refusal.'[131] Competence may be 'contextually relative' (where it relates to types of interests) or 'complexity-relative,'[132] for example, where a person may have competence in respect of decisions on their health, yet still be unable to take care of their patrimonial interests. It may also be considered 'risk-relative' depending on the type of risk which might arise as a result of an intervention.[133] Therefore, according to the accepted definitions of competence, traditional notions of capacity are not necessarily appropriate.[134]

---

[125] *Salontaji-Drobnjak v. Serbia* (App. No. 36500/05) [2009] ECHR 1526.

[126] *Shtukaturov v. Russia*, *op cit,* n. 124.

[127] Schroeder and Gefenas (2009); Macklin (2003); Goodin(1985), p. 110.

[128] Committee of the Ministers of Council of Europe, Recommendation no. R 98(9) concerning dependency, Annex of 18 September 1998, available at https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=532369&SecMode=1&DocId=486242&Usage=2 (accessed 06.06.15).

[129] See Article 2, n. 2 Spanish Law no. 39/2006, of December 14 of the Promotion of Personal Autonomy and Care (Ley 39/2006, de 14 de diciembre, de Promoción de la Autonomía Personal y Atención a las personas en situación de dependencia, available at http://www.boe.es/buscar/doc.php?id=BOE-A-2006-21990) (accessed 6.6.15).

[130] On competence' see Beauchamp and Childress (2009); Buchanan and Brock (1990); Culver and Gert (1990); Drane (1985); Jonas (2007), pp. 255–262.

[131] European Commission '*European Textbook on Ethics in Research*', Brussels, European Union (2010), p. 55.

[132] Buller (2001).

[133] Wilks (1997).

[134] This observation can also be applied to those agreements needed to implement fundamental rights. The legal literature and the case-law affirms that it is not acceptable to deny legal capacity to minors (especially adolescents) when participating in a contract to use ITC technologies. See in particular Palazzo (2013).

6.2 The Right to Withdraw Consent

Furthermore, the agreements used to protect fundamental rights may derogate from other traditional principles such as the rules on initially agreed terms as set out by the parties to the contracts. The principle of *pacta sunt servanda* is affirmed at both international and national levels: see for example Article 1372 of the Italian Civil Code on how contracts 'have the force of the law between the parties'. In cases where a contract is being used to protect personal rights however, such an absolute form of agreement cannot be accepted. Consent to a therapeutic or other intervention (intruding on the personal sphere of an individual) may be allowed by the person, but only up until the point where the person concerned no longer wants the intervention. Indeed, consent may at any time be freely withdrawn by a person, under Article 5 of the Oviedo Convention.[135] An example of such a revocation can be found in *Evans v. UK* (2007) where a woman suffering from ovarian cancer decided upon in vitro fertilization with her partner. The embryos were cryopreserved. When the couple's relationship ended, her partner sought destruction of the embryos.

7 Conclusion: Contracts and Obligations as Instruments for the Implementation of Human Rights

In sum, contract law, originally devised to regulate patrimonial relationships between individuals, on the basis of formal parity, has changed significantly in terms of content and function. Human rights, as well as those principles established by domestic Constitutions to protect them (such as 'solidarity') are able to integrate with the rules of contract law. Today it would be difficult to argue that the definition of contract as provided by the various European civil codes can cover all such aspects of an agreement. Notions such as the formal equality of contracting parties, assumed contractual capacity, or the immutable nature of agreements, no longer hold the same level of influence. Current legal systems, both national and transnational, ensure that agreements are not aimed simply at enabling patrimonial exchanges: they are now facilitating governance and the implementation of public policies; regulating consent to medical treatments and participation in research activities. They regulate other activities which may engage human rights, not least those concerned with privacy and dignity: the gifting of organs and human tissue or the provision of social services. A blurring of the lines may thus arise between the different disciplines of public and private law;[136] as Savigny has

[135] See also Article 13 (3), Additional Protocol of biomedical research to the Convention of Oviedo; Article 9 (2), of the Additional Protocol to the Oviedo Convention on genetic testing for health purposes, 2008.

[136] Guettier (2008), pp. 33 ff.

argued, at the centre of public law there are societal public aims, with individuals sometimes left in the background. On the other hand, private law *is* focused on individuals, and the relationships between them. The jurisprudence referred to in this chapter suggests however an emergence of new hybrid models, and a lessening of the strict disciplinary distinctions between private and public law.[137] Several academics have proposed theoretical approaches aimed at overcoming lingering divisions,[138] using formulations which are much more comprehensive, such as, for example, a 'private law of public administration.'[139] Private relationships are strongly influenced by collective social interests (fundamental rights, economics) and yet the implementation of many public policies no longer relies solely upon unilateral instruments but looks to achieve meaningful agreement and satisfy 'good conscience' obligations.

Public law emphasizes the doctrinal, higher role of fundamental interests in legal relationships; private law is no longer beyond the reach of human rights law. And yet, private law increasingly provides a useful means of embedding in domestic legal systems, in an efficient, flexible and pervasive manner, meaningful protections for key elements of human rights law. Definitions of fundamental rights are no longer a matter solely for political decision-makers, but may be influenced by domestic jurists. This is not surprising given the nature of private law, not least its ability to adapt to the new and unexpected demands of society and the economy.[140] Its traditional function was to provide logical, legal tools, such as contracts and trusts, to solve those difficult problems that tend to arise within the realm of 'human relationships,' irrespective of whether parties are private or public entities, or indeed the state itself.[141]

References

Álvarez Ledesma, M. I. (1998). *Acerca Del Concepto De Derechos Humanos*. México: McGraw-Hill.

Andorno, R. (2009). Human dignity and human rights as a common ground for a global bioethics. *Journal of Medicine and Philosophy, 34*, 223–240.

Armstrong, H. W. (1995). Convergence among regions of the European Union 1950–1990. *Papers in Regional Science, 74*(2), 143–152.

Aynès, L. (2001). Préjudice de l'enfant né handicapé: la plainte de Job devant la Cour de cassation. *Dalloz*, 492–496.

[137] Terneyre (2000), pp. 575 ff.

[138] Within the French doctrine the debate is always live: see, for example, Gaudemet (1999), p. 626; Drago (1990), pp. 110 ff.; Jossaud (2002), pp. 1483 ff. Lichére (2005), pp. 79 ff.

[139] Saporito (2006).

[140] Pennasilico (2005), p. 432.

[141] Roman Law utilised the ancient scheme of agreement in order to cover the new needs which were emerging, through a 'reproductive imitation (*dicis causa*)'. See Betti (1935), pp. 279 ff.; Treggiari (2006).

Barettoni Arleri, A. (1975). L'assistenza nell'attuale momento normativo e interpretativo. *Rivista degli infortuni e delle malattie professionali, 2,* 410.
Barro, R. J., & Sala-I-Martin, X. (1991). Convergence across states and regions. *Brookings Papers on Economic Activity, 2*, 107–182.
Beauchamp, T. L., & Childress, J. F. (2009). *Principles of biomedical ethics*. Oxford, England: Oxford University Press.
Betti, E. (1935). *Diritto romano* (Vol. I). Padova: Cedam.
Bobbio, N. (1984). *Il problema della guerra e le vie della pace*. Bologna: Il Mulino.
Bourgeois, L. (1911). *La politique de la Prévoyance sociale. La doctrine et la méthode*. Paris.
Bourgeois, L. (1919). *La politique de la Prévoyance sociale. L'action*. Paris.
Buchanan, A. E., & Brock, D. W. (1990). *Deciding for others: The ethics of surrogate decision making*. Cambridge, England: Cambridge University Press.
Buller, T. (2001). Competence and risk-relativity. *Bioethics, 15*(2), 93–109.
Calamandrei, P. (1950). *La Illegittimità Costituzionale Delle Leggi Nel Processo Civile*. Padova: Cedam.
Caprioli, S. (2008). *Il Codice Civile. Struttura e Vicende*. Milano: Giuffrè.
Carbonnier, J. (2004). *Droit civil* (vol. I). Paris: PUF.
Cardone, A. (2011). *'Diritti fondamentali (tutela multilivello dei)' Enciclopedia del diritto. Annali, IV*. Milano: Giuffrè.
Cédras, M. J. (2003). Le solidarisme contractuel en doctrine et devant la Cour de cassation. Available at https://www.courdecassation.fr/publications_26/rapport_annuel_36/rapport_2003_37/deuxieme_partie_tudes_documents_40/tudes_diverses_43/doctrine_devant_6260.html. Accessed 06.06.15.
Cherednychenko, O. (2010). Fundamental rights, policy issues and the Draft Common Frame of Reference for European private law. *European Review of Contract Law, 6*(1), 39–65.
Chiarelli, G. (1957). Lo Stato E L'assistenza Sanitaria. Feder. med.
Cippitani, R. (2010). *La Solidarietà Giuridica Tra Pubblico E Privato*. Roma-Perugia-México: ISEG.
Cippitani, R. (2012a). Principi e metodo nella revisione della normativa francese relativa alla bioetica. In *Diritto di famiglia e delle persone*. Roma-Perugia-México: ISEG.
Cippitani, R. (2012b). *El Derecho de la Sociedad del Conocimiento*. Roma-Perugia-México: ISEG.
Cippitani, R. (2013). Solidaridad. In M. I. Álvarez Ledesma & R. Cippitani (Eds.), *Diccionario analítico de Derechos humanos e integración jurídica* (pp. 642–649). Roma-Perugia-México: ISEG.
Cippitani, R., & Gatt, S. (2009). Legal developments and problems of the Bologna process within the European higher education area and European integration. *Higher Education in Europe, 34* (3), 385–397.
Clive, E. (2008). An introduction to the academic Draft Common Frame of Reference. *Era Forum, 9*, 13–31.
Colcelli, V. (2010). *Le situazioni giuridiche soggettive nel sistema CEDU*. Roma-Perugia: ISEG.
Colombi Ciacchi, A. (2006). The constitutionalization of European contract law: Judicial convergence and social justice. *European Review of Contract Law, 2*, 167.
Costa, P. (2002). *Civitas. Storia della cittadinanza in Europa* (vol. IV). L'Età dei totalitarismi e della democrazia. Roma-Bari: La Terza.
Crisafulli, V. (1952). Costituzione e protezione sociale. In *La Costituzione e le sue disposizioni di principio*. Milano: Giuffrè.
Culver, C. M., & Gert, B. (1990). The inadequacy of incompetence. *Milbank Quarterly, 68*, 619–643.
De La Fuente, A., & Domenéch, R. (1999). *The redistributive effects of the EU budget: An analysis and some reflections on the Agenda 2000 negotiations*. CERP Discussion Paper 2113.
De Nova, G. (1994). Criteri generali di determinazione dell'abusività delle clausole ed elenco di clausole abusive. *Rivista trimestrale di diritto e procedura civile*, 693 ff.

Domat, J. (1689). *Traité des lois civiles prises dans leur ordre naturel*. Paris.
Drago, R. (1990). Le contrat administratif aujourd'hui. *Droits, 12*, 110.
Drane, J. F. (1985). The many faces of competency. *Hastings Centre Report, 15*(2), 17–21.
Duguit, L. (1908). *Le droit social, le droit individuel et la transformation de l'État*. Paris.
Fuchs, A. (2008). A plea a Europe-wide discussion of Draft Common Frame of Reference. *Era Forum, 9*, S1–S6.
Galgano, F. (2001). *Lex mercatoria*. Bologna: Il Mulino.
Gaudemet, Y. (1999). Prolégomenès pour un théorie des obligations en droit administratif français. In *Mélanges En hommage a Jean Gaudemet*. Paris: PUF.
Goodin, R. E. (1985). *Protecting the vulnerable: A re-analysis of our social responsibilities*. London: University of Chicago Press.
Guettier, C. (2008). *Droit de contrats administratifs*. Paris: Presses Universitaires de France.
Häberle, P. (2002). Dallo Stato nazionale all'Unione europea: evoluzioni dello Stato costituzionale. *Diritto pubblico comparato europeo*.
Halperin, J. L. (1992). *L'impossible Code Civil. Paris*. Paris: PUF.
Hesselink, M. (2003). The horizontal effect of social rights in European contract law. In M. Hesselink et al. (Eds.), *Privaatrecht tussen autonomie en solidariteit*. Den Haag, the Netherlands: Boom Juridische Uitgevers.
Jannarelli, A. (2002). La disciplina dell'atto e dell'attività: i contratti tra imprese e tra imprese e consumatori. In N. Lipari (Ed.), *Trattato di diritto privato europeo* (vol. III). L'attività e il contratto. Padova: Cedam.
Jansen, N. (2010). The concept of non-contractual obligations: Rethinking the divisions of tort, unjustified enrichment, and contract law. *Journal of European Tort Law, 1,* 16–47.
Jhering, R. (1972). *Lo Scopo Del Diritto* (Italian transl. of Losano MG). Torino: Einaudi.
Jonas, M. F. (2007). Competence to consent. In R. E. Ashcroft, A. Dawson, H. Draper, & J. R. McMillan (Eds.), *Principles of health care ethics* (pp. 255–262). Chichester, England: Wiley.
Jones, J. (2012). Human dignity in the EU charter of fundamental rights and its interpretation before the European Court of Justice. *Liverpool Law Review, 33*, 281–300.
Jossaud, A. (2002). Pour un droit public des marchés. *AJDA*, 1483.
Lega, C. (1952). *Il diritto alla salute in un sistema di sicurezza sociale*. Roma: Istituto di Medicina Sociale.
Lega, C. (1969). *Il rapporto giuridico di previdenza sociale*. Milano: Giuffrè.
Lichére, F. (2005). *Droit des contrats pubblics*. Paris: Dalloz.
Lipari, N. (1987). La formazione negoziale del diritto. *Rivista di diritto civile*, I.
López-Bazo, E., Vayá, E., Mora, A. J., & Suriñac, J. (1999). Regional economic dynamics and convergence in the European Union. *Annals of Regional Science, 33*, 257–370.
Lucifredi, R. (1952). *La nuova Costituzione italiana raffrontata con lo Statuto albertino e vista nel primo triennio di sua applicazione*. Milano: Giuffrè.
Macklin, R. (2003). Bioethics, vulnerability and protection. *Bioethics, 17*(5–6), 472–486.
Marshall, T. H. (1998). Ciudadanía y clase social. In T. Bottomore & T. H. Marshall (Eds.), *Ciudadanía y clase social*. Madrid: Alianza.
Mazziotti, M. (1964). Diriti sociali. In *Enciclopedia del diritto* (vol. XII). Milano: Giuffrè.
Menger, A. (1908). *Das bürgerliche Recht und die besitzlosen Volksklassen. Eine Kritik des Entwurfes eines Bürgerlichen Gesetzbuch für das Deutsche Reich.* Tübingen: H. Laupp.
Millins, S. (1996). Dwarf-throwing and human dignity: A French perspective. *Journal of Social Welfare and Family Law, 18*(3), 375.
Mislawski, R. (2010). Dignité, autonomie, vulenrabilité: aproche juridique. In E. Hirsch (Ed.), *Traité de bioétique* (vol. I) Fondements, principles, repéres. Toulouse: Érés.
Espinoza de los Monteros Sánchez, J. E. (2010). Contitucionalismo global. In *Diccionario Histórico Judicial de México, Ideas e Instituciones*. Tomo I. México: Suprema Corte de Justicia de la Nación de México.
Mortati, C. (1946). *La Costituzione di Weimar*. Firenze: Sansoni.
Natoli, U. (1974). *L'attuazione del rapporto obbligatorio*. Milano: Giuffrè.

Nys, H., Dreezen, I., Vinck, I., Dierickx, K., Dequeker, E., & Cassiman, J.-J. (2002). 'Genetic Testing Patients' rights, insurance and employment. A survey of regulations in the European Union. Luxembourg' (2002), Brussels: Office for Official Publications of the European Communities.

Ost, F. (1990). Droit et intérêt. In *Entre droit et non-droit: l'intérêt* (vol. II). Bruxelles, Belgium: Publications des Facultés universitaires Saint-Louis.

Palazzo, A. (2013). *La filiazione*. Padova, Italy: Cedam.

Peces-Barba Martínez, G. (1986). *Derechos fundamentales*. Madrid, Spain: Universidad Complutense, Facultad de Derecho.

Pennasilico, M. (2005). L'interpretazione dei contratti della pubblica amministrazione tra conservazione e stabilità degli effetti. *Rassegna di Diritto civile, 2*, 432.

Pérez Luño, A. E. (1991). *Los derechos fundamentals*. Madrid: Tecnos.

Perkmann, M. (2003). Cross border regions in Europe. Significance and drivers of regional cross-border cooperation. *European Urban and Regional Studies, 10,* 153–171.

Pernice, I. (1999). Multilevel constitutionalism and the treaty of Amsterdam: European constitution making revisited. *Common Market Law Review,* 703.

Portalis, J. M. E. (1891). *Discours préliminaire du premier projet de Code civil*. Paris.

Pothier, R. G. (1819). *Pandectae Justinianae in novum ordinem digestae*. Paris: ex typis Dondey-Dupré.

Rawls, J. (1980). *A theory of justice*. Cambridge, MA: The Belknap Press of Harvard University.

Renner, K. (1929). *Die Rechtsinstitute des Privatrechts und ihre soziale Funktion*. Tübingen.

Rizzo, V. (1996). Il significativo squilibrio 'malgrado' la buona fede nella clausola generale dell'art. 1469 bis c.c.: un collegamento ambiguo da chiarire. *Rassegna di diritto civile*.

Rodotà, S. (1990). *Il terribile diritto. Studi sulla proprietà privata*. Bologna: Zanichelli.

Rodotà, S. (1991). Le clausole generali. In G. Alpa & M. Bessone (Eds.), *Giurisprudenza sistematica di diritto civile e commerciale. I contratti in generale*. Torino: Utet.

Rodotà, S. (2004). Buona fede e correttezza nel quadro dell'integrazione. In *Le fonti d'integrazione del contratto*. Milano: Giuffrè.

Rodotà, S. (2005). Il Codice civile e il processo costituente europeo. *Rivista Critica di Diritto privato,* 21.

Sanz Caballero, S. (2013). Obligaciones positivas del Estado. In M. I. Álvarez Ledesma & R. Cippitani (Eds.), *Diccionario analítico de Derechos humanos e integración jurídica* (pp. 466–474). Roma-Perugia-México: ISEG.

Saporito, L. (2006). I vizi della volontà della Pubblica Amministrazione. In P. Stanzione & A. Saturno (Eds.), *Il diritto privato della Pubblica Amministrazione*. Padova: Cedam.

Sassi, A. (2005). Equità e buona fede oggettiva nel diritto interno ed 'europeo'. In T. Sediari (Ed.), *Cultura dell'integrazione europea*. Torino: Giappichelli.

Sassi, A. (2013). Consentimiento informado. In M. I. Álvarez Ledesma & R. Cippitani (Eds.), *Diccionario analítico de Derechos humanos e integración jurídica* (pp. 70–77). Roma-Perugia-México: ISEG.

Savigny, F. K. (1840). *System des heutigen römischen Rechts*. Berlin: Veit.

Sayn, I. (2005). *Le contentieux de la protection sociale: procédures comparées (Allemagne, Angleterre, Belgique, France)*. Saint'Ètienne, France: Publication de l'Université de Saint-Etienne.

Schroeder, D., & Gefenas, E. (2009). Vulnerability: Too vague and too broad. *Cambridge Quarterly of Healthcare Ethics, 18,* 113–121.

Sepúlveda Iguíniz, R. (2013). Estado de Derechos. In M. I. Álvarez Ledesma & R. Cippitani (Eds.), *Diccionario analítico de Derechos humanos e integración jurídica* (pp. 239–244). Roma-Perugia-México: ISEG.

Siccherio, G. (1993). Appunti sul fondamento costituzionale del principio di buona fede. *Giurisprudenza italiana, I*(1), 2132.

Terneyre, P. (2000). Le montages contractuels complexes. *AJDA,* 575.

Treggiari, F. (2006). Fiducialitas. Tecniche e tutele della fiducia nel diritto intermedio. In M. Lupoi (Ed.), *Le situazioni affidanti*. Torino: Giappichelli.

von Bar, C., Clive, E., Schulte-Nölke, H., Beale, H., Herre, J., Huet, J., et al. (2009). *Principles, definitions and model rules of European private law Draft Common Frame of Reference (DCFR) outline edition.* Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group). Munich: Sellier.
Whittaker, S., & Zimmermann, R. (2000). Good faith in European contract law: Surveying the legal landscape. In R. Zimmermann & S. Whittaker (Coord.), Good faith in European contract law (Vol. 44, pp. 7 ff.). Cambridge: Cambridge University Press.
Wilkinson, S. (2003). *Bodies for sale: Ethics and exploitation in the human body trade*. London: Routledge.
Wilks, I. (1997). The debate over risk-related standards of competence. *Bioethics, 11*(5), 413–426.
Windscheid, B. (1900). *Lehrbuch des Pandektenrechts*. Frankfurt: Rütten & Loening.
Zagreblesky, G. (1992). *Il diritto mite*. Torino: Einaudi.

Case Law

European Court of Human Rights

Maurice v France (App. No. 11810/03), (2006) 42 EHRR 42.
Mennesson v. France (App. No. 65192/11), judgement 26 Jun 2014.
Salesi v. Italy (App. No. 13023/87) [1993] ECHR 14.
Salontaji-Drobnjak v. Serbia (App. No. 36500/05) [2009] ECHR 1526.
Schuler-Zagraggen v S*wiszterland* (App No. 14518/89) (1993) 16 EHRR 405.
Shtukaturov v. Russia (App. No. 44009/05) [2008] ECHR 223.
Stanev v. Bulgaria (App. No. 36760/06) (2012) ECHR 46.

European Union Case Law

Case 26/62 *Van Gend en Loos* [1963] *ECR* 1.
Case 29/69 *Stauder* [1969] *ECR* 419.
Case 6/64 *Costa v ENEL* [1964] *ECR* 585.
Case 155/79 *AM & S Limited* [1982] *ECR* 1575.
Case C-283/82, *Schoellershammer/Commission*, [1983] *ECR* 4219.
Case C-58/86, *Coopérative agricole d'approvisionnement des Avirons*, [1987] *ECR* 1525.
Case C-34/89 *Italy v Commission* [1990] *ECR* I-3613.
Case C-6/90 and C-9/90, *Francovich and Bonifaci v Italy*, [1991] *ECR* I-5357.
Case C-2/92, *Bostock* [1994] *ECR* I-955.
Case C-446/93 *SEIM* [1996] *ECR* I-73.
Case C-120/95, *Nicolas Decker* [1998] *ECR* I-1831.
C-44/96 *Mannesmann Anlagenbau Austria AG et oth v Strohal Rotationsdruck GesmbH* [1998] *ECR* I-73.
Case C-67/96, *Albany International BV* [1999] *ECR* I-5751.
Case C-158/96, *Raymond Kohll*, [1998] *ECR* 1998 I-1931.
Case C-292/97, *Karlsson et oth.* [2000] *ECR* I-2737.
Case C-453/99 *Courage Ltd.* [2001] *ECR* I-6297.
Case C-168/00 *Leitner/TUI Deutschland* [2002] *ECR* I-2631.
Case C-442/00 *Rodríguez Caballero* [2002] *ECR* I-11915.
Case C-129/2000 *Commission v Italy* [2003] *ECR* I-14672.
Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] *ECR* I-9609.
Case T-115/94 *Opel Austria v Conseil* [1997] ECR II-39.
Case T-239/00 *SCI UK/Commission* [2002] *ECR* II-2957.