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Judicial Governance in Private Law through the Application of Fundamental Rights

Aurelia Colombi Ciacchi*, Groningen

Abstract

Through the acknowledgment and balancing of the conflicting fundamental rights at stake in a private litigation, the courts 'govern' societal relationships. This judicial governance complements and adjusts the governance of the concerned societal relationships that takes place at the legislative level. This paper discusses a number of societal governance policies pursued, consciously or unconsciously, by national courts while deciding on private relationships through the application of fundamental rights. Thereby it considers cases decided by courts in Germany, England, France, Italy, the Netherlands, Poland, Portugal, Sweden and Spain. One may observe six major policy trends underlying these decisions: (1) the fight against discrimination, (2) the protection of weaker parties in contract cases, (3) the increasing valorisation of non-economic interests in tort cases, (4) the protection of privacy from intrusions by media, (5) the protection of political rights in privately owned public spaces, and (6) environmental protection in property cases.

Durch die Feststellung und Abwägung der in einer Zivilsache relevanten und kollidierenden Grundrechte, steuern Gerichte gesellschaftliche Verhältnisse. Diese judizielle Steuerung der Gesellschaft („judicial governance“) ergänzt und korrigiert die Steuerung der betroffenen gesellschaftlichen Verhältnisse, die auf legislativer Ebene stattfindet. Dieser Aufsatz diskutiert eine Reihe gesellschaftspolitischer Richtungen, in die sich nationale Gerichte bewusst oder unbewusst bewegen, wenn sie Grundrechte bei der Entscheidung über Privatrechtsverhältnisse anwenden. Dafür nimmt dieser Aufsatz Entscheidungen von deutschen, englischen, französischen, italienischen, niederländischen, polnischen, portugiesischen, schwedischen und spanischen Gerichten in Betracht. Sechs gesellschaftspolitische Richtungen können dabei beobachtet werden: (1) Bekämpfung von Diskriminierungen, (2) Schutz schwächerer Vertragsparteien, (3) zunehmende Aufwertung nicht-ökonomischer Interessen in Haftungsfällen, (4) Schutz der Privatsphäre vor Eingriffen

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der Medien, (5) Schutz politischer Rechte in privaten aber öffentlich zugänglichen Räumen, (6) Umweltschutz in Sachenrechtsfällen.

Subjects: judicial governance; governance; non-economic interests; prohibition of discrimination; environmental protection.

I. Governance definitions and discourses: a brief overview

In the course of the last 50 years, the concept of governance has gained increasing popularity in different academic disciplines.¹ In institutional economics, this concept comprehends all modes of regulation and coordination of modern economic relationships.² In social science and international relations, 'governance' is often intended as the process of obtaining the consent or acquiescence necessary to carry out a programme in an arena where many different interests are in play.³ In political science, several discourses on governance take place, in all of which the involvement of private actors and the use of steering mechanisms other than command-and-control play a major role.⁴ Indeed, a distinction is often made between 'old' and 'new' modes of governance.⁵ In contrast to the 'old', traditional, 'hard' governance based on state power, hierarchy, command and control, the concept of 'new governance' indicates alternative, 'soft' techniques such as horizontal coordination, deliberation, or experimentalism, often based on the participation and collaboration of public and private actors.⁶ For example, in their studies on the functioning of the European Union, both political scientists and legal

¹ For a brief overview see Christian JOERGES AND MARIA WEIMER, A CRISIS OF EXECUTIVE MANAGERIALISM IN THE EU: NO ALTERNATIVE?, 7 Maastricht Faculty of Law Working Paper 2012, 11 et seq.; Aurelia Colombi Ciacchi and Dietmar von der Pfordten, *Exploring the Relationship between Law and Governance: A Proposal*, in GOVERNANCE MEETS LAW (Aurelia Colombi Ciacchi ed., 2015 forthcoming).

² See Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 JOURNAL OF LAW AND ECONOMICS 233 (1979); id., THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING (1985).

³ Ali Kazancigil, *Governance and science: market-like modes of managing society and producing knowledge*, 50 INTERNATIONAL SOCIAL SCIENCE JOURNAL 69 (1998); Hewitt de Alcántara, *Uses and abuses of the concept of governance*, 50 INTERNATIONAL SOCIAL SCIENCE JOURNAL 105 (1998).

⁴ See inter alia MODERN GOVERNANCE: NEW GOVERNMENT-SOCIETY INTERACTIONS (Jan Kooijmann ed., 1993); RODERICK A. W. RHODES, UNDERSTANDING GOVERNANCE: POLICY NETWORKS, GOVERNANCE, REFLEXIVITY, AND ACCOUNTABILITY (1997); Orly Lobel, *The Renew Deal: The fall of regulation and the rise of governance in contemporary legal thought*, 89 MINNESOTA LAW REVIEW 7 (2004).

⁵ See inter alia Orly Lobel, *New Governance as Regulatory Governance*, in THE OXFORD HANDBOOK OF GOVERNANCE 65 (David Levi-Faur ed., 2012).

⁶ For a recent overview see Jeroen van der Heijden, *Looking Forward and Sideways: Trajectories of New Governance Theories*, 4 Amsterdam Law School Research Paper (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2204524.

scientists pay great attention to new modes of governance other than the traditional Community method.⁷

Governance structures are typically multilayered. Modes of governance employed at the local, national, supranational, international and global level coexist and interact with each other.⁸ The relationship between the layers of such a multi-level system of governance is often non-hierarchical. At the highest level of this multi-layered structure, we find global governance, which differs from the state-centric concept of international relations insofar as it includes the interplay of public and private actors in setting regulatory standards that become applicable across the globe.⁹

Scholars asking for a common core of meaning of the term 'governance', a definition which fits all disciplines and includes both the 'old' and the 'new' steering mechanisms, would find two types of answers. The first one seems to assume that the concept of governance has no meaning in itself. The most drastical formulation of this opinion views governance as an empty formula of the political discourse ('Leerformel des politischen Diskurses'¹⁰). A less drastical position highlights the positive function of the concept of governance in the academic discourse. It has been convincingly argued that governance is a heuristic term, which widens the research focus on certain modes of social co-ordination that have not been considered as relevant before.¹¹

The second type of answer tries to specify the substance of governance. For example, the political scientist *Kohler-Koch* wrote: '(...) governance is about the ways and means by which the divergent preferences of citizens are translated into effective policy choices, about how the plurality of societal interests are transformed into unitary action and the compliance of

⁷ See inter alia EUROPEAN INTEGRATION AND SUPRANATIONAL GOVERNANCE (Alec Stone Sweet and Wayne Sandholtz eds., 1998); KENNETH A. ARMSTRONG AND SIMON J. BULMER, THE GOVERNANCE OF THE SINGLE EUROPEAN MARKET (1998); THE TRANSFORMATION OF GOVERNANCE IN THE EUROPEAN UNION (Beate Kohler-Koch and Rainer Eising eds., 1999); TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM (Christian Joerges, Inger-Johanne Sand and Gunther Teubner eds., 2004); LAW AND GOVERNANCE IN POSTNATIONAL EUROPE: COMPLIANCE BEYOND THE NATION-STATE (Michael Zürn and Christian Joerges eds., 2005); POUL KJAER, BETWEEN GOVERNING AND GOVERNANCE: ON THE EMERGENCE, FUNCTION AND FORM OF EUROPE'S POST-NATIONAL CONSTELLATION (2010); LISBET HOOGHE AND GARY MARKS, MULTI-LEVEL GOVERNANCE AND EUROPEAN INTEGRATION (2011); THE EUROPEAN CRISIS AND THE TRANSFORMATION OF GOVERNANCE: AUTHORITARIAN MANAGERIALISM VS DEMOCRATIC GOVERNANCE (Christian Joerges and Carola Glinski eds., 2014); MATJAZ NAHTIGAL, EU EXPERIMENTAL GOVERNANCE: GOING BEYOND RODRIK'S TRILEMMA, Social Science Network, 12 July 2014, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2465347, both with further references.

⁸ See HANDBOOK ON MULTI-LEVEL GOVERNANCE (Henrik Enderlein, Sonja Wälti and Michael Zürn eds., 2010); LISBET HOOGHE AND GARY MARKS, MULTI-LEVEL GOVERNANCE AND EUROPEAN INTEGRATION (2011); CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND INTERNATIONAL ECONOMIC LAW (Christian Joerges and Ernst-Ullrich Petersmann eds., 2011).

⁹ See e.g. PRIVATE STANDARDS AND GLOBAL GOVERNANCE (Axel Marx, Miet Maertens, Johan Swinnen and Jan Wouters eds., 2012).

¹⁰ Cf. SABINE FRERICHS, JUDICIAL GOVERNANCE IN DER EUROPÄISCHEN RECHTSGEMEINSCHAFT. INTEGRATION DURCH RECHT JENSEITS DES STAATES 21 (2008).

¹¹ CHRISTIAN JOERGES AND MARIA WEIMER, A CRISIS OF EXECUTIVE MANAGERIALISM IN THE EU: NO ALTERNATIVE?, 7 Maastricht Faculty of Law Working Paper 2012, 11 et seq.

social actors is achieved'.¹² These words of *Kohler-Koch* seem to explicate perfectly what another social scientist, *Kazancigil*, meant when he defined governance as 'policy-making with or without politics'.¹³ However, the stress on the 'citizen' in *Kohler-Koch's* definition seems to restrict its scope to political science, making it less suitable to be extended to other governance discourses such as the ones developed earlier in institutional economics. From this angle, a better i.e. more universal definition of governance can be found in the writings of a public law scholar, *Issalys*. He defines governance as "mechanisms by which social actors seeking to achieve coordinate action can work together to accommodate their own legitimacy, diversity of objectives, values and interests".¹⁴

Both this analytical definition of *Issalys*, and *Kazancigil's* synthetical definition of governance of "policy-making with or without politics", seem to fit all disciplines and all kinds of governance, including the purely private governance of a business firm. Where a plurality of actors interact, a plurality of diverse (and often conflicting) objectives, values, interests and policies exist, which needs to be accommodated and coordinated (policy-making).

The growing number of new academic institutions, professorships and journals for "law and governance"¹⁵ since the beginning of the third millennium seems to demonstrate that legal science is increasingly acknowledging the gradual shift from government to governance, from traditional politics to policy-making-with-or-without-politics, that has been taking place in contemporary society during the last 50 years. A growing number of legal scholars is becoming familiar with the governance discourses originated in other disciplines than law. More and more fields of legal research are now being viewed from a governance perspective. For what concerns private law, three governance discourses seem to attract particular attention: (1) contract governance,¹⁶ (2) the governance design of European private law,¹⁷ and (3) judicial governance. The following section of this paper will concentrate on the last one.

¹² Beate Kohler-Koch, *The Evolution and Transformation of European Governance*, in *THE TRANSFORMATION OF GOVERNANCE IN THE EUROPEAN UNION* 14 et seq. (Beate Kohler-Koch and Rainer Eising eds., 1999).

¹³ Ali Kazancigil, *Governance and science: market-like modes of managing society and producing knowledge*, 50 *INTERNATIONAL SOCIAL SCIENCE JOURNAL* 69 et seq. (1998).

¹⁴ Pierre Issalys, *Choosing Among Forms of Public Action*, in *DESIGNING GOVERNMENT: FROM INSTRUMENT TO GOVERNANCE* 154, 180 (Eliadis Pearl, Margaret Hill and Michael Howlett eds., 2005).

¹⁵ For example, Brill publishes the journal *Middle East Law and Governance* (MELG, <http://www.brill.com/middle-east-law-and-governance>) since 2009 and the *European Journal of Comparative Law and Governance* (EJCL, <http://www.brill.com/publications/journals/european-journal-comparative-law-and-governance>) since 2014.

¹⁶ Florian Möslin and Karl Riesenhuber, *Contract Governance: A Draft Research Agenda*, 5 *EUROPEAN REVIEW OF CONTRACT LAW* 248 et seq. (2009).

¹⁷ *MAKING EUROPEAN PRIVATE LAW. GOVERNANCE DESIGN* (Fabrizio Cafaggi and Horatia Muir-Watt eds., 2008).

II. Judicial Governance

The term 'judicial governance' has been used by scholars coming from very different backgrounds to describe fairly different phenomena. Giving a complete overview of the relevant literature would exceed the limited space and scope of this paper. The following paragraphs will only mention some current uses of the term 'judicial governance', before explaining the understanding of this notion underlying the present paper.

In her comprehensive monograph on 'judicial governance in the European legal community',¹⁸ *Frerichs* (a sociologist and political scientist) analyses the jurisprudence of the European Court of Justice (ECJ, now Court of Justice of the European Union, CJEU) in the light of social science theories on multilevel governance. In particular, she adopts a sociological institutionalist theory viewpoint to explain how the Court of Justice adjudicates conflicts concerning the European economic and societal constitution. *Frerichs* views judicial governance in the EU as a social field that comprises, besides the Court of Justice, 'a whole bunch of private, public, national, supranational and transnational actors competing for the right interpretation of EU law in general and the European economic constitution in particular'. In this field, the Court of Justice acts as an arbiter of the transforming European political economy, which 'sometimes cannot but 'govern' – in the Platonic sense – 'beyond the law' as it is written'.¹⁹

Petersmann, a public international and EU law scholar, deals with 'multi-level judicial governance' when he describes how transnational disputes in Europe (especially on economic law) are adjudicated by different supranational courts on the basis of different legal methodologies and constitutional backgrounds.²⁰ In this context, he draws attention on the sometimes inadequate responses of supranational courts to the governance gaps created by globalisation.²¹

While *Frerichs* and *Petersmann* focus their judicial governance analyses on the adjudication by supranational courts, *Whytock* (who is both a political scientist and a private international law scholar) focuses on the adjudication by domestic courts. He defines 'transnational judicial governance' as 'governance of transnational activity by domestic

¹⁸ SABINE FRERICHS, JUDICIAL GOVERNANCE IN DER EUROPÄISCHEN RECHTSGEMEINSCHAFT. INTEGRATION DURCH RECHT JENSEITS DES STAATES (2008).

¹⁹ SABINE FRERICHS, JUDICIAL GOVERNANCE IN THE EUROPEAN COMMUNITY OF LAW: ADAPTING THE ECONOMIC CONSTITUTION TO SOCIAL CHANGE, paper presented at the 2004 Maastricht Forum on European Integration, European Institute of Public Administration (EIPA), Maastricht, 19 November 2004, available at http://www.uni-bamberg.de/fileadmin/uni/wissenschaft_einricht/gk_mse/Paper/frerichs-legal_perspectives.pdf.

²⁰ Ernst-Ullrich Petersmann, *Judging Judges: From 'Principal-Agent Theory' to 'Constitutional Justice' in Multilevel 'Judicial Governance' of Economic Cooperation Among Citizens*, 11 JOURNAL OF INTERNATIONAL ECONOMIC LAW 827 et seq. (2008); id., CONSTITUTIONAL PROBLEMS OF MULTILEVEL JUDICIAL GOVERNANCE IN TRADE AND INVESTMENT REGULATION, EUI Working Paper LAW 2012/08, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2069916; id., *Multilevel Judicial Governance in European and International Economic Law*, in LE JUGE EN DROIT EUROPÉEN ET INTERNATIONAL – THE JUDGE IN EUROPEAN AND INTERNATIONAL LAW 45 et seq. (Samantha Besson and Andreas R. Ziegler eds., 2013), and EUI Working Paper LAW 2013/03, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2244839.

²¹ Ernst-Ullrich Petersmann, 11 JOURNAL OF INTERNATIONAL ECONOMIC LAW 827 et seq. (2008).

courts'.²² In his analyses, he concentrates on the role of US courts as global governance actors in adjudicating private international law cases.

A general notion of judicial governance, comprising the activity of both national and supranational courts, is proposed by *Schmid* (a legal scholar expert in both comparative private law and EU constitutional law). He explicitly links judicial governance to judicial activism, i.e. 'the prominent phenomenon of courts assuming tasks which are, under the classic separation of powers doctrine, reserved to the executive and legislative power'.²³ *Schmid* does not criticize judicial activism as such. On the contrary, he is of the opinion that 'the phenomenon of activist courts reflects the very nature of adjudication'. He starts from the assumption that adjudication is always embedded in a wider social context and is, therefore, always influenced by the political, economic and social circumstances under which it operates and which influence the minds of jurists and informs their decisions. *Schmid* deems such an influence not undesirable, but instead indispensable to adapt the law to its changing social environment. *Schmid*, in private law cases the Court of Justice should not act as an ordinary private law court: it should act as a constitutional court.²⁴

My perspective on judicial governance is partly similar to *Schmid's* approach. Both in the present paper and in previous publications,²⁵ I understand judicial governance as *societal policy-making* through adjudication at both the national and the supranational level.

The core of my governance analysis are the *conflicting interests and policies* at stake in a certain private litigation. One of the most important goals in governing both private and public institutions and relationships is that the interests of all participants are well represented and realized. Governance as policy-making implies accommodating and balancing different policy objectives and interests of different actors,²⁶ and taking decisions based on this balancing.

The interests and policies to be balanced and accommodated are both economic and non-economic interests of individuals or collective entities, including human rights and basic societal values such as democracy, and efficiency goals. A large number of those interests

²² CHRISTOPHER A. WHYTOCK, DOMESTIC COURTS AND GLOBAL GOVERNANCE: THE POLITICS OF PRIVATE INTERNATIONAL LAW 7 (Ph.D., Duke University, 2007, <http://pqdtopen.proquest.com/pqdtopen/doc/304870759.html?FMT=ABS>). He understands 'governance' as 'processes and institutions that guide and restrain collective activity' (ibid.). Cf. Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TULANE LAW REVIEW 67 (2009).

²³ Christoph U. Schmid, *Judicial Governance in the European Union*, in LAW AND DEMOCRACY IN EUROPE'S POSTNATIONAL POLITY 85 et seq. (Cristian Joerges and Florian Rödl eds., 2008).

²⁴ Christoph U. Schmid, *Judicial Governance in the European Union*, in LAW AND DEMOCRACY IN EUROPE'S POSTNATIONAL POLITY 85 et seq. (Cristian Joerges and Florian Rödl eds., 2008). See also CHRISTOPH U. SCHMID, DIE INSTRUMENTALISIERUNG DES PRIVATRECHTS DURCH DIE EUROPÄISCHE UNION (2010).

²⁵ Aurelia Colombi Ciacchi, *Jenseits der "Drittwirkung": Grundrechte, Privatrecht und Judicial Governance in Europa*, in EUROPÄISCHES PRIVATRECHT IM WISSENSCHAFTLICHEN DISKURS 231 et seq. (Andreas Furrer ed., 2006); id., *European Fundamental Rights, Private Law and Judicial Governance*, in THE CONSTITUTIONALISATION OF EUROPEAN PRIVATE LAW 102 et seq. (Hans-W. Micklitz ed., 2014).

²⁶ See the definitions of governance by Kohler-Koch and Issalys referred to under II above.

are protected at a national, European or constitutional level as fundamental rights or constitutional principles.

III. Judicial Governance of Private Litigation through the Application of Fundamental Rights

My judicial governance analysis has been focussing so far on a relatively limited area: the application of fundamental rights in the adjudication of private litigation. With 'private relationships' and 'private litigation' I mean relationships and litigation between parties other than public authorities. With 'fundamental rights' I mean all rights enshrined in national constitutions or constitutional traditions, or in the Charter of Fundamental Rights of the European Union, or in supranational documents such as the European Convention on Human Rights, or otherwise generally acknowledged as fundamental in a national or supranational legal system.

Both national courts and the Court of Justice of the European Union have relatively often invoked fundamental rights in adjudicating private litigation. In a previous publication, I have compared the methods of adjudication and the societal governance policies of the application of fundamental rights to private litigations by national courts on the one hand, and the ECJ/CJEU on the other.²⁷ The present paper will concentrate on national courts adjudication.

In particular, I will discuss a number of societal governance policies pursued, consciously or unconsciously, by national courts while deciding on private relationships through the application of fundamental rights. Thereby I consider cases decided by courts in Germany, England, France, Italy, the Netherlands, Poland, Portugal, Sweden and Spain.²⁸

One may observe six major policy trends underlying these decisions: (1) the prohibition of discrimination, (2) the protection of weaker parties in contract cases, (3) the increasing valorisation of non-economic interests in tort cases, (4) the protection of privacy from intrusions by media, (5) the protection of political rights in privately owned public spaces, and (6) environmental protection in property cases.

A. Prohibition of Discrimination

²⁷ See Aurelia Colombi Ciacchi, *European Fundamental Rights, Private Law and Judicial Governance*, in *THE CONSTITUTIONALISATION OF EUROPEAN PRIVATE LAW* 102 et seq. (Hans-W. Micklitz ed., 2014).

²⁸ These nine countries were involved in a comprehensive comparative study co-ordinated by Gert Brüggemeier, Giovanni Comandé and myself: *FUNDAMENTAL RIGHTS AND PRIVATE LAW IN THE EUROPEAN UNION. VOLUME 1: A COMPARATIVE OVERVIEW; VOLUME 2: COMPARATIVE ANALYSES OF SELECTED CASE PATTERNS* (Gert Brüggemeier, Aurelia Colombi Ciacchi and Giovanni Comandé eds., 2010).

Since the end of World War II, national courts in Europe have often applied fundamental rights to combat discrimination in private relationships. Such decisions can be found in many fields of private law, including labour law, succession law, and tenancy law. Also the discrimination grounds addressed by the courts cover a large spectrum, including discrimination on ground of gender,²⁹ sexual orientation,³⁰ religion or belief,³¹ being born within or out of wedlock,³² etc.

The policy trend combating discrimination in private relationships cannot be clearly labelled as 'left wing'. As *Alexander Somek* convincingly argued, anti-discrimination policy is compatible with neoliberal market liberalism and with a non-solidary society.³³ Independent on the political orientation, the societal governance impact of court judgments prohibiting discriminatory practices is evident. Courts have been increasingly replacing the traditional, formalistic understanding of equality in private law with a substantive understanding that recognizes and attempts to compensate for the substantive lack of equality of the person discriminated against in a private relationships.

B. Protection of Weaker Contract Parties

During the last 60-70 years, national courts have consistently applied fundamental rights to protect the interests of employees against employers, tenants against landlords, patients against doctors, hospitals, small businesses against bigger corporations etc., further than

²⁹ German courts have established the principle of equal pay for men and women immediately after the entry into force of the German Constitution of 1949. On this see HANS C. NIPPERDEY, *GLEICHER LOHN DER FRAU FÜR GLEICHE LEISTUNG* 121 et seq. (1950); see also HANS C. NIPPERDEY, *RECHT DER ARBEIT* (1948). In Italy, a leading Supreme Court case prohibiting gender discrimination in labour relationships is Cass. 25. September 2002 No. 13942, *Dir. e giust.* 202, 32 with a comment by Grassi.

³⁰ For a leading English case combating discrimination between heterosexual and homosexual couples in tenancy law see *Ghaidan v. Godin-Mendoza* [2004] UKHL 30. The House of Lords affirmed a right of abode of the homosexual partner of the tenant after the tenant's death based on a new interpretation of the Rent Act of 1977 in the light of Art. 8 and 14 ECHR. On this, see Chiara Favilli and Nuno Ferreira, *Different Legal Treatment of Married and Unmarried Couples in the European Union*, in *FUNDAMENTAL RIGHTS AND PRIVATE LAW IN THE EUROPEAN UNION. VOLUME 2: COMPARATIVE ANALYSES OF SELECTED CASE PATTERNS* 347, at 349 et seq. (Gert Brüggemeier, Aurelia Colombi Ciacchi and Giovanni Comandé eds., 2010).

³¹ See for example in France, Tribunal de la Seine 22 January 1947, *D* 1947, 126. The court found a clause of a testament which eliminates rights to inheritance for a person who marries a Jew to be invalid because of a violation of public policy (Art. 900 Code Civil). This judgment interpreted the term 'public policy' in the light of the French constitution of 1946. On this see Christoph Herrmann and Chiara Perfumi, *France*, in *FUNDAMENTAL RIGHTS AND PRIVATE LAW IN THE EUROPEAN UNION. VOLUME 1: A COMPARATIVE OVERVIEW* 218 et seq. (Gert Brüggemeier, Aurelia Colombi Ciacchi and Giovanni Comandé eds., 2010).

³² See for example in Portugal, Tribunal Constitucional Ac. TC 99/88 DR, II série, 22 August 1988. On this see Gisela Kern, *Portugal*, in *FUNDAMENTAL RIGHTS AND PRIVATE LAW IN THE EUROPEAN UNION. VOLUME 1: A COMPARATIVE OVERVIEW* 577 et seq. (Gert Brüggemeier, Aurelia Colombi Ciacchi and Giovanni Comandé eds., 2010).

³³ Alexander Somek, *Das europäische Sozialmodell: Diskriminierungsschutz und Wettbewerb*, 3 *JURIDIKUM* 118 (2008).

they would be protected in an ordinary application of private law.³⁴ One may therefore acknowledge a clear societal governance policy of the application of fundamental rights in adjudicating private litigation: the protection of weaker contract parties, or, perhaps more precisely, the correction of unequal levels of power in contractual relationships.³⁵

In fact, in assessing and balancing the colliding interests and fundamental rights of the parties, the courts often attempt to compensate for structural inequalities in the bargaining abilities and socioeconomic relations of private individuals or groups.³⁶ The courts thus correct the socially unsatisfactory consequences of a formal application of contract law by re-interpreting private law rules or doctrines in the light of fundamental rights.³⁷ In these re-interpretations, the consideration of the actual socioeconomic situation of the contracting parties play a major role.³⁸ Like in the anti-discrimination cases discussed under 1.1. above, also here the courts increasingly replace the traditional, formalistic understanding of freedom and equality in contract law with a substantive understanding that recognizes and attempts to compensate for the substantive lack of freedom and equality of the weaker party.

³⁴ Aurelia Colombi Ciacchi, *The Constitutionalisation of European Contract Law: Judicial Convergence and Social Justice*, 2 EUROPEAN REVIEW OF CONTRACT LAW 167, at 175 et seq. (2006), with further references; Chiara Perfumi and Chantal Mak, *The impact of fundamental rights on the content of contracts: determining limits to freedom of contract in family and employment relations*, in FUNDAMENTAL RIGHTS AND PRIVATE LAW IN THE EUROPEAN UNION. VOLUME 2: COMPARATIVE ANALYSES OF SELECTED CASE PATTERNS 33 et seq. (Gert Brüggemeier, Aurelia Colombi Ciacchi and Giovanni Comandé eds., 2010), with further references; Maria Gagliardi and Anna Sukhova, *Contractual Duties of Care, Confidence and Cooperation in the Context of Fundamental Rights and Constitutional Principles*, in FUNDAMENTAL RIGHTS AND PRIVATE LAW IN THE EUROPEAN UNION. VOLUME 2: COMPARATIVE ANALYSES OF SELECTED CASE PATTERNS 7 (Gert Brüggemeier, Aurelia Colombi Ciacchi and Giovanni Comandé eds., 2010), with further references.

³⁵ On the political dimension of the application of fundamental rights to contract cases see Chantal Mak, *Harmonising Effect of Fundamental Rights in European Contract Law*, 1 ERASMUS LAW REVIEW 60 (2007); id., FUNDAMENTAL RIGHTS IN EUROPEAN CONTRACT LAW 193 et seq. (2008); id., THE LION, THE FOX AND THE WORKPLACE: FUNDAMENTAL RIGHTS AND THE POLITICS OF LONG-TERM CONTRACTUAL RELATIONSHIP, IN THE ORGANIZATIONAL CONTRACT. FROM EXCHANGE TO LONG-TERM NETWORK COOPERATION IN EUROPEAN CONTRACT LAW 97 et seq. (Stefan Grundmann, Fabrizio Cafaggi and Guiseppe Vettori eds., 2013).

³⁶ Cf. Aurelia Colombi Ciacchi, *Concluding Remarks*, in FUNDAMENTAL RIGHTS AND PRIVATE LAW IN THE EUROPEAN UNION. VOLUME 2: COMPARATIVE ANALYSES OF SELECTED CASE PATTERNS 421, at 427 (Gert Brüggemeier, Aurelia Colombi Ciacchi and Giovanni Comandé eds., 2010).

³⁷ See for example in Germany the leading cases of the Federal Constitutional Court on agency contracts (BVerfG 7 February 1990, BVerfGE 81, 242), suretyship contracts (BVerfG 19 October 1993, BVerfGE 89, 214), marriage contracts (BVerfG 6 February 2001, BVerfGE 103, 89) and insurance contracts (BVerfG 26 July 2005, 1 BvR 782/94 and 1 BvR 957/96; BVerfG 26 July 2005, 1 BvR 80/95). For further discussion on these five cases see Aurelia Colombi Ciacchi, *Party Autonomy as a Fundamental Right in the European Union*, 6 EUROPEAN REVIEW OF CONTRACT LAW 303 et seq. (2010).

³⁸ On the horizontal effect of social rights see Martijn W. Hesselink, *The Horizontal Effect of Social Rights in European Contract Law*, in PRIVAATRECHT TUSSEN AUTONOMIE EN SOLIDARITEIT 119 et seq. (Martijn W. Hesselink, C. Edgar du Perron and Arthur F. Salomons eds., 2003). On social policies in contract law see Brigitta Lurger, *The Social Side of Contract Law and the New Principle of Regard and Fairness*, in TOWARDS A EUROPEAN CIVIL CODE 273 et seq. (Arthur Hartkamp, Martijn W. Hesselink et al. eds., 2004).

C. Valorisation of Non-Economic Interests in Tort Cases

Courts have often applied fundamental rights in tort cases in order to enable the victims to be properly compensated for injuries to their body, health, or personality rights. For example, the German Federal Court of Justice (Bundesgerichtshof, BGH) invoked the constitutional protection of fundamental rights in order to enable compensation for non-economic loss in a case where compensation for pain and suffering was actually impossible (since the victim could no longer feel pain because of brain damage).³⁹

In Italy, the application of fundamental rights by civil courts led to two revolutions in liability law. The first was the allowance of compensation for bodily and health damages per se, i.e. independent of the existence of an economic loss (e.g. loss of income) deriving from the injury. In 1986, the Italian Constitutional Court based this allowance on the constitutionally protected fundamental right to health (Article 32 of the Italian Constitution).⁴⁰ In Italian literature and jurisprudence, this doctrine was called *danno biologico* (biological damage).⁴¹ Clearly, this new doctrine originated from concerns of scholars and courts on social equality and personal dignity. It was found unjust and incompatible with the equality of all persons if, for example, two school children were injured by the same unlawful act, with the parents of the one belonging to the upper class and the other's being poor workers, and they were compensated differently only because of their future income potentials.⁴²

The second revolution overturned the traditional principle of very limited compensation of non-economic loss. With a series of decisions in 2003, the Italian Supreme Court and the Italian Constitutional Court created a new principle, according to which all violations of fundamental rights establish per se a right to compensation.⁴³ Arguably, this principle of per se compensation of violations of fundamental rights has the potential to become a

³⁹ See BGH 13 October 1992, BGHZ 120 1, with a comment by Erwin Deutsch, 46 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 781 (1993); with a comment by Dieter Giesen, 48 JURISTENZEITUNG (JZ) 516 (1993). In this case, the victim's brain injury was caused by a doctor mistake. The German Federal Court of Justice considered the brain damage equal to the destruction of the victim's personality and thus acknowledged a right to compensation for non-economic loss on ground of infringement of the constitutionally protected general personality right. For a reinterpretation of monetary compensation as civil compensation see GERT BRÜGGEMEIER, HAFTUNGSRECHT. STRUKTUR, PRINZIPIEN, SCHUTZBEREICH: EIN BEITRAG ZUR EUROPÄISIERUNG DES PRIVATRECHTS 575 et seq. (2006).

⁴⁰ Corte Costituzionale 14 July 1986 No. 184, *Foro it.* 1986 I 2053, with a comment by Giulio Ponzanelli.

⁴¹ FRANCESCO BUSNELLI, IL DANNO BIOLOGICO. DAL 'DIRITTO VIVENTE' AL 'DIRITTO VIGENTE' (2001); GUIDO ALPA, IL DANNO BIOLOGICO. PERCORSO DI UN'IDEA (2003). For the 'Europeanization of *danno biologico*' or rather for the relation between this doctrine and the tort law provisions of the Draft Common Frame of Reference, see Gert Brüggemeier, *Gemeinsamer Referenzrahmen (Entwurf), Buch VI: "Außervertragliche Haftung für die Schädigung anderer" – eine kritische Stellungnahme, in Festschrift für Erwin Deutsch zum 80. Geburtstag* 749 (Hans-Jürgen Ahrens et al. eds., 2009).

⁴² This argument was triggered by the *Gennarino* case during the 1970s: When the child of a simple worker was the victim of an accident, the Milan court (Trib. Milano 18 January 1971) calculated the extent of the compensation based on the assumption that the child would pursue the same career as his father. This decision was heavily criticized as class justice. See GALOPPINI, IL CASO GENNARINO, OVVERO QUANTO VALE IL FIGLIO DELL'OPERAIO 255 (1971), who provocatively asks how much a worker's child is worth.

⁴³ Cass. 31 May 2003 No. 8827 and 8828; Corte cost. 11 July 2003 No. 233, *Foro it.* 2003 I 2201. On this see IL 'NUOVO' DANNO NON PATRIMONIALE (Giulio Ponzanelli ed., 2004).

pan-European principle of law.⁴⁴ One could see it as an equivalent, at the national level, to the right to an effective remedy in the case of human rights violations in accordance with Article 13 ECHR, at the European level.

The aforementioned developments of member state jurisprudence are clearly motivated by societal governance concerns. Like in contract cases, also in tort cases the application of fundamental rights opens the door to a more flexible and better consideration of social and human needs in the application of private law. This leads to an increasing valorisation of personal, non-economic interests that were not or only to a limited extent compensable in pre-constitutional tort law.

D. Protection of Privacy from Intrusions by Media

The most frequent cases of application of fundamental rights to private litigation in Germany, England, France, Italy, the Netherlands, Portugal, Poland, Spain and Sweden, concern claims for damages or injunction on ground of infringement of one's privacy.⁴⁵ In these cases, the fundamental rights to privacy and personality must be balanced against the conflicting fundamental rights to freedom of expression and information.

The societal governance policies at stake in these cases consist, on the one hand, in the protection of constitutionally safeguarded interests of natural persons from abuses of power by non-state actors (the media). On the other hand, also the procedural control of processes considered political in a broad sense plays a role here. With their decisions on the conflict between privacy and freedom of expression, the courts help to define the borderline between private and public matters, and determine some rules of the political discourse.⁴⁶

E. Protection of Political Rights in Privately Owned Public Spaces

In several European countries, courts are confronted with claims of people who were banned by the operators of shopping centres, sports stadiums or airports from handing

⁴⁴ In the Draft Common Frame of Reference, a *per se* damage (injury as such, Art. 6:204 DCFR) can also lead to compensation in cases other than violations of fundamental rights. For a commentary on this norm, see NON-CONTRACTUAL LIABILITY ARISING OUT OF DAMAGE CAUSED TO ANOTHER (PEL LIAB. DAM.) at 986-990 (Christian von Bar ed., 2009).

⁴⁵ See Joanna Krzeminska-Vamvaka and Patrick O'Callaghan, *Mapping out a Right of Privacy in Tort Law*, in FUNDAMENTAL RIGHTS AND PRIVATE LAW IN THE EUROPEAN UNION. VOLUME 2: COMPARATIVE ANALYSES OF SELECTED CASE PATTERNS 111 (Gert Brüggemeier, Aurelia Colombi Ciacchi and Giovanni Comandé eds., 2010); Aurelia Colombi Ciacchi, *Concluding Remarks*, in FUNDAMENTAL RIGHTS AND PRIVATE LAW IN THE EUROPEAN UNION. VOLUME 2: COMPARATIVE ANALYSES OF SELECTED CASE PATTERNS 421, at 423 et seq. (Gert Brüggemeier, Aurelia Colombi Ciacchi and Giovanni Comandé eds., 2010).

⁴⁶ Cf. See Oliver Gerstenberg, *Private Law and the New European Constitutional Settlement*, 10 EUROPEAN LAW JOURNAL 766 (2004).

out flyers or practising other forms of political activism.⁴⁷ This type of cases has been called 'mall litigation', because the 'public' space in question is often a privately owned shopping mall.⁴⁸

In such cases, courts have often explicated the need to balance the fundamental rights to freedom of expression of the political activists against the fundamental right to property of the owner of the premise. This balancing often led to the recognition of rights of the political activists under new interpretations of private law, which would not have been possible under traditional property law.

A famous example of mall litigation is the English *Appleby* case. Here, activists handed out flyers for a citizens' initiative in an English shopping centre. They were prohibited from doing so by the owner of the premises. The activists fought against this ban and eventually filed a complaint before the European Court of Human Rights. The Court established the principle according to which if a ban on access to property were to result in the lack of any effective exercise of freedom of expression, possibly a positive obligation could arise for the State to protect the enjoyment of Convention rights by regulating property rights. However, in this individual case, the Court did not find that the UK Government had failed to comply with any positive obligation to protect the applicants' freedom of expression.⁴⁹

The opposite outcome was eventually reached in the German *Fraport* case. Political activists protested against the German deportation practice on the premises of Frankfurt Airport. They were banned from doing so by the owner of the premises, the private undertaking Fraport AG. The activists fought against this ban through all instances of the civil proceeding. Since the German Federal Court of Justice ruled in favour of Fraport AG,⁵⁰ one of the activists filed a constitutional complaint against this decision.⁵¹ The German Federal Constitutional Court (BVerfG) decided in favour of the complainant. It held the prohibition of political demonstrations issued by the Fraport AG to be disproportionate and it declared the unconstitutionality of the BGH decision which considered this prohibition lawful.⁵²

⁴⁷ See e.g. in Sweden, NJA 1971, 571; in Italy, Trib. Verona 7 July 1999, Il diritto dell'informazione e dell'informatica 1999 VI, 1059 (distribution of political flyers in a shopping centre); in Spain, STS 7 November 2001, RJ 2001/1025. On these and other judgments see Jana Gajdosova and Stathis Banakas, *Private property, public access and the access to information - a comparative analysis*, in FUNDAMENTAL RIGHTS AND PRIVATE LAW IN THE EUROPEAN UNION. VOLUME 2: COMPARATIVE ANALYSES OF SELECTED CASE PATTERNS 281 et seq. (Gert Brüggemeier, Aurelia Colombi Ciacchi and Giovanni Comandé eds., 2010).

⁴⁸ Cf. J. Gajdosova and S. Banakas (see previous footnote).

⁴⁹ *Appleby v United Kingdom*, ECHR (2003) 37 EHRR 38. For a good critical analysis of this judgment see Oliver Gerstenberg, 10 EUROPEAN LAW JOURNAL 766 (2004).

⁵⁰ BGH, 59 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 105 (2006). On this see Andreas Fischer-Lescano and Andreas Maurer, *Grundrechtsbindung von privaten Betreibern öffentlicher Räume*, 20 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1394 (2006).

⁵¹ This constitutional complaint was drafted by the Frankfurt professor Günter Frankenberg together with the Bremen professor Andreas Fischer-Lescano, delegated by the plaintiffs as solicitors.

⁵² BVerfG, 1 BvR 699/06, 22 February 2011, BVerfGE 128, 226.

The societal governance dimension of these judgments is evident. In this type of litigation, the courts regulate the exercise of political rights in spaces that are private property but open to the public. Thereby, the courts contribute to setting the borderline between the private and the public, and defining the rules of the political discourse.⁵³

F. Environmental Protection in Property Cases

In a number of European countries, civil courts have taken environmental protection interests into account while adjudicating litigation between owners or users of pieces of land. A typical case pattern concerns claims of annoyed neighbours of properties where polluting activities take place. The neighbours usually claim under property law against the owner or user of land who causes emissions potentially harmful for the health and well-being of human beings, and/or the natural environment.

In these cases, the courts have sometimes invoked fundamental rights (for example the right to health) and/or constitutional principles concerning the protection of the natural environment, as a support for new interpretations of property law aimed at protecting the neighbours of pieces of land and the environment itself from such emissions.⁵⁴

In Italy, the fundamental principle applied horizontally by the courts was not the state's duty to protect the environment, but the fundamental right to health of the concerned individuals. The interpretation of the right to health was extended to the right to live in a healthy environment, but the basic interests concerned remained the ones of the single individuals living near the sources of pollution.

The consideration of environmental interests in property cases is a clear example of judicial governance in private law adjudication. Besides the property interests of the litigating parties, the courts consider in their balancing also other, non-economic but not less fundamental, interests of individuals and collectives⁵⁵ such as the interests in a clean and healthy environment.

⁵³ See Oliver Gerstenberg, 10 *EUROPEAN LAW JOURNAL* 766 (2004).

⁵⁴ For a detailed comparative study of this subject matter see *PROPERTY AND ENVIRONMENT* (Barbara Pozzo ed., 2007). See also Maria Dolores Sánchez Galera and Judith Zehetner, *Action against emissions: fundamental rights and the extension of the right to sue in private nuisance to non-owners*, in *FUNDAMENTAL RIGHTS AND PRIVATE LAW IN THE EUROPEAN UNION. VOLUME 2: COMPARATIVE ANALYSES OF SELECTED CASE PATTERNS* 298 et seq. (Gert Brüggemeier, Aurelia Colombi Ciacchi and Giovanni Comandé eds., 2010). One of the first monographs on this subject published in Europe is SALVATORE PATTI, *LA TUTELA CIVILE DELL'AMBIENTE* (1979).

⁵⁵ On the need to balance property rights against other conflicting fundamental rights and constitutional principles like equal treatment, non-discrimination and social rights, see Brigitta Lurger, *Political Issues in Property Law and European Unification Projects*, in *THE POLITICS OF A EUROPEAN CIVIL CODE* 33, at 39 (Martijn W. Hesselink ed., 2006).

IV. Conclusion

Through the acknowledgment and balancing of the conflicting fundamental rights at stake in a private litigation, the courts 'govern' societal relationships. This judicial governance complements and adjusts the governance of the concerned societal relationships that takes place at the legislative level. In fact, legislation is often influenced by powerful economic lobbies (e.g. multinational corporations, the banking and insurance industry, etc.). This may lead to an underrepresentation of other, especially non-economic, human interests.

In fact, the groups of cases considered in the previous section of this paper seem to evidence that some fundamental human interests (such as the actual self-determination of weaker contractual parties, or the exercise of freedom of expression in privately owned public spaces) were not adequately considered under the traditional interpretations of private law, before the courts gave them weight through the application of fundamental rights. The interests of the counter-parties, however (such as freedom of business, or property rights) were already adequately protected by the private law instrumentarium. This imbalance was then corrected through judicial governance, with the help of fundamental rights based argumentations. Therefore, one may argue that the application of fundamental rights to private litigation gives a voice especially to those interests which had not been fought for by a powerful lobby at the legislative level.⁵⁶

Theoretically it would also be possible to achieve such new interpretations of private law without invoking fundamental rights.⁵⁷ However, a fundamental rights argumentation offers at least three important advantages. First, it gives more legitimacy to the new private law interpretations and protects them from objections based on arguments not backed on fundamental rights. Second, it explicates that the previous, traditional interpretations of the relevant private law rules lacked to properly consider one of the fundamental human interests at stake in the relevant private relationship, which makes a judicial adjustment necessary.⁵⁸ Third, through this practice, the judiciary opens up the private law discourse to embrace the constitutional and international law discourse as well. In doing so, it enables legal actors to deal with the balancing of conflicting interests and policies in private relationships more explicitly, under a broader and supranational perspective. The

⁵⁶ Cf. Aurelia Colombi Ciacchi, *European Fundamental Rights, Private Law and Judicial Governance*, in THE CONSTITUTIONALISATION OF EUROPEAN PRIVATE LAW 102, at 133 (Hans-W. Micklitz ed., 2014).

⁵⁷ Cf. Olha O. Cherednychenko, *Subordinating Contract Law to Fundamental Rights: Towards a Major Breakthrough or towards Walking in Circles?*, in CONSTITUTIONAL VALUES AND EUROPEAN CONTRACT LAW 35 et seq. (Stefan Grundmann ed., 2008).

⁵⁸ Cf. Aurelia Colombi Ciacchi, *Non-Legislative Harmonisation of Private Law under the European Constitution: The Case of Unfair Suretyships*, 3 EUROPEAN REVIEW OF PRIVATE LAW, 285 et seq. (2005).

substantive core of judicial reasoning becomes more transparent, more suitable to cross-border comparison and mutual learning processes.⁵⁹

⁵⁹ In favour of the constitutionalisation of private law through adjudication, see among others Oliver Gerstenberg, 10 *EUROPEAN LAW JOURNAL* 766 (2004); id., *What Constitutions Can Do (but Courts Sometimes Don't): Property, Speech, and the Influence of Constitutional Norms on Private Law*, 17 *CANADIAN JOURNAL OF LAW AND JURISPRUDENCE* 61 (2004); Gert Brüggemeier, *Constitutionalisation of private law – the German perspective*, in *CONSTITUTIONALISATION OF PRIVATE LAW* 59, at 82 (Thomas Barkhuysen and Staffan Lindenberg eds., 2006); CHANTAL MAK, *FUNDAMENTAL RIGHTS IN EUROPEAN CONTRACT LAW* (2008); id., *Judges in Utopia. Fundamental Rights as Constitutive Elements of a European Private Legal Culture*, in *TOWARDS A EUROPEAN LEGAL* 375 et seq. (Geneviève Helleringer and Kai Purnhagen eds., 2014).