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Fundamental Rights and Contractual Justice: Cultural-Legal Interactions

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Abstract: *This analysis reveals the contribution of fundamental rights to the restoration of contractual balance. The judicial illustrations presented show the difficulties raised by reconciling contractual freedom with the fundamental rights enshrined by the European Convention on Human Rights (ECHR) and the triumph of fundamental freedoms over the binding force of the contract. The impact of the ECHR in contractual matters results from the horizontal effect granted to the text, meaning its applicability in inter-individual relations. By providing clarity and strength to fundamental rights, the alliance of the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union thus ensures protection and legal certainty within the EU. The developments in European contract law suggest a pluralistic notion of contract in European private law based not only on the will of the parties but also on good faith and legitimate expectations. Indeed, the assessment and restoration of contractual balance concerning the provisions of the ECHR speak of a renewed paradigm of contract in European private law.*

Keywords: *contract, autonomy of will, fundamental rights, European private law, European contract law.*

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Introduction

Law is not merely a technical discipline or a collection of arid prescriptions, just as courtrooms are not merely austere arenas where social conflicts are resolved and human contradictions temporarily unfold. Law is "also a kind of ideal of man who believed himself to be God," wrote Paul Valéry, transfiguring the sober and more prosaic technique of drafting legal norms into a celestial metaphor. For its passionate devotees and priests, the realization of justice becomes a fertile ground where hermeneutics of the laws, precision in reasoning, eloquence of discourse combine to achieve the highest expression of the art of law. Indeed, to restore lost harmony, goodness, and fairness, we need moral values and legal principles to be shaped into forms of expression characterized by order, symmetry, and the *elegantia juris*. A brilliant writer and diplomat, Jean Giraudoux, in his famous play *The Trojan War Will Not Take Place*, paid one of the most beautiful tributes to the science of law and its practitioners: *"Law is the most powerful of all schools of imagination. No poet has ever interpreted nature as freely as a jurist interprets reality!"*

The Age of Enlightenment has passed, and the digital era writes its chronicle at an autocratic speed. Recent jurisprudential developments have prompted us to ask: How does the interaction between fundamental rights and contractual justice manifest? What is *the contribution of fundamental rights to restoring contractual balance*? In search of an answer, the vibrant silhouettes of lovers from Marc Chagall's paintings came repeatedly to mind. Some float in the air above the earthly boundaries of the world (*Over Town*), nestling in the fragrant refuge of a fantastic bouquet (*Lovers in the Lilacs*), gazing tenderly at one another in solarized scenes (*The Lovers of Vence*), or traveling on the back of a radiant bird across the Parisian sky (*The Eiffel Tower Lovers*). Others are innocent witnesses amidst the snowy, treacherous backdrop of unleashed war (*Between Darkness and Light*), or punished by divine wrath through exile from paradise (*Biblical Message*).We cannot mistake the varied emotions our astonished gaze experiences when confronted with these astounding lithographs. In an allegorical blend, idealism and the supernatural coexist with realism, and especially with the surrealism that emanates from the work of this multicultural artist who was "Russian by birth, Jewish by faith and culture, French at heart, and even American by refuge" (Bouquet, 2015). The realist is always a reserved, even taciturn individual. He has the certainty of his reflections and knows the evils of humanity. He best understands why "the assertion that the protection of human rights in Europe was born from the ashes of Auschwitz is (...) not merely a recurring figure of speech in the

books of European law professors" (Bercea, 2020, 2). The idealist, by contrast, is optimistic, even carefree, happy, and ever confident in the future (Pélissier [2008, 29)] - one of those "naïve individuals who feed on the illusions their fragile minds produce" (Stanca, 2024). And is it not precisely the realist, who "does not intoxicate his mind with illusions and ideals," (Stanca, 2024) who is reconciled with the imperfections of the world in which he lives while the dreamy idealist risks being tormented by this fervent quest for a wonderful world ?

This is the mindset and the framework of thought within which I have integrated the contribution of fundamental rights (Bîrsan, 2010; Muraru & Tănăsescu, 2023, 185-189; Selejan-Guțan, 2023) to the restoration of contractual balance. I have allowed for an idealistic perspective on the participation of fundamental rights in a renewed paradigm of contractual justice, but also a realistic vision, with pertinent responses regarding the legal foundation and the utility of such a contribution. The stakes of the debate can only be fair and feasible solutions, not ideological conflicts artificially maintained through sterile arguments. I will not speak about what some critical voices call *"the superfluous, even detrimental intrusion of human rights into relationships between private parties,"* (Ancel, 2005, 121) nor about *"contractual terrorism"* (Piperea, 2014, 372) or, conversely, *"the requiem of the contract"* (Puig, 2011, 21). Instead, I will address the challenges that the protection of fundamental rights raises in the realm of contractual relationships, particularly in the resolution of disputes between parties.

Reconciling contractual interests in European private law

Undoubtedly, the crisis of the classical conception of the contract and the decline of the will theory as the exclusive foundation of contracts (Pop et al., 2012, 60) are realities acknowledged by European private law. This legal tradition has drawn from national legislations notions inspired by their respective contractual philosophies: *good faith* from the continental tradition and *legitimate expectations* from common law. These concepts offer two perspectives on contracts—one from the debtor's viewpoint and the other from the creditor's. From the enshrinement of *good faith* in §242 of the German Civil Code (BGB) and its recognition as a general principle in the *Principles of European Contract Law* (PECL), to the "letter of nobility" (Busseuil, 2009, 567) it received through Article 3 (1) of the Directive on Unfair Terms in Consumer Contracts (April 5, 1993), the concept of *good faith* is firmly established as an essential contribution of continental law to European contract law (Orga-Dumitriu, 2013, 112). The identification of *reasonable expectations* as common law's contribution to European private law

is aptly captured by Jean Carbonnier when he notes that "expectations (the creditor's reasonable expectations—our emphasis) came from the English through the directives from Bruxelles" (Carbonnier, 2004, 1956). The metamorphosis of contract identity could not go unnoticed in European private law, imbued as it is with the relational theory of contracts. This theory has shaped a *"pluralistic notion of the contract, structured by the will of the parties and the interplay of good faith and legitimate expectations"* (Busseuil, 2009, 614); this renewed conception of contract identity - resulting from the increasingly visible integration of these two key concepts - inevitably impacts both the content of contracts and the dynamics of contractual liability as an institution (Jugastru, 2023, 309). Indeed, developments in European contract law suggest that the restoration of contractual balance and contractual justice, in general, lies at the heart of the European conception of contracts. This assertion can be illustrated through two examples. The first concerns the enhanced role of *good faith* in ensuring contractual balance in European private law. The mechanism for suppressing unfair terms established by Directive 93/13 stands as the most telling example. The original framework devised by the European Union legislator to determine the unfairness of clauses in consumer contracts requires the cumulative existence of three conditions: i) the clause must not have been individually negotiated, ii) there must be a significant imbalance between the rights and obligations of the parties and iii) the professional must have failed to meet the requirement of good faith. But the stakes represented by the achievement of contractual justice in the European context are equally manifested through the intervention of fundamental rights in contractual obligations:

„Fundamental rights constitute a significant source of influence on European contract law. It is true that they are not (immediately and directly, our emphasis) intended to be used in crafting the technical rules that govern the formation or performance of contracts. This explains their absence from the *Principles of European Contract Law* drafted by the Lando Commission or the *European Contract Code* proposed by the Academy of European Private Lawyers in Pavia. However, the participation of fundamental rights finds its full meaning at the stage of defining the guiding principles of European contract law. Even if their relevance seems to diminish when it comes to addressing purely technical aspects of contractual matters, their influence remains undeniable in shaping the broader principles and values underpinning the European contractual framework" (Pélissier, 2008, 31).

Thus, the contract - traditionally the domain of economic exchanges between private parties - today also manifests as a receptacle, a host for the conflicts it may foster with fundamental rights. It remains to determine the extent of this participation of fundamental rights in resolving contractual disputes. The idealist will approach the subject through the liberal logic of recognizing this influence and, with the rosy lens of their imagination, will seek to extend its scope as far as possible. The realist, more cautious, will examine the cultural-legal reasoning and the legal foundation of the contribution of fundamental rights to contractual justice, focusing on ensuring proportional remedies when the parties' liability is engaged. The truth can only be revealed through the reflection in our minds of the meanings carried by both alternatives.

The idealist's plea: recognizing the contribution of fundamental rights to restoring contractual balance

The contract, as the ultimate expression of the sovereign will of the parties, is not naturally the domain of fundamental rights intervention. Yet judicial chronicles bear witness to how these fundamental rights and freedoms strain the binding force of contracts. While the contract is indeed the *law of the parties*, do the parties truly enjoy absolute freedom in determining its content?

To speak of the influence of fundamental rights on contractual relationships is to acknowledge that these rights can dramatize the classical paradigms of contract theory, compelling us to adapt them to new realities.

A few examples from case law shed light on this phenomenon. The French *Cour de Cassation* was called upon to rule on the conformity of a lease clause with Article 8 §1 of the European Convention on Human Rights (the Convention), which guarantees the right to respect for private and family life. The lease clause in question restricted the tenant's right to host individuals other than their own descendants in the rented property. In this particular case, the contract holder lived with the father of her children and her sister. Invoking the violation of contractual terms, the Paris administrative authority sought termination of the lease in court.

In its decision of March 6, 1996, the *Cour de Cassation* ruled that such a "personal habitation" clause was contrary to Article 8 §1 of the Convention. Consequently, by weighing the binding force of the contract against the right to respect for family life, the court upheld the hierarchy of norms and prioritized supranational fundamental rights.

The discussions surrounding the *Hutten-Czapska v. Poland* case (European Court of Human Rights, 2005) brought to the attention of the

European Court of Human Rights (ECtHR) the Polish legislation of 1994, which established a restrictive rent control system. This regulation was the result of a series of measures adopted by the communist authorities after World War II. Under this system, property owners were required to bear the costs of maintaining the properties, while the maximum rent was capped. In this specific case, the maximum rent covered only 60% of the maintenance costs. At the same time, the claimant-property owner invoked certain unjustified restrictions on the right to terminate the lease contract. Initially, the Court held that the regulations adopted by the Polish state did not amount to expropriation in practice, but rather were measures for the control of property use under Article 1 §2 of Protocol No. 1 to the Convention, the adoption of these measures was closely linked to a specific historical context marked by a persistent housing shortage, a limited supply of apartments, and high real estate prices. Therefore, the limitation of rents for the protection of tenants was, in principle, legitimate. However, in the second phase of its analysis, the Court considered that such a legislative system, designed to be so protective of tenants that it prevented property owners from covering their maintenance costs and deprived them of any minimal property benefit, constituted a violation of Article 1 of Protocol No. 1 to the Convention. This was due to the undue interference with the claimant's property rights. The Strasbourg Court condemned the disproportionate nature of the measures adopted by the Polish state for the protection of the public interests pursued and issued a pilot judgment (Selejan-Guțan, 2011a, 74), urging Poland to take all necessary measures to ensure that rents remained at a reasonable level without imposing excessive burdens on property owners.

Undoubtedly, such examples are encouraging. However, to avoid getting too carried away, it is essential to also filter the more technical arguments arising from

The realist's plea: legal basis for the intervention of fundamental rights in contractual relations

The optimistic perspective on the increasing affirmation of fundamental rights—especially in the realm of contractual justice - has a certain appeal. The idea that fundamental rights could be universally recognized and indivisible, transforming into a kind of secular religion for contemporary society, is undoubtedly alluring. However, these idealistic expectations can be deceptive, especially when the realities of the day reveal the erosion and challenges faced by human rights, particularly in specific political or geographical contexts. Therefore, certain responses can only be

provided through a Socratic approach, guided by specific questions regarding the legal basis for the participation of fundamental rights in contractual justice and the legal limits within which certain cultural or religious considerations (Tăvală, 2015, 104) may justify the protection of fundamental rights in contractual relationships.

Following this method, we can test the threshold at which fundamental rights can be legitimately invoked by one contracting party against another. A novel situation that has been analyzed by French courts involved a dispute arising from a lease contract, which raised the issue of the conflict between the exercise of religious freedom and the content and effects of the contract. In this case, the tenants, who were Jewish, observed the Sabbath, a day of rest established by the Jewish religion. According to the free online encyclopedia Wikipedia, the Sabbath is a day outside of time and material contingencies, during which all external activities must be reduced so that individuals can focus on family and home. Work (understood as activities aimed at exploiting resources to increase wealth and comfort) and other modern-world activities are forbidden.

The tenants, being faithful to their religious beliefs, could not use electricity on the Sabbath. The installation of an electronic entry system in their building prevented them from entering or exiting their home. As a result, they requested in court that the landlord be compelled to install a mechanical lock and provide them with the access keys. After the Paris Court of Appeal upheld the tenants' request in the name of good faith contract performance, the Court of Cassation was called upon to determine whether the landlord was obligated to ensure the peaceful exercise of the tenants' religious freedom.

By applying the provisions of Article 1134 of the French Civil Code (the binding force of contracts), special regulations (Article 6 of Law 89-462 of July 6, 1989, regarding the rental of housing), and Article 9 of the European Convention on Human Rights (which concerns the freedom of thought, conscience, and religion), the Court of Cassation, in its ruling of December 18, 2002, concluded that the practices dictated by the tenants' religious beliefs did not fall under the scope of the lease agreement in the absence of an express clause. As such, the landlord was not under any specific obligation to accommodate these religious practices. The solution prioritizes contractual security by preventing the expansion of the landlord's classic obligations for reasons related to the tenants' religious affiliation, in the absence of a contrary clause. Therefore, the application of the Convention to the law of obligations must be approached with caution and discernment, as "the intervention of fundamental rights in disputes between

private individuals is likely to disrupt the very foundations of private law" (Fromont, 1975, 301). The doctrine has identified here a so-called "principle of contractual secularism" (Damas, 2004, 844) and even an implicit refusal to consider religious justifications. Under different circumstances, the landlord would face inextricable situations in trying to satisfy the religious beliefs of each of the tenants in the rented properties.

This jurisprudential orientation was later confirmed in a dispute concerning the impact of a religious practice on the rules governing the exercise of rights over properties in a condominium. Sukkot (or the Feast of Tabernacles) is an annual Jewish tradition during which, for seven days, practitioners live and receive visits from loved ones in temporary huts with walls covered with tree branches or bamboo shoots, set up in gardens or on balconies. The ritual is a form of celebrating gratitude in memory of the fragile shelters where the Jews lived during the 40 years of wandering in the desert after leaving Egyptian bondage. During the holiday, meals are served in this *suká*, and some people even sleep in it at night. According to the prophet Zechariah, in the Messianic era, Sukkot will become a universal holiday, and all nations will make an annual pilgrimage to Jerusalem to celebrate the holiday in the holy city.

In a Haussmann-style building, the owners of an apartment (a married couple) set up their ritual hut (sukkah) on their balcony, despite the fact that the condominium rules for multi-story residential buildings prohibited any constructions on balconies in order to preserve the standing, the environmental character, and the bourgeois appearance of the building's façade. The owners requested in court the annulment of the decision adopted by the general meeting of the homeowners' association, which required them to remove the ritual setup. In support of their request, they argued that the condominium rules cannot impose any restrictions on the owners' rights other than those justified by the destination of the property, nor can they deprive any owner in the condominium of their freedom to practice their religion, in the absence of any damage (Jugastru, 2013, 180) caused to the other owners.

Confirming the line of reasoning of the court of appeal, the French Court of Cassation, by decision of June 8, 2006, ruled that religious freedom, no matter how fundamental, cannot result in the legalization of violations of the condominium regulations, as in this case, the work was prohibited by the provisions of the regulations since it affected the general harmony of the building and was visible from the street. Any custom, practice, or ritual cannot be systematically protected by the fundamental right to religious freedom. The right to freedom of conscience, recognized by Article 9 of the

Convention, is a conditional right, which can be restricted by the state in certain situations (Selejan-Guțan, 2011b, 189). Indeed, according to Article 9 §2 of the Convention, "freedom to manifest one's religion or beliefs may be subject to such limitations as are prescribed by law and are necessary in a democratic society for public safety, the protection of order, health or morals, or for the protection of the rights and freedoms of others".

Moreover, the Strasbourg Court has also ruled that the exercise of religious freedom cannot be a shelter under which a person could evade the conduct prescribed by law. For example, the religious beliefs of pharmacists could not justify their refusal to sell contraceptive pills (Hutten-Czapska v. Poland , European Court of Human Rights, 2001) in a context where the provisions of the Consumer Code sanction such behavior (refusal to sell). It is true that judges may have difficulties in achieving the right balance between the rules laid down either by state law (which is the product of the general will) or by a condominium regulation (as the result of individual wills of the condominium owners) and fundamental religious freedom. In this case, the conflict between the fundamental interests of the owners whose beliefs were infringed upon and the collective interests protected by the condominium regulations was resolved in favor of the latter. The solution, "however surprising it may seem at first glance" (Raynaud, 2006, 609) demonstrates that invoking fundamental freedoms and applying the Convention in relations between individuals cannot be automatic and absolute.

Conclusions

While fundamental freedoms are most often invoked in relations with the contracting states, which are obligated to guarantee their application (the vertical effect of the Convention), the effectiveness of the rights enshrined in the Convention requires their application even in disputes between private individuals (the horizontal effect). The contribution of fundamental rights to contractual justice can only be considered by acknowledging this horizontal effect granted to the text, in other words, the possibility for it to apply in inter-individual relationships. The case law analyzed is sufficiently clear regarding how fundamental rights tension contractual relationships and force courts to assess their influence on the contractual content. Contractual freedom can no longer be conceived as an abstract freedom, insulated from the impact of the norms that enshrine fundamental rights and liberties and their dynamic interpretation. The interaction between the individual-centered vision (and the rights inherently

recognized in their human condition), brought by the European Convention on Human Rights, and the social logic of civil codes must be nuanced.

While courts dismiss the "additive effect" (Chassagnard-Pinet, 2008, 237) of fundamental rights (which consists in integrating a clause into the contract regarding the exercise of religious freedom), they are instead favorable to the elusive effect, which consists of removing from the contract, or more precisely, invalidating the clause that violates the fundamental rights (such as the right to respect for private and family life, emphasis added) of the tenant (Busseuil, 2009, 644). When a national judge applies and enforces the respect for fundamental rights in relationships between private individuals, they actively participate in a true "fundamentalization" of contract law. However, for every national judge, there are as many proportionality tests and specific assessments. Fundamental rights are no longer applied in contractual relationships as they might result from a concerted action of judges at the European level (through the case law of the European Court of Human Rights); here, they are fragmented, dispersed (Pélissier, 2008, 40). Of course, we may easily feel confused by these developments, which put pressure on the traditional mechanisms of private law.

The "rolling" of fundamental rights and the foam of their philosophy infiltrate contractual paradigms and invite us to rethink the most appropriate and renewed responses to restore contractual order. Written words, in the world of law, are like color for the painter and verse for the poet – bearers of meaning and future. Even though "history makes things happen to us that are 'immensely destructive,' (...) it transforms everything into memory – that is, into *yesterday* (...), writing, on the other hand, is 'immensely constructive.' It is the strict opposite of history: through the syntax of the utopian and the messianic, language constructs in memory the figure of that *tomorrow*, which is the supreme value of European culture" (Vancu, 2021, 83).

I like to believe that the realist and the idealist have agreed on this truth.

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