

# Fundamental Rights and Civil Law Contracts from a European Perspective

## Summary

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By way of introduction, professor Lengauer noted that European law does not *per se* contain a catalogue of fundamental rights that would be an explicit part of a European Constitution.

EU primary law contained some provisions which were similar in nature to fundamental rights or – as jurisprudence by the European Court of Justice suggests – in essence even constituted fundamental rights.

However, the rights of individuals could not be derived immediately from the explicit provisions of the EC Treaty, but only from case law.

As a central clause, professor Lengauer mentioned Article 12 of the EC Treaty which generally prohibits discrimination on the grounds of nationality. This clause is directly applicable. Article 13 of the EC Treaty, which can be regarded as a constitutional principle of equal treatment before the law, is not directly applicable according to prevailing legal opinion and case law.

This general principle of equal treatment before the law constitutes one of the fundamental principles of Community law and has been defined by the European Court of Justice as follows: “According to this principle, comparable situations may not be treated differently, unless a difference of treatment is objectively justified”. The prohibition to discriminate covers direct as well as indirect discrimination.

Professor Lengauer went on the outline the grounds which may be invoked in order to justify a – directly or indirectly – discriminating provision. With direct discrimination, only such reasons as are laid down in the EU Treaty or in appropriate secondary law may be used as justification; with indirect discrimination, factual grounds relating to general interest suffice, provided they are proportionate, necessary, and not related to the undesired discriminating attribute.

As another specific prohibition of discrimination, professor Lengauer referred to Article 141 of the EC Treaty, which provides for equal pay for male and female workers for equal work. This clause also covers indirect discriminations and was ruled by the European Court of Justice to have direct third-party effect between the parties.

The European Court of Justice, as professor Lengauer explained, had ruled that the free movement of workers, the freedom of establishment, and the freedom to provide services as far as it relates to persons, have a direct third-party effect between natural persons and intermediary powers. Due to their economic and regulatory dominance, these intermediary powers become the normative targets of the said fundamental freedoms and cover those private-law institutions that are vested with (formerly) typical sovereign powers, including i.a. oversight and regulatory powers and/or disciplinary powers (e.g. FIFA, UEFA...)

Professor Lengauer qualified the rules on the freedom to exercise a profession throughout the Community, and on the freedom to act, as the fundamental–right dimension of the said freedoms. According to case law, only direct discrimination on the grounds of nationality was held to have a direct third-party effect.

Finally, professor Lengauer addressed the question as to whether the freedom of contract and private autonomy could be used as justifying reasons. In the light of the ECJ's rulings (i.a. in the *Familiapress case*), the answer will have to be affirmative. On the one hand, the justifying reasons will be subjected to a rigorous examination as to proportionality, on the other, they must not be factual causes that do not relate to the nationality of the individual. When assessing proportionality, a differentiation will have to be made according to the severity and scope of the undesired behaviour (direct discrimination, indirect discrimination), restriction, and the need to protect the individual (being the subject of discrimination).

Professor Lengauer concluded by arguing that the impact of the fundamental rights inherent in Community law on civil-law contracts created two additional, undesired attributes for the choice of the contract partner and the design of the contract with direct third-party effect: the imperative of equal pay for male and female work for

equal work, and the prohibition to discriminate on the grounds of nationality when it comes to freedoms that are similar in nature to fundamental rights.

Owing to the quality of the Community provisions mentioned (primacy and direct applicability), such interference with private-law contracts effectively interferes with Member States' private law; by their very nature, however, they are not incompatible with the Member States systems.