

# The Horizontal Effect of the EU Charter of Fundamental Rights: A Constitutional Analysis

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## **Declaration**

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‘I, Eleni Frantziou, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.’

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## Abstract

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This thesis analyses the horizontal effect of the Charter of Fundamental Rights of the European Union from a constitutional perspective. It advances two main arguments: firstly, it argues that the horizontal effect of the Charter cannot be usefully discussed based on the existing EU horizontality doctrine. In the case law, horizontality is primarily associated with the exercise of horizontal direct effect. It is characterised by a series of technical rules as to how the latter may be produced and has a case-specific nature that lacks overall constitutional coherence. However, the horizontal effect of a fundamental rights list has organisational implications for society, which go beyond specific intersubjective disputes. Secondly, the thesis argues that a constitutional model of horizontality is required. This model necessitates constitutional reasoning by the Court of Justice, in the sense of public justification. In light of the Charter's inherently political role in the EU project, its application to private relations rests upon a reconstruction of the EU public sphere. It requires an explicit recognition of the public character of certain private platforms of will formation (e.g. the workplace) and a discussion of the role of fundamental rights therein. At the same time, a constitutionally adequate model of horizontality involves an acknowledgment of the supranational character of EU adjudication. The horizontal effect of fundamental rights is applied in different ways in the constitutional orders of the Member States. As the Charter's purpose was to coordinate the standard of fundamental rights protection and not to harmonise the structures through which it is delivered, national courts remain responsible for assessing the technicalities of its operation. Thus, while the determination of *horizontal applicability* falls upon the Court of Justice, the *parameters of horizontal effect* (e.g. direct, indirect or state-mediated effect) rest with national courts.

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## Table of Contents

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<b>Declaration .....</b>	<b>2</b>
<b>Abstract .....</b>	<b>3</b>
<b>Acknowledgments .....</b>	<b>4</b>
<b>Table of Contents .....</b>	<b>6</b>
<b>Introduction .....</b>	<b>10</b>
The Charter of Fundamental Rights and horizontal responsibilities .....	10
Methodology and originality of the research .....	17
Structure of the thesis .....	20
<b>1 The Horizontal Effect of Fundamental Rights as a Constitutional Problem.....</b>	<b>26</b>
1.1 Introduction .....	26
1.2 Horizontal rights in a multi-layered global polity: some conceptual foundations .....	27
1.3 The constitutional operation of horizontality .....	33
1.4 Three types of horizontality .....	40
1.5 Conclusion: the horizontal effect of constitutional rights and the EU Charter .....	51
<b>2 The Charter of Fundamental Rights and the Question of Horizontality .55</b>	
2.1 Introduction .....	55
2.2 Understanding the Charter’s constitutional significance: its content, drafting history and links to further political integration in the EU .....	56
2.3 The current debate about the Charter’s horizontality .....	69
2.3.1 Article 51 EUCFR .....	71
2.3.2 The Charter’s drafting intricacies and the distinction between rights and principles.....	76
2.4 Conclusion: The horizontal effect of the Charter from a constitutional perspective.....	79
<b>3 From <i>Defrenne</i> to the Charter: Understanding the EU Horizontality Heritage .....</b>	<b>83</b>
3.1 Introduction .....	83

## Table of Contents

3.2 Vertical and horizontal individual rights as means of advancing integration within the common market .....	85
3.2.1 A horizontal conception of rights: <i>Van Gend en Loos</i> and <i>Defrenne II</i> .....	86
3.2.2 The lack of direct horizontal effect of directives .....	91
3.3 Counteracting the distinction between Treaty rights and directives .....	95
3.3.1 Emanations of the state .....	95
3.3.2 Application of indirect horizontality as a substitute for the lack of direct horizontal effect.....	99
3.3.3 A conceptually flawed application of state-mediated effect.....	101
3.3.4 Fundamental rights-specific horizontality: direct horizontal effect through the general principles of EU law .....	106
3.4 Conclusion: ‘a law of diminishing coherence’ .....	112
<b>4 Old Problems, No New Responses: The Horizontal Effect of the Charter in the Court’s Case Law .....</b>	<b>117</b>
4.1 Introduction.....	117
4.2 Affirming pre-Lisbon case law in respect of the horizontal effect of the Charter .....	119
4.2.1 <i>Prigge</i> and <i>Dominguez</i> : the continued salience of general principles ..	120
4.2.2 <i>Association de Médiation Sociale</i> : rights-conferring and non-rights-conferring provisions of the Charter as the test for horizontality .....	124
4.2.3 <i>Dansk Industri</i> : confirming a fragmented view of horizontality for fundamental rights post-Lisbon.....	136
4.3 <i>De facto</i> application of horizontality without ‘horizontal’ reasoning. ....	141
4.4 The problems with the Court’s approach in the Charter context: a law of diminishing legitimacy?.....	146
4.5 Conclusion: a horizontality doctrine that marginalises the idea of constitutional duties .....	157
<b>5 The Horizontal Effect of the Charter and the Public/Private Divide.....</b>	<b>161</b>
5.1 Introduction.....	161
5.2 The Court’s private law focused approach to fundamental rights .....	163
5.3 Horizontal effect and the public/private divide in modernity .....	178
5.4 The need for supranational constitutional discourse in respect of horizontality .....	184
5.5 Conclusion: towards horizontality in a constitutional polity .....	192
<b>6 Rediscovering Constitutional Reasoning Regarding the Horizontal Effect of the Charter .....</b>	<b>195</b>
6.1 Introduction.....	195

## Table of Contents

6.2	Public justification and supranational constitutional reasoning: the Charter as a vehicle towards political equality.....	196
6.3	Political equality and the horizontal effect of the Charter: recognising constitutional rights <i>and duties</i> .....	205
6.4	Conclusion: a political conception of horizontality under the Charter.....	217
<b>7</b>	<b>A Supranational Model of Horizontality for the Charter.....</b>	<b>220</b>
7.1	Introduction .....	220
7.2	Understanding the role of the CJEU in the adjudication of the horizontal effect of the Charter.....	222
7.3	The application of a supranational constitutional model of horizontality. ....	232
7.3.1	Differentiating between national and supranational remedies .....	232
7.3.2	Understanding the operation of the horizontal effect of the Charter: application to the case law .....	238
7.4	Conclusion: horizontality in a supranational constitutional polity.....	244
	<b>Conclusion .....</b>	<b>247</b>
	<b>Bibliography.....</b>	<b>256</b>
	<i>List of Cases and Opinions of Advocates General.....</i>	<i>256</i>
a.	Opinions of Advocates General.....	256
b.	EU Case Law.....	258
c.	ECHR Case Law.....	265
d.	National Case Law .....	265
d.1.	Germany.....	265
d.2.	Ireland .....	266
d.3.	South Africa.....	266
d.4.	United Kingdom.....	266
d.5.	United States.....	266
	<i>Legislation and Official Documents .....</i>	<i>266</i>
a.	EU Legislation and Official Documents .....	266
a.1.	Primary Legislation .....	266
a.2.	Secondary Legislation.....	267
a.3.	Other Official Documents .....	268
b.	National Legislation .....	268



## *Table of Contents*

b.1. Germany .....	268
b.2. South Africa .....	268
b.3. Spain.....	268
b.4. Belgium .....	268
b.5. United Kingdom .....	269
c. Regional and International Treaties and Official Documents.....	269
<i>Academic Literature</i> .....	269
a. Monographs and Anthologies .....	269
b. Journal Articles and Working Papers .....	273
c. Chapters in Edited Volumes .....	282
d. Newspaper Articles and Blog Posts.....	286
<i>Other Material</i> .....	287
a. Reports by National, EU and International Institutions.....	287
b. Reports by Academics and Non-Governmental Organisations .....	288

## Introduction

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### **The Charter of Fundamental Rights and horizontal responsibilities**

On the 1<sup>st</sup> of December 2009, the Charter of Fundamental Rights<sup>1</sup> acquired constitutional status within the EU legal order, together with the entry into force of the Lisbon Treaty.<sup>2</sup> The Charter is a comprehensive rights list containing provisions such as the right to human dignity;<sup>3</sup> the rights to privacy and to the protection of private data;<sup>4</sup> the right not to be discriminated against;<sup>5</sup> the right to be informed and consulted in the workplace;<sup>6</sup> the right to vote and to stand as a candidate in European elections;<sup>7</sup> and the right to an effective remedy,<sup>8</sup> to mention but a few. Crucially, its Preamble makes clear that the ‘enjoyment of these rights entails *responsibilities and duties* with regard to other persons, to the human community, and to future generations.’<sup>9</sup> It thus appears to recognise that fundamental rights are not merely prerogatives that individuals hold against the Member States and the Union’s institutions. Their enjoyment is also bound up with duties towards others. In other words, the Charter is not characterised by a strictly *vertical* conception of fundamental rights that views, on the one hand, individuals as the holders of rights and, on the other hand, the EU via its institutions and the Member States as the bearers of the duty to protect them. It starts from the premise that fundamental rights are, at least in principle, capable of creating obligations between private parties *inter se*.

This thesis analyses the interplay between such a horizontal conception of rights, evident in the Charter’s Preamble, and the application of the Charter in

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<sup>1</sup> [2000] OJ C364/1. Hereinafter referred to as ‘Charter’ or ‘EUCFR.’

<sup>2</sup> Art 6(1) TEU; See also J Kokott and C Sobotta, ‘The Charter of Fundamental Rights of the European Union after Lisbon’ (2010) EUI Working Paper 2010/6, <[http://diana-n.iue.it:8080/bitstream/handle/1814/15208/AEL\\_WP\\_2010\\_06.pdf?sequence=3&isAllowed=y](http://diana-n.iue.it:8080/bitstream/handle/1814/15208/AEL_WP_2010_06.pdf?sequence=3&isAllowed=y)> accessed 21 April 2016.

<sup>3</sup> Article 1 EUCFR.

<sup>4</sup> Articles 7 and 8 EUCFR, respectively.

<sup>5</sup> Article 21 EUCFR.

<sup>6</sup> Article 27 EUCFR.

<sup>7</sup> Article 39 EUCFR.

<sup>8</sup> Article 47 EUCFR.

<sup>9</sup> Charter Preamble, recital 6.

private relations by the Court of Justice of the European Union.<sup>10</sup> It addresses the following main questions: firstly, is the horizontal effect of a fundamental rights list necessary or purposeful in the EU today? Secondly, is the EU horizontality doctrine heretofore presented in the case law compatible with the idea that fundamental rights, such as the ones contained in the Charter, create obligations that transcend the public/private divide? Finally, on what basis should determinations of the Charter's horizontality be made?

The first two chapters argue that the horizontal effect of fundamental rights plays an important constitutional role in societies in which the public/private divide has become less prominent and that horizontality is consonant, in principle, with the nature, content, and structure of the Charter.<sup>11</sup> Applying fundamental rights to private relations recognises that the modern public sphere can no longer merely be associated with the state but, rather, often merges into civil society and the associations we make with other private parties, such as an employer, a landlord, or an Internet search engine. These actors can have a crucial impact on our access to fundamental rights, such as pay, adequate housing or privacy. In turn, these relationships are central to the public order of the European Union, as a political project stemming from the completion of a single market.<sup>12</sup> The Charter itself covers them in detail, by including a range of employment rights,<sup>13</sup> together with provisions concerning, *inter alia*, social security,<sup>14</sup> healthcare,<sup>15</sup> and the protection of personal data.<sup>16</sup> It is, therefore, necessary to accommodate private relations, at least to some extent, within the EU fundamental rights regime.

The thesis takes a more critical stance in respect of the second question identified above, namely the way in which horizontality has featured in the Court's case law over the years.<sup>17</sup> It argues that the Court's reasoning to date has been marred by continuing formalism, which has left unaddressed a foundational

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<sup>10</sup> Hereinafter referred to as 'CJEU,' 'Court' or 'Court of Justice.'

<sup>11</sup> See further Chapters 1 and 2, respectively.

<sup>12</sup> See Treaty of Maastricht on European Union [1992] OJ C91/1.

<sup>13</sup> Most illustratively, see Article 23 EUCFR concerning equal pay for men and women as well as Articles 27-32 EUCFR.

<sup>14</sup> Article 33 EUCFR.

<sup>15</sup> Article 34 EUCFR.

<sup>16</sup> Article 8 EUCFR.

<sup>17</sup> See the critique of the Court's case law, advanced in Chapters 3-5.

discussion about the principles that determine horizontality at the level of supranational constitutional adjudication. The idea that the EU is a ‘new legal order of international law [...] the subjects of which comprise not only Member States but also their nationals,’<sup>18</sup> thus creating rights as well as obligations for individuals, was clear from the Court’s seminal ruling in *Van Gend en Loos*.<sup>19</sup> In its case law, the Court primarily justified the horizontal application of rights based on considerations regarding the effectiveness and uniformity of the EU legal order.<sup>20</sup> It then carried out a source-based assessment of the provisions of EU law in question so as to determine the parameters of horizontal effect (most notably distinguishing the horizontal effect of directives from other sources of EU law).<sup>21</sup> In this process, though, the Court did not engage in a discussion of the implications of the horizontality doctrine on the EU public order and its impact on fundamental rights. It merely discussed it as part of EU law more broadly.<sup>22</sup>

Indeed, the Court’s approach was neither confined to fundamental rights nor applied in a consistent manner in this field over the years. Some fundamental rights, such as non-discrimination, have been an integral part of the EU horizontality doctrine, starting with the Court’s ruling in *Defrenne*, which established gender equality in respect of pay.<sup>23</sup> In other cases, most famously *Viking* and *Laval*, the Court has hesitated to apply fundamental rights horizontally, especially insofar as social rights were concerned, such as collective action including the right to strike.<sup>24</sup> Thus, although horizontal effect has played an important role in the application of EU law from early on, it presents significant problems when examined through the lens of constitutional analysis of a Charter that includes a multitude of protections, which have been subject to different treatment by the Court of Justice to date.

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<sup>18</sup> Case 26/72, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1, 12.

<sup>19</sup> Ibid. See also Case 43/75, *Defrenne v Sabena* [1976] ECR 455.

<sup>20</sup> N Ferreira, ‘The Horizontal Effect of Fundamental Rights and Freedoms in European Union Law’ in G Brügge and others (eds), *Fundamental rights and private law in the European Union*, Vol 1 (CUP 2010) 33-34.

<sup>21</sup> Case 152/84, *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 723. This issue is discussed further in Chapter 3.

<sup>22</sup> See Case C-144/04 *Mangold v Helm* [2005] ECR I-9981.

<sup>23</sup> *Defrenne* (n 19) para 39.

<sup>24</sup> Case C-438/05, *The International Transport Workers' Federation & The Finnish Seamen's Union v Viking Line. ABP & Oü Viking Line Eesti* [2007] ECR I-10779 and Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-1767.

In recent years, a series of cases concerning different provisions of the Charter, from age discrimination in *Kücükdeveci*<sup>25</sup> to the right to paid annual leave in *Dominguez*<sup>26</sup> and from the right to information and consultation within the undertaking in *Association de Médiation Sociale*<sup>27</sup> to the right to the protection of private data in *Google*,<sup>28</sup> have revived the debate about horizontal effect in the European Union. In this line of cases, the Court has maintained contradictions regarding the status and value of different rights in EU law and their potential for horizontal effect. Furthermore, it has continued to avoid a constitutional analysis of the role and value of fundamental rights in the EU today (rather than their subjective value, specific to a particular right and a particular dispute). Crucially, despite the fact that the Charter now has the ‘same legal value as the Treaties,’<sup>29</sup> the Court has not distinguished its horizontal applicability from its approach towards the horizontal effect of EU law to date. Rather, it has merely granted or denied horizontal effect to certain provisions, without examining the overall constitutional import of the Charter, as a set of rights with a ‘fundamental’ character.<sup>30</sup>

The thesis criticises the Court’s case law on two main grounds: Firstly, it highlights that the horizontality doctrine has been inconsistently rendered in the fundamental rights context, thus resulting in legal uncertainty both for claimants and for national courts. Secondly, it argues that the case law has been characterised by an understanding of rights as individual interests,<sup>31</sup> which sits largely at odds with the collective dimensions inherent in a fundamental rights

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<sup>25</sup> Case C-555/07, *Kücükdeveci v Swedex GmbH* [2010] ECR I-365. Whereas the facts of this case pre-dated the entry into binding force of the Charter, the Court referred to the inclusion of the principle of non-discrimination in Article 21 EUCFR. See further Chapter 4.

<sup>26</sup> Case C-282/10, *Dominguez v Centre Informatique du Centre Ouest Atlantique and Préfet de la Région Centre*, EU:C:2012:33.

<sup>27</sup> Case C-176/12, *Association de Médiation Sociale v Union Locale des Syndicats CGT Hichem Laboubi Union Départementale CGT Des Bouches-du-Rhône Confédération Générale Du Travail (CGT)*, EU:C:2014:2.

<sup>28</sup> Case C-131/12, *Google Spain, SL, Google Inc v Agencia Espanola de Proteccion de Datos*, EU:C:2014:317.

<sup>29</sup> Article 6(1) TEU.

<sup>30</sup> See further Chapters 3-4.

<sup>31</sup> JHH Weiler, ‘The Individual as Subject and Object and the Dilemma of European Legitimacy’ (2014) 12:1 *ICON* 94, 103. See also J Habermas, ‘On the Internal Relation between the Rule of Law and Democracy’ in J Habermas (ed), *The Inclusion of the Other: Studies in Political Theory* (Polity Press 1999) 254, 260-261.

catalogue as a politically constitutive device.<sup>32</sup> As such, the adjudication of horizontal claims in the European Union structurally excludes a meaningful constitutional analysis of the fundamental rights obligations of private actors as issues of a public character.

In light of its significance in the EU constitutionalisation process, the Charter's application to disputes between private parties can only be meaningfully understood as a public law issue.<sup>33</sup> It concerns the overall operation of fundamental rights as organisational features of the EU public sphere, rather than simply giving rise to individual claims between private parties, determinable on a case-by-case basis.<sup>34</sup> Additionally, as the Charter places on an equal constitutional footing a range of rights that have heretofore been denied horizontal effect in the case law, and particularly social rights, it raises anew important questions about the coherence of the horizontality doctrine and the justifications supplied for its application (or lack thereof) by the Court of Justice. It follows that, whereas horizontality is not a new problem in the adjudication of EU law, it nonetheless requires reassessment on the basis of constitutional analysis, which is difficult to locate in the Court's existing toolbox. It is for this reason that the Charter in its binding dimension becomes the focus point for this project.<sup>35</sup>

Indeed, against this background, it becomes clear that the question of horizontality in respect of the Charter is caught between past and present. On the

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<sup>32</sup> See J Habermas, 'Remarks on legitimation through human rights' in J Habermas, *The Postnational Constellation* (M Pensky tr, Polity Press 2001) 117. G Souillac, 'From Global Norms to Local Change: Theoretical Perspectives on the Promotion of Human Rights in Societies in Transition' in SA Horowitz and A Schnabel (eds), *Human Rights and Societies in Transition: Causes, Consequences, Responses* (United Nations University Press 2004) 77, 93. See further Chapter 1.

<sup>33</sup> In this thesis, the terms 'public law' and 'constitutional law' are used interchangeably. While I am cognisant of the specificity of constitutional law compared to public law more broadly, the analysis carried out in this thesis concerns precisely the recognition that constitutional rights fall within the realm of EU public law, so that private-law-centric reasoning is inappropriate in their adjudication.

<sup>34</sup> Regarding the relationship between EU constitutional law and the public sphere, see MA Wilkinson, 'Political Constitutionalism and the European Union' (2013) 76:2 *MLR* 191, 209. See further Chapters 1 and 5.

<sup>35</sup> The focus on the Charter of Fundamental Rights does not negate the constitutional importance of other sources for the protection of fundamental rights in the European Union, and particularly the general principles of EU law. I hope that it will nonetheless become clear from my analysis that a constitutional lens in the application of horizontality would recognise the complementarity of these sources of rights protection, rather than privileging particular rights / principles as the case law has done so far (see further, to this effect, Chapter 4).

one hand, the Charter reaffirms rights that have existed within EU law for a long time, and some of which have already had horizontal dimensions therein (most clearly non-discrimination).<sup>36</sup> In this sense, it is necessary to relate the horizontal aspects of the Charter's provisions to the case law that preceded it. On the other hand though, it is equally clear that, to the extent that provisions such as rights in the workplace, and protections of private life and against discrimination have been enshrined in a particular constitutional framework under the Charter, the EU horizontality doctrine must now encompass the goals and nature of these rights in their new context more specifically.

The Charter's Preamble proclaims that 'the peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values.'<sup>37</sup> That is a remarkable statement. Unlike the Treaties themselves,<sup>38</sup> the Charter's Preamble places the 'peoples of Europe' in a position of authorship based on their common commitment to the 'indivisible, universal values of human dignity, freedom, equality and solidarity,' together with 'the principles of democracy and the rule of law.'<sup>39</sup> The Charter's Preamble speaks of an individual who is 'at the heart' of the Union's activities, by referring to Union citizenship and the creation of 'an area of freedom, security and justice.'<sup>40</sup> Thus, the Charter conceptualises the EU as a political community that goes beyond economic integration and which is based on foundational values, concretised through fundamental rights. It is a document addressed to EU citizens/members, as a *public* characterised by certain common ethical commitments but, most importantly, one that puts these commitments into effect by exercising the public function of authorship.<sup>41</sup>

In the Charter context, therefore, horizontality does not merely affect private actors in the Union individually, i.e. in the *Van Gend en Loos* sense of

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<sup>36</sup> Now enshrined in Article 21 EUCFR.

<sup>37</sup> Charter Preamble, recital 1.

<sup>38</sup> The Preambles to the TEU and TFEU refer to the commitment of the heads of state of the Member States of the European Union. The Constitutional Treaty had used the same formulation as the Charter.

<sup>39</sup> Charter Preamble, recital 2.

<sup>40</sup> Ibid.

<sup>41</sup> It is important, as Chapter 6 will discuss in more detail, to define 'membership' broadly, as the Charter envisages citizens and non-citizens in most of its provisions. Only Chapter V thereof, entitled 'Citizens' Rights' is addressed to EU citizens.

becoming potentially liable for breaches of the rights of others.<sup>42</sup> At the same time, it affects them collectively, as members of an EU polity in which this set of fundamental rights defines the conditions of reasonable interaction in the public sphere.<sup>43</sup> Horizontality is now a more wide-ranging, directional constitutional question, going beyond the issues previously considered in the case law. When and how the Charter is applied horizontally are matters that affect profoundly the types of legal relations covered by fundamental rights, who is their final constitutional arbiter and, ultimately, how several aspects of common life, including but not limited to matters of equality, employment conditions, free speech, and privacy, are legally institutionalised in the EU polity, beyond the protections that already exist within the Member States.

In turn, the latter chapters of the thesis argue, more constructively, that the horizontal effect of the Charter should be re-conceptualised as part of a coherent theory of EU fundamental rights adjudication.<sup>44</sup> Horizontality is meaningful from the perspective of supranational constitutional law only to the extent that it addresses questions that relate to the content and structure of fundamental rights and not just to the operation of the doctrines of direct effect and supremacy. Indeed, the main argument that this thesis advances is that a constitutional analysis of horizontality consists in developing an adequate understanding of the role of fundamental rights in the EU public sphere, as well as of the construction of EU public law more broadly. That system is developing in tandem with the protection of fundamental rights in national constitutional laws and regional and international human rights standards, rather than generating meaning independently, within the framework of EU law only.

Thus, as the following chapters will show, horizontality in the Charter context should rest on an interpretation, on the part of the Court of Justice, of the meaning of fundamental rights in the EU and the standard of protection that is required to deliver them effectively. By contrast, a supranational constitutional doctrine of horizontality does not necessarily require the stipulation of specific

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<sup>42</sup> *Van Gend en Loos* (n 18) 12.

<sup>43</sup> Constitutional rights are structural for the emergence of the public institutions: Habermas (n 32) 117; H Arendt, *On Revolution* (Penguin 1990) 145. See further Chapter 1.

<sup>44</sup> See Chapters 6 and 7.



means or remedies for meeting that standard (e.g. direct horizontality).<sup>45</sup> The main benefit that horizontality provides from a constitutional perspective lies in its potential of achieving inclusion and effectiveness for fundamental constitutional rights, and not in its ability to further the principles of primacy and uniformity of EU law. Horizontal effect is a basic tenet of a substantively equal enjoyment of fundamental rights in the EU public sphere – a public sphere historically shaped by public as well as private action. It is in this sense that it remains highly relevant in supranational constitutional discourse today.

### **Methodology and originality of the research**

The arguments put forward in the thesis are substantiated through a detailed examination of the horizontality case law of the CJEU before and after 2009, when the Charter acquired binding effect, as well as the drafting history (*travaux préparatoires*) of the Charter and the Constitutional Treaty.<sup>46</sup> The thesis uses a logic of ‘appropriateness to context,’ seeking to reconstruct the law in the light of the political and social issues that shaped it at the time of its creation as well as tracing its historical evolution.<sup>47</sup> The contextual methodology is especially useful in accounting for the specific features of the EU, for two main reasons: firstly, it acknowledges the Union’s complex legal makeup (one of 28 constituent regimes involving multiple layers of governance), in which a constitutional discussion of horizontal effect must be removed from statist constructions of constitutionalism.<sup>48</sup> Secondly, this method recognises another significant feature of the EU constitutional order, namely the crucial role that judicial decisions have played as a driving force of EU politics.<sup>49</sup>

The theoretical leanings of this research lie in constitutional theory. In addition to a discussion of the legal coherence of the case law, the critique of the existing horizontality doctrine rests upon the sociological reassessment of the

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<sup>45</sup> Ibid.

<sup>46</sup> The Lisbon Treaty was not preceded by a convention.

<sup>47</sup> JG March and JP Olsen, ‘The Logic of Appropriateness,’ in M Moran, M Rein and RE Goodin (eds) *The Oxford Handbook of Public Policy* (OUP 2006) 689-691.

<sup>48</sup> J Shaw and A Wiener, ‘The Paradox of the “European Polity”,’ Harvard Jean Monnet Working Paper 1/99 (2000), available at [www.jeanmonnetprogram.org/archive/papers/99/991001.rtf](http://www.jeanmonnetprogram.org/archive/papers/99/991001.rtf), accessed 4/12/2013, 2.

<sup>49</sup> See C Thornhill, ‘The Formation of a European Constitution: An Approach from Historical-political Sociology’ (2012) 8 *Int J L Context* 354.

structure of modern free market democracies, identified primarily by Jürgen Habermas in his seminal work on the transformation of the public sphere in modernity<sup>50</sup> and highlighted more recently in the work of Wolfgang Streeck.<sup>51</sup> The thesis relies on the findings made in this research both to substantiate the critique of the case law and to re-evaluate the justifications for horizontality. Insofar as it refers to ‘private power,’ the thesis associates this with the discussion of institutional power advanced by Morriss, which conceptualises it as applying to a number of institutions holding political power and not just governments.<sup>52</sup> Finally, the alternative model this thesis proposes – one based on political equality – relies on a conception of fundamental rights as preconditions for political organisation. It is primarily influenced by Jürgen Habermas’s revision of Arendt’s concept of rights and, more precisely, his argument that fundamental rights are essential in order for inequalities to be contained in the public sphere and the ideal state of communicative freedom to be achieved.<sup>53</sup>

A few remarks on the fit of this research within the existing EU literature are also necessary. Indeed, in this field, it is impossible to ignore the fact that the Court’s approach towards horizontality has already faced a long line of critique, particularly concerning the arbitrary nature of the distinctions made in the case law and the legal uncertainty that ensued therefrom.<sup>54</sup> As such, merely to suggest

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<sup>50</sup> J Habermas, *The Structural Transformation of the Public Sphere: Inquiry into a Category of Bourgeois Society* (Polity Press 1989).

<sup>51</sup> W Streeck, ‘Citizens as Customers: Considerations on the New Politics of Consumption’ (2012) 76 *New Left Rev* 27.

<sup>52</sup> P Morriss, *Power: A Philosophical Analysis* (2<sup>nd</sup> edn, Manchester University Press 2002). See also T Parsons, ‘On the Concept of Political Power’ (1963) 107:3 *Proc Amer Phil Soc* 232; J Habermas, *The Theory of Communicative Action, Vol 2 – Lifeworld and System: A Critique of Functional Reason* (T McCarthy tr, Beacon Press 1987); J Habermas, ‘Hannah Arendt’s Communicative Concept of Power’ in LP Hinchman and SK Hinchman (eds), *Hannah Arendt: Critical Essays* (State University of New York Press, 1994).

<sup>53</sup> In such a public sphere consociates would, through communication, reach agreement regarding the organisation of their common life: Habermas, *Communicative Action*, *ibid*; J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press 1996); See also H Arendt, *The Origins of Totalitarianism* (2<sup>nd</sup> edn, Harcourt 1958).

<sup>54</sup> Most illustratively, see PP Craig, ‘Directives, Direct Effect, Indirect Effect and the Construction of National Legislation’ (1997) 22 *ELR* 519, 520; T Tridimas, ‘Horizontal Direct Effect of Directives: a Missed Opportunity?’ (1994) 19 *ELR* 621, 635-636; D Kinley, ‘Direct Effect of Directives: Stuck on Vertical Hold’ (1995) 1 *EPL* 79; R Mastroianni, ‘On the Distinction Between Vertical and Horizontal Effects of Community Directives: What Role for the Principle of Equality?’ (1999) 5 *EPL* 417; T Tridimas, ‘Black White and Shades of Grey: Horizontality of Directives Revisited’ (2002) 21 *YEL* 327, 327; S Drake, ‘Twenty years after Von Colson: the impact of "indirect effect" on the protection of the individual's community rights’ (2005) 30 *ELR*

in this thesis that the existing EU horizontal effect model is unsatisfactory would be hardly surprising. The present analysis adds value to the horizontality debate for the following reasons.

First, the thesis contributes to the discussions that have started to resurface in this field in the Charter era, which remain limited.<sup>55</sup> Secondly, the theoretical backdrop of this research differs from the prevalent account of horizontal effect in European Union law, which consists in an understanding of horizontality as an *extension* of fundamental rights to private law matters – the relevant debates remaining within the sphere of private law.<sup>56</sup> By combining a reconstruction of European Union case law with perspectives from constitutional theory and discourse ethics, the thesis demonstrates the broader implications of horizontal effect within the EU context and steers the discussion towards a conceptually grounded analysis of the fundamental rights obligations of private parties under the Charter. It thus provides helpful insights for moving forward in this, relatively new, constitutional setting. Finally, the thesis presents a framework which, despite starting from the viewpoint of EU law, can nonetheless form part of a broader debate about the role that private parties – from powerful corporations to individual citizens – play in the application of fundamental rights beyond the state.<sup>57</sup>

The thesis thus brings together two heretofore distinct conversations: on the one hand, a discussion of horizontal effect as a functional doctrine with deep roots in the legal construction of the European Union and its commitment to the effective application of certain individual rights and freedoms and, on the other hand, a discussion of horizontality in the context of fundamental rights, as

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329; Editorial comments, ‘Horizontal Direct Effect – A Law of Diminishing Coherence?’ (2006) 43 *CML Rev* 1, 2.

<sup>55</sup> See Opinion of Advocate General Cruz Villalón, delivered on 18 July 2013, in Case C-176/12, *Association de médiation sociale v Union locale des syndicats CGT*, EU:C:2013:491; cf Opinion of Advocate General Trstenjak, delivered on 8 September 2011, in Case C-282/10, *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, EU:C:2011:559.

<sup>56</sup> See for example: Brüggemeier (n 20); D Leczykiewicz and S Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Hart 2013).

<sup>57</sup> See generally, M Kumm, ‘How Does European Union Law Fit into the World of Public Law’ in J Neyer and A Weiner (eds), *Political Theory of the European Union* (OUP 2010) 111. This thesis does not share Kumm’s point regarding a global, value-based constitutionalism, which he espouses in this article (see in particular pp 125-135), but instead conceptualises the EU as an example of a postnational project of political, republican cosmopolitanism (see Habermas, n 32).

commitments operating within a shared polity with individual as well as collective dimensions. Whereas analyses – and indeed critiques – of horizontal effect in the European Union abound in respect of the former discussion,<sup>58</sup> the latter has been insufficiently examined to date.

The seven chapters that follow demonstrate that the conceptual gap between these two visions of horizontality can nonetheless be bridged. The argument unfolds in the following manner.

### **Structure of the thesis**

**Chapter 1** discusses the idea of horizontality as a constitutional problem in more detail and lays down the key conceptual underpinnings of this research. In particular, it sets out the way in which the role of constitutional law is understood in this project and provides a background to the main debates regarding the horizontal effect of fundamental rights. It then draws some important distinctions between horizontality as a moral obligation and horizontality as a legal obligation to observe rights posited as ‘fundamental’ to a particular community. While there may be good moral arguments for horizontally protecting all rights derived from basic humanity, when it comes to rights with a politically validated fundamental status, horizontal effect needs to serve a constitutional, public law purpose. It is argued that this is the case only in disputes that raise organisational questions. The chapter then goes on to explain that there does not exist a single correct horizontality formula in constitutional adjudication. Horizontality has multiple manifestations, consisting in direct effect, indirect effect and state-mediated effect.<sup>59</sup> These forms of horizontality are complementary. The constitutional value of horizontality resides not in the application of any one of its manifestations but in its overall function of restoring effectiveness to fundamental rights by recognising the multitude of private relations in which they may be relevant.

**Chapter 2** brings the discussion about the constitutional dimension of horizontality within the Charter context. It delves into the Charter’s drafting and discusses its role in the EU fundamental rights regime more thoroughly. It argues that, in light of its drafting background and constitutional aspirations, the

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<sup>58</sup> See (n 54) above.

<sup>59</sup> R Alexy, *A Theory of Constitutional Rights* (tr Julian Rivers, OUP 2002) 355.

horizontal effect of the Charter must be analysed from the perspective of supranational constitutional law. The chapter then discusses the place of horizontality in the Charter's text and, particularly, in the provisions governing its scope of application and the distinction between rights and principles made therein.<sup>60</sup> It is argued that the Charter's text does not in itself provide enough guidance regarding the constitutional nature of horizontality, nor does it specify the provisions that may be amenable to a horizontal analysis. Thus, in order adequately to situate the horizontal effect of fundamental rights within the EU, it is necessary to nuance our examination of this concept based on the analyses provided over the years in the Court's case law.

**Chapter 3** discusses the Court's use of the horizontality doctrine before the entry into force of the Lisbon Treaty. Unlike most other legal orders, the EU can be seen as incorporating, in some form, all three dimensions of horizontality identified in Chapter 1 (direct, indirect, and state-mediated effect) – at least at first glance. However, upon closer examination of the case law, it quickly becomes clear that the horizontality doctrine in EU law entails substantial misunderstandings about the relevance of the different manifestations of horizontality in practice. The assessment of the case law shows that the EU horizontality doctrine has in fact been one-dimensional, focusing almost exclusively on horizontal direct effect or its absence. Furthermore, the rules developed in the case law, such as the lack of horizontal direct effect of directives, have been rendered in an inconsistent manner in the context of fundamental rights, without an assessment of their constitutional features. As such, there has been a mismatch between the theory of horizontality for fundamental rights and its application in EU law. Should fundamental rights enjoy protection horizontally (e.g. through indirect effect), even in the absence of direct effect? If so, what distinguishes these rights from other provisions of EU law? As this chapter highlights, the EU horizontality doctrine before the entry into force of the Charter provided largely conflicting answers to these questions.

**Chapter 4** goes on to consider the Court's application of horizontal effect to the provisions of the EU Charter. It discusses the Court's reasoning in more

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<sup>60</sup> Articles 51-52 EUCFR.

recent cases concerning the compatibility of national implementing measures with fundamental rights, such as *Dominguez*, *Association de Médiation Sociale*, and *Dansk Industri*.<sup>61</sup> These cases demonstrate that the Charter's entry into binding force does not signal any perceptible departure from previous case law, which focused on source-based distinctions. Furthermore, the Court has maintained the position that only *some* fundamental rights, such as non-discrimination on grounds of age, constitute general principles of EU law (which are capable of horizontal direct effect when given more 'specific expression' in secondary legislation), thus forgoing an assessment of horizontality based on the inclusion of fundamental rights in the Charter. At the same time, a second line of case law can be identified, concerning mostly the interpretation of EU measures themselves, which is exemplified by cases such as *Google* and *Test-Achats*.<sup>62</sup> In these cases, the Court has more actively relied on the Charter to justify horizontal fundamental rights outcomes, such as an obligation on search engines to protect privacy and private data and an obligation for insurance companies not to discriminate on grounds of gender, respectively. It has, nonetheless, altogether omitted references to the horizontality doctrine in doing so. The case law therefore continues to display both methodological and substantive problems, particularly in light of the Court's limited fundamental rights reasoning. This approach impedes the development of a coherent constitutional doctrine of horizontality in respect of the Charter.

**Chapter 5** draws the case law together and attributes the Court's deep-seated unease with discussing the horizontal effect of fundamental rights both before and after the entry into force of the Charter to a broader issue: its problematic depiction of the public/private divide. It is argued that the horizontality case law ties well into a tendency, on the part of the Court, to conceptualise the EU public sphere in an individualistic, private-law-centric way, even in the fundamental rights context.<sup>63</sup> Even though the case law has

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<sup>61</sup> *Dominguez* (n 26); *AMS* (n 27); Case C-441/14, *Dansk Industri (DI) v Estate of Karsten Eigil Rasmussen*, EU:C:2016:278.

<sup>62</sup> *Google* (n 28). Case C-236/09, *Association belge des Consommateurs Test-Achats ASBL v Conseil des ministres* [2011] ECR I-00773.

<sup>63</sup> See, most illustratively: Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-06351; Joined Cases C-584/10

occasionally produced outcomes that heightened the protection of particular rights, most clearly in the non-discrimination context through cases such as *Mangold* and *Kücükdeveci*,<sup>64</sup> it has not justified horizontality as a means of giving effect to EU public law commitments, which provide a ‘normative directive’ for society.<sup>65</sup> Rather, grounded in the methodology of integration through law, the existing EU horizontality doctrine privileges a case-by-case approach that is structurally problematic from the perspective of constitutional analysis. In turn, it comes as no surprise that rights that directly engage questions of collective deliberation or public concern but do so within private forums, such as the right to strike in *Viking* and *Laval*<sup>66</sup> or the right to be informed and consulted in the workplace in *Association de Médiation Sociale*,<sup>67</sup> have been the subject of systematic exclusion from horizontal effect. To the extent that the Charter envisages an EU public sphere broader than the market in which members (and not just market actors) assume the political role of authorship, a conceptualisation of horizontality based on the individual interest is no longer appropriate.

What needs to be done to restore constitutional meaning to the horizontal effect of the Charter? The remainder of the thesis examines this question. It argues that the horizontal effect of the Charter cannot be detached from the question of how (and by whom) fundamental rights should be interpreted in a supranational constitutional order. **Chapter 6** discusses the main parameters of a constitutionally sound horizontality doctrine at the EU level. It argues that the development of public law reasoning that speaks to the substance of the claims raised by the Charter is required. The assessment of horizontality by the Court of Justice needs to be made in light of the values that underpin the European Union and, particularly, the Charter’s goal of affirming the fundamental preconditions of membership thereof. The chapter then demonstrates that the concept of political equality would be an adequate justification for the horizontality doctrine in this field. The role of horizontality in giving effect to this goal is evident: by ensuring

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P, C-593/10 P and C-595/10 P, *European Commission and Others v Kadi*, EU:C:2013:518. See also Weiler (n 31).

<sup>64</sup> *Mangold* (n 22); *Kücükdeveci* (n 25).

<sup>65</sup> G Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP 2012) 26.

<sup>66</sup> (n 24).

<sup>67</sup> (n 27).

the application of fundamental rights in private relations that bear relevance to the public sphere, it affirms political status for groups and individuals whose fundamental rights *de facto* cannot be guaranteed by public institutions. Horizontality in this context is thus inherently related to membership of the EU through the recognition of a right for every person affected by EU law to participate in public life on the basis of equality. That membership can come with duties, as noted in the Charter's Preamble itself, 'to each other, to the human community and to future generations.'

At the same time, a constitutionally sound horizontality doctrine in the European Union also needs to take into account the specificities that a supranational jurisdiction displays. The final chapter of the thesis, **Chapter 7**, argues that horizontality at the EU level has a primarily coordinating, rather than harmonising, function. It argues that, from the perspective of supranational constitutional adjudication, the question that needs to be answered is one of interpretation: does the standard of protection of a fundamental right include any or all private relations? In other words, is a provision horizontally applicable? In turn, the means through which that standard is delivered rest, primarily, with domestic courts. The Charter can accommodate multiple renderings of horizontal effect within national law, to the extent that the relevant standard of protection is not compromised. It does not necessarily require that a specific instantiation of horizontality, such as direct effect, should be followed uniformly across the EU at the national level but, rather, that a standard of protection of fundamental rights that gives effect to them equally in all questions of public concern (including those taking place in private forums) should be employed.

By emphasising the public discourse enhancing properties of fundamental rights, especially at the postnational level,<sup>68</sup> the thesis ultimately aims to demonstrate that horizontal effect is not merely a tool in the enforcement of EU law by private parties. The horizontal effect of fundamental rights plays a vital role in making the person – a being situated within a family, a workplace and a broader community – and not just the individual right-holder operating within the single market, as its main point of focus. It thus serves a significant constitutional

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<sup>68</sup> Habermas, *Postnational Constellation* (n 32) 117.



reform of the post-Maastricht Treaty framework. With this in mind, we can turn the page to Chapter 1 and discuss the idea of horizontality more closely.

# 1 The Horizontal Effect of Fundamental Rights as a Constitutional Problem

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## 1.1 Introduction

As Monica Claes has rightly noted, European Union lawyers often take for granted the starting point that individual rights are, as a matter of principle, horizontal.<sup>1</sup> To question the notion of rights as entitlements against the state would not be a new endeavour in the context of EU law, within which horizontality is embedded in the application of many individual rights already, such as the right to equal pay.<sup>2</sup> However, it is not sufficient to state that individual rights create obligations between private parties *inter se* in order to conclude that these obligations stem from constitutional law or that they pertain to fundamental rights. This chapter discusses the concept of horizontality in more detail. It seeks to demonstrate that the horizontal effect of constitutionally protected fundamental rights, such as the ones contained in the EU Charter, has implications on public life that go beyond particular intersubjective disputes. In this field, therefore, horizontality requires careful assessment through the prism of supranational constitutional interpretation.

Section 1.2 introduces the main ideas that theoretically underpin the application of horizontality and defines some of the key terms that the thesis relies upon, such as ‘horizontal effect’ and ‘fundamental rights.’ It focuses on the value and meaning of horizontally applicable fundamental rights within constitutional law by discussing some of its distinctive features and politically definitional functions.<sup>3</sup> Section 1.3 builds on a conception of fundamental rights as enabling conditions for participation in public life and argues that, in this context, the role of horizontal effect is to ensure a more substantively equal public sphere than the state/individual paradigm alone can offer. Horizontality is inextricably linked to

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<sup>1</sup> M Claes, ‘The European Union, its Member States and its Citizens’ in D Leczykiewicz and S Weatherill (eds), *The Involvement of EU Law in Private Law Relationships* (Hart 2013) 30-31.

<sup>2</sup> See, most illustratively, Case 43/75, *Defrenne v Sabena* [1976] ECR 455.

<sup>3</sup> MW Dowdle and MA Wilkinson, ‘On the Limits of Constitutional Liberalism: In Search of a Constitutional Reflexivity’ (2015) NUS Law Working Paper 2015/009, <<http://ssrn.com/abstract=2686013>> accessed 10 May 2016, 6-7.

the displacement of the public/private divide in modernity. As public life is increasingly embedded within civil society, the actions of private parties (corporations, private associations and even individual citizens) can affect deeply the way in which it is organised.<sup>4</sup>

However, this does not mean that fundamental rights can always be relied upon against a private party or that they can acquire horizontality in one way only. A properly conceptualised theory of horizontality recognises both the limits of constitutional adjudication and the different forms in which horizontality can enter private disputes. Direct, indirect and state-mediated forms of horizontal effect can all be useful tools to integrate fundamental rights in private relations, depending on the circumstances and specificities of the constitutional order in question. Ultimately, though, as a constitutional mechanism, through each of its manifestations horizontality serves an overarching purpose of inclusion in the public sphere (Section 1.4).

## **1.2 Horizontal rights in a multi-layered global polity: some conceptual foundations**

Different people may have very different life-plans, such that they ‘probably cannot convince each other that this or that activity is more worthwhile to pursue.’<sup>5</sup> However, there are some things ‘which are necessary for *any* conception of the good life to succeed.’<sup>6</sup> For instance, we can probably agree, no matter how deep-seated our differences, that no human being can live and live well without things like adequate food and water, freedom from torture or slavery, access to an impartial courts system, and some opportunities of self-development.<sup>7</sup> If one were to say that, as a matter of basic morality, everyone should have these goods, the focus of that claim would be on the result (that all human beings should have them) rather than on the question of who is responsible for providing them.<sup>8</sup> Everyone capable of making these goods available to others may be considered to

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<sup>4</sup> See J Habermas, *The Structural Transformation of the Public Sphere: Inquiry into a Category of Bourgeois Society* (Polity Press 1989) 27.

<sup>5</sup> V Mantouvalou, ‘In Support of Legalisation’ in CA Gearty and V Mantouvalou, *Debating Social Rights* (Hart 2011) 85.

<sup>6</sup> Ibid (emphasis original). See also T Pogge, ‘The Health Impact Fund and its Justification by Appeal to Human Rights’ (2009) 40 *J Soc Phil* 542.

<sup>7</sup> Mantouvalou (n 5) 85.

<sup>8</sup> Pogge (n 6) 553.

be under a moral obligation to do so.<sup>9</sup> Many people indeed choose to provide for others by giving to charity or volunteering their help. When we talk about the *idea* of rights, therefore, there is no reason to question horizontality. If certain things attach to the human condition, then it is clear that they must do so in every aspect of human life and not merely in interactions with the state.

If, however, we were to go beyond the realm of morality and consider how the basic rights of all should be institutionalised in law – in other words, once failure to respect/protect the rights of others gives rise to sanctions – then the question of who the obligor of a right is acquires central significance. The intricacies of horizontal effect do not arise so much at the level of normative justification but, rather, once we start to consider how and against whom they should be legally safeguarded. While it may follow logically that human rights can give rise to claims of observance by states and private parties alike, this does not explain *how* such rights should be applied horizontally when legally protected in a national, regional, supranational, or cosmopolitan catalogue of rights. There is, simply, a moral claim that they should be observed.<sup>10</sup> The natural forum for a legal discussion of inherent rights owed to others is that of human rights law, as a legal code that institutionalises basic universal entitlements. However, in the multi-layered legal context of human rights protection, which comprises national, supranational and international standards, horizontality is much more contested.

Human rights have traditionally been understood as setting out boundaries for state power.<sup>11</sup> It is sometimes even argued, as Zegveld points out, that the main feature of such rights is that ‘people hold [them] against the state only.’<sup>12</sup> It is important not to underestimate the strength of this view. State-centric rights, *qua* guarantees against abuses of state power, have gone a long way in securing a good life for people pursuing different goals and life choices. The protection of rights such as the freedom of association, the freedom of conscience and religion and the right to equal treatment from state interference has allowed different

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<sup>9</sup> Ibid.

<sup>10</sup> See A Buchanan, *The Heart of Human Rights* (OUP 2014) 43 and Chapter 2, providing a convincing rebuttal of the ‘mirroring view,’ i.e. the view that legal rights need not necessarily correspond to antecedent moral rights as a ground of validity.

<sup>11</sup> See, for example, C Tomuschat, *Human Rights: Between Idealism And Realism* (OUP 2003) 84.

<sup>12</sup> L Zegveld, *Accountability of Armed Opposition Groups in International Law* (CUP 2002) 53.

groups of people to co-exist in modern societies under a basic framework that enjoys wide-ranging legitimacy. Furthermore, the guarantee of human rights against the state has, at least formally, facilitated participation in processes of political will formation without fear or prejudice, thus actively contributing to modern models of democracy.<sup>13</sup>

In turn, the central objection to horizontality in this field stems precisely from an intention to protect the sanctity of basic human rights. As Andrew Clapham usefully summarises it, there is a concern that ‘an application of human rights obligations to non-state actors trivialises, dilutes and distracts from the great concept of human rights [and that] such an application bestows inappropriate power and legitimacy on such actors.’<sup>14</sup> Various sub-issues can be read into this position. Firstly, an important objection is that horizontality could eventually reduce human rights to ordinary private law claims, thus removing their symbolic value and, consequently, their heightened normative force.<sup>15</sup> Furthermore, as current human rights frameworks have not been designed to apply horizontally, there is a concern about the extent to which a sound judicial methodology for applying them to private parties can be developed, other than the judges’ intuition.<sup>16</sup> There are, therefore, reasons pertaining to the status and legitimacy of human rights that warrant caution in assuming that it would be desirable for these rights to apply to private actors. Another important objection to horizontality stems from the structure of the archetypal liberal system of rights protection itself: its emphasis on liberty and individual autonomy resonates well with sanctioning state authority but sits at odds with over-regulating private conduct.<sup>17</sup>

What are, then, the main reasons for institutionalising horizontal protections of rights (as legal and not merely moral obligations)? Both the legitimacy and the autonomy critiques of horizontality stem from two main

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<sup>13</sup> H Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (2<sup>nd</sup> edn, Princeton University Press 1996) 83-84.

<sup>14</sup> A Clapham, *The Human Rights Obligations of Non-State Actors* (OUP 2006) 58.

<sup>15</sup> M Tushnet, ‘The Issue of State Action/Horizontal Effect in Comparative Constitutional Law’ (2003) 1:1 *ICON* 79, 93.

<sup>16</sup> A Barak, ‘Constitutional Human Rights and Private Law’ in D Friedmann and D Barak-Erez (eds), *Human Rights in Private Law* (Hart 2001) 17.

<sup>17</sup> A Brysk, *Human Rights and Private Wrongs: Constructing Global Civil Society* (Routledge 2005) 23. See also Clapham (n 14) 438.

assumptions: firstly, that the state alone can effectively guarantee human rights and, secondly, that the state poses the main threat to the protection of human rights. Both of these assumptions are highly problematic. Contemporary developments such as globalisation, the privatisation of public functions and legal fragmentation point towards an extension of at least some human rights obligations to private actors.<sup>18</sup> Indeed, not only are a range of private parties, such as large multinational corporations, paramilitary groups and religious institutions increasingly accumulating power equivalent to that of states.<sup>19</sup> Excessively focusing on state conduct also fails to recognise that the traditionally private domain may not be immune to human rights violations.<sup>20</sup>

For example, private employers can play an important role in the treatment of questions of equal pay between persons of a different ethnicity, age or gender; the balance between working hours and family life; or the right to strike. Furthermore, as Knox highlights, ‘violence against women, perhaps the most pervasive human rights violation in the world today, is committed by husbands and fathers far more often than by government agents.’<sup>21</sup> Questions of substantive equality, domestic violence and poverty can be particularly difficult to accommodate under frameworks of rights protection premised on the concept of state authority only.<sup>22</sup> Still, from the perspective of the victim of a human rights violation, such as the right not to be discriminated against on grounds of gender, a breach of that right can be equally dehumanising irrespective of whether it is committed by a public employer or a private employer. For these reasons, Andrew Clapham rightly points out:

We can legitimately reverse the presumption that human rights are inevitably a contract between individuals and the state; we can presume that human rights are entitlements enjoyed by everyone to be respected by everyone.<sup>23</sup>

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<sup>18</sup> Clapham (n 14) 3-19.

<sup>19</sup> JH Knox, ‘Horizontal Human Rights Law’ (2008) 102 *AJIL* 1, 19.

<sup>20</sup> Ibid; See also, particularly in relation to the effect of domestic forms of violations of the fundamental rights of women: Human Rights Watch, ‘The Human Rights Watch Global Report on Women’s Human Rights’ (1995), <<http://www.hrw.org.au/hrwglobalrept1.pdf>>, accessed 3 March 2013.

<sup>21</sup> Knox (n 19) 19.

<sup>22</sup> Brysk (n 17) 25.

<sup>23</sup> Clapham (n 14) 58.

Indeed, the question of *whether* certain rights might necessitate a degree of legal protection against private parties is reasonably easy to address. The fact that non-state actors are capable of violating the content of basic human rights renders vertical conceptions of these rights highly problematic. However, even if the idea that we may all owe certain legal duties and responsibilities towards others in a global society has become increasingly accepted, it would be simplistic not to consider the parameters of that responsibility in further detail. In particular, it is necessary to assess two additional questions: firstly, *which* rights necessitate protection against private parties, to the extent that there is no unitary definition of human rights nationally, supranationally and internationally? Secondly, *how* can these rights take effect in private relations governed by a particular legal framework? While one might acknowledge that certain rights require a degree of protection against everyone, does this necessarily mean that they should also be protected horizontally *qua* fundamental, constitutional-order rights? Do they need to be invoked in a specific way against other private parties, such as through direct action, or is it sufficient that the content of the right is otherwise protected within a legal system (e.g. through incorporation in private law)?

The content of human rights can be safeguarded in many different ways, and not necessarily through constitutional law.<sup>24</sup> It does not follow from the fact that human rights may not always ‘receive *special* legal protection in the private sphere that they receive *no* protection at all.’<sup>25</sup> Indeed, human beings can do terrible things to one another, which may not always be questions of human rights law. They may be regulated by criminal law or private law. Most clearly, human rights objectives provide reasons for the regulation of private relations within private law, and can be traced in tort, contract and property laws.<sup>26</sup> Thus, whereas a horizontal understanding of human rights may be conceptually more satisfactory than a purely state-centric conception thereof,<sup>27</sup> it does not necessarily also mean

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<sup>24</sup> D Oliver and J Fedtke, ‘Human Rights and the Private Sphere – The Scope of the Project’ in D Oliver and J Fedtke (eds), *Human Rights and the Private Sphere: A Comparative Study* (Routledge-Cavendish 2007) 5, emphasis original.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Debates on the horizontality of these rights are only presented here in outline, insofar as they are relevant to a constitutional assessment of horizontality. In the sense of a moral obligation to observe the rights of others, horizontality has been discussed *inter alia* in: Shue (n 13); Brysk (n

that these rights require horizontal protection at the constitutional level.<sup>28</sup> As such, a central question that needs to be answered before a determination of horizontality is made is whether a particular right needs to be applied to private parties at the constitutional level, in addition/alternatively to any protections that might already exist in legislation designed to apply to private relations.

Furthermore, to the extent that we are concerned with the horizontal application of a particular set of fundamental rights enshrined in constitutional law, as is the case with the EU Charter, our discussion requires further nuance. In order to understand horizontality as a constitutional problem, in line with the chapter's title, it is necessary to make further distinctions between human rights *norms* as moral imperatives, the international law framework for the protection of human rights,<sup>29</sup> and the protection of individual rights through national (or, in the EU case, supranational) rights lists with a politically validated 'fundamental' status. The Charter is a supranational set of rights not necessarily shared by the human community broadly and, therefore, does not give rise to legal obligations at each of the levels of global governance at which human rights are protected.

Of course, it must be noted that the legitimacy of constitutional rights lists that do not include human rights could be strongly challenged.<sup>30</sup> As Jürgen Habermas has put it, 'human rights themselves are what satisfies the requirement that a civic practice of the public use of communicative freedom be legally institutionalised.'<sup>31</sup> A positive law paradigm that has rid itself of human rights will be inherently problematic: in a free and substantively equal public sphere,

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17); T Pogge, 'Are We Violating the Human Rights of the World's Poor?' (2011) 14:2 *Yale HR Dev L J* 1. Excellent legal analyses of horizontality in the human rights context include, P Alston, *Non-State Actors and Human Rights* (OUP 2005); Clapham (n 14).

<sup>28</sup> See Oliver and Fedtke (n 24) 5.

<sup>29</sup> This thesis only tangentially touches upon the emergence of horizontality in international human rights law. However, insofar as adjudicative coherence is essential for a meaningful doctrine of horizontality to operate within the EU, it is important to highlight that the international legal order has taken cognisance of the necessity of horizontality. See, most notably, Brysk (n 17) 125; J Ruggie, 'Protect, Respect and Remedy: A Framework for Business And Human Rights' (2008) 3 *Innov Technol Gov Glob* 189; United Nations Commission on Human Rights, Promotion and Protection of Human Rights: Human Rights and Human Responsibilities (2003) Annex I, UN Doc E/CN.4/2003/105; United Nations Sub-Commission on the Promotion and Protection of Human Rights, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2.

<sup>30</sup> J Habermas, 'On the Internal Relation between the Rule of Law and Democracy' in J Habermas, *The Inclusion of the Other: Studies in Political Theory* (Polity Press 1999) 259.

<sup>31</sup> J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press 1996) 89.



human rights and positive law are mutually presupposed.<sup>32</sup> Furthermore, drawing a sharp distinction between the horizontal application of human rights and the horizontal application of fundamental constitutional rights would overlook the fact that these rights often concern the same protections. It is therefore important to clarify that separating the questions of horizontality for human rights and fundamental constitutional rights is not intended to relativise the importance of the former *within* constitutional law.<sup>33</sup> Rather, it simply indicates that the inclusion of human rights standards in a particular constitutional framework *also* ascribes to these rights direct organisational functions for the political community that has put them in place.<sup>34</sup> Fundamental rights to equality, freedom of speech, or privacy, do not only protect basic human needs. They are at the same time pre-conditions for the existence of a diverse and inclusive public sphere.<sup>35</sup> They have a double function therein: to guarantee the ability of public discourse for all and to ensure that private interests do not coerce such discourse.<sup>36</sup>

Even though there are substantive overlaps between different systems of rights protection, it is only in the narrower sense of how fundamental rights take effect within private relations that the question of horizontality is relevant in constitutional adjudication in the European Union, on which this thesis is focused. Are there, then, good reasons for horizontally applying a list of rights of this kind within a bounded constitutional community?

### **1.3 The constitutional operation of horizontality**

Whereas the preceding discussion has shown that horizontal effect is relevant both in moral and in legal discourse, it has not considered in what way horizontality has to operate within a national or postnational constitutional framework, more specifically. As such, it is necessary to examine, before assessing the parameters of horizontal effect, when the determination of whether a right should apply to private parties falls within the realm of constitutional interpretation. In other

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<sup>32</sup> Habermas, *Internal Relation* (n 30) 258-62.

<sup>33</sup> See Habermas, *Between Facts and Norms* (n 31) 118, 456ff.

<sup>34</sup> Of course, this is true only to the extent that this political community can be considered as 'authored' by its members: *ibid*, 143.

<sup>35</sup> *Ibid*, 321.

<sup>36</sup> *Ibid*; EA Christodoulidis, *Law and Reflexive Politics* (Springer 2001) 28.

words, when is a constitutional claim necessary besides the inherently ‘horizontal’ application of, for instance, a private contract?

The constitutional operation of horizontality is directly linked to the following question, as posed by Bruce Ackerman: ‘What does the Constitution constitute?’<sup>37</sup> Constitutional law aims at the preservation of institutions that safeguard the conditions of common life that a given society commits to and is indeed premised on.<sup>38</sup> In a democratic polity, the constitution involves the idea of authorship on the part of its members.<sup>39</sup> At the same time, the constitution also defines the authors in the sense that it envisions their collective ‘politicalness’ in a unique manner.<sup>40</sup> It depicts a particular way of organising the public sphere and ascribes a particular role to different actors. Thus, whereas most constitutional thought will entail some universalist aspirations, to the extent that it is intended to organise common life by making arrangements that are considered the best possible,<sup>41</sup> every constitutional arrangement will be inherently specific. As Dowdle and Wilkinson rightly note:

Constitutional discourse always has to acknowledge its rootedness in a particular polity, to acknowledge some spatial boundary and limit. [...] [T]he constitution is always constructed in a specific social setting with a specific political morality and contributes towards the building of a particular state or polity.<sup>42</sup>

In turn, fundamental rights defined in constitutional law<sup>43</sup> are important claims about how a certain community can be legitimately run.<sup>44</sup> In addition to any

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<sup>37</sup> B Ackerman, ‘The Storrs Lectures: Discovering the Constitution’ (1984) 93 *Yale LJ* 1013, 1040.

<sup>38</sup> G Teubner, *Constitutional fragments: Societal Constitutionalism and Globalization* (OUP 2012) 142-3. See also J Raz, ‘On the Authority and Interpretation of Constitutions: Some Preliminaries’ in L Alexander, *Constitutionalism: Philosophical Foundations* (CUP 1998) 152-154.

<sup>39</sup> Habermas, *Between Facts and Norms* (n 31) 143. See also UK Preuss, ‘Constitutional Power-Making for the New Polity: Some Deliberations on the Relations between the Constituent Power and the Constitution’ (1992-1993) 14 *Cardozo L Rev* 639; H Arendt, *On Revolution* (Penguin 1990) 145. ‘Members’ are defined as a ‘public’ and not as a demos characterised by ethnic or ethical commonality.

<sup>40</sup> SS Wolin, ‘Collective Identity and the Constitutional State’ in SS Wolin, *The Presence of the Past: Essays on the State and the Constitution* (Johns Hopkins University Press 1989) 9; Dowdle and Wilkinson (n 3) 6-7. See, more generally: M Loughlin and N Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2007).

<sup>41</sup> Dowdle and Wilkinson (n 3) 20.

<sup>42</sup> Ibid, 20-21; See also N Walker, ‘The Place of European Law’ in G De Búrca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (OUP 2012) 65.

<sup>43</sup> I use the terms public law and constitutional law interchangeably to denote the law applicable to the process of governing: M Loughlin, *The Idea of Public Law* (OUP 2003) 5-7.

questions about what protections a dignified, minimally worthwhile human life entails, fundamental rights concern the conditions of membership of a community defined by a given institutional framework. Such a framework may, of course, have implications for basic humanity. However, a breach of a fundamental constitutional right does not only concern the individuals affected by that breach but also the way in which a political community collectively chooses to organise itself.<sup>45</sup>

As Geneviève Souillac usefully points out, fundamental rights lists can assume an ‘architectural role,’<sup>46</sup> especially where constitutional transitions are taking place, such as in the EU today. They have a constructional function for an emerging public sphere because they institutionalise conditions for ‘appropriate forms of governance’ to be developed and provide ‘structural legitimacy’ to newly founded institutions.<sup>47</sup> In turn, as Michael Wilkinson rightly notes, the public sphere ‘is constituted by the practice and discourse of political right, which, put simply, consists in competing claims, more or less plausible, of collective self-government.’<sup>48</sup> Fundamental rights adjudication aims precisely at the safeguard of the process of self-government/collective authorship.<sup>49</sup> It follows that the fundamental rights proclaimed within a political community have an inherently public dimension. They are not only about the recognition of a person as a human being but also about the recognition of their political status within a defined institutional framework.<sup>50</sup>

What are, then, the reasons for ascribing horizontality to a fundamental constitutional right? One of the main drawbacks of theories based on the notion of political right is the statist construction of the public sphere that they often

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<sup>44</sup> Loughlin, *ibid.* See also M Loughlin, *The Foundations of Public Law* (OUP 2010) 108.

<sup>45</sup> PW Kahn, ‘Community in Contemporary Constitutional Theory’ (1989) 99:1 *Yale LJ* 1, 20-28; See also Ackerman (n 37) 1040-1043. More generally, see Habermas, *Between Facts and Norms* (n 31).

<sup>46</sup> G Souillac, ‘From Global Norms to Local Change: Theoretical Perspectives on the Promotion of Human Rights in Societies in Transition’ in SA Horowitz and A Schnabel (eds), *Human Rights and Societies in Transition: Causes, Consequences, Responses* (United Nations University Press 2004) 79.

<sup>47</sup> *Ibid* 81, 93.

<sup>48</sup> MA Wilkinson, ‘Political Constitutionalism and the European Union’ (2013) 76:2 *MLR* 191, 209. See also Loughlin (n 43) 108ff.

<sup>49</sup> Habermas (n 31) 321. See also Christodoulidis (n 36) 28-29.

<sup>50</sup> H Arendt, *The Origins of Totalitarianism* (2<sup>nd</sup> edn, Harcourt 1958) 299-301; Habermas (n 31) 89.

present.<sup>51</sup> Equal political status becomes rather meaningless if it cannot be claimed against all actors capable of denying it, as well as against the state.<sup>52</sup> As Teubner puts it:

The model of fundamental rights oriented towards protection against the state works only so long as the state can be identified with society, or at least the state can be regarded as society's organisational form, and politics as its hierarchical co-ordination.<sup>53</sup>

If the state is no longer capable or effective in organising common life within a constitutional polity as a matter of fact, it is necessary to address the fundamental rights that safeguard the basic conditions of common life to a broader set of institutional relations than the individual/state paradigm can offer.

The role of horizontal effect is indeed becoming all the more evident in constitutional adjudication. The effects of privatisation on public power in modernity, discussed above, are as relevant in justifying the protection of fundamental rights against private actors as they are in rethinking human rights obligations altogether.<sup>54</sup> To emphasise the distinction between public and private in a purist sense would be inappropriate in all contexts where private power colonises public functions. Most clearly, an understanding of fundamental rights as limits on state power would not provide sufficient protection for the members of highly marketised societies, characterised by a decline in public power.<sup>55</sup> This is a crucial concern. Today, a number of actors enjoy political power.<sup>56</sup> Especially in the context of European welfare states, the private provision of services is increasingly replacing formerly key state provisions in fields such as healthcare and law enforcement, previously often offered through state monopolies.<sup>57</sup> Thus, the social privileges or disadvantages once attached to defined groups (such as a

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<sup>51</sup> See, for example, Loughlin (n 43).

<sup>52</sup> C Christodoulidis and A Schaap, 'Arendt's Constitutional Question' in M Goldoni and C McCorkindale (eds), *Hannah Arendt and the Law* (Hart 2012) 113.

<sup>53</sup> G Teubner, 'Transnational Fundamental Rights: Horizontal Effect?' (2011) 40:3 *Rechtsphilosophie & Rechtstheorie* 191, 207.

<sup>54</sup> See Clapham (n 14) 3-19.

<sup>55</sup> See W Streeck, 'Citizens as Customers: Considerations on the New Politics of Consumption' (2012) 76 *New Left Rev* 27, 42ff.

<sup>56</sup> As Parsons puts it, political power exists 'not only in political systems, narrowly construed, but in the structure and processes of societies generally': T Parsons, 'On the Concept of Political Power' (1963) 107:3 *Proc Amer Phil Soc* 232, 257. For example, it is present in the employment context: *ibid*, 241.

<sup>57</sup> Streeck (n 55) 46.

gender or social class) are increasingly being replaced by questions of *de facto* access to certain goods and institutions (such as food or a home, work or schooling), which are not always – or may no longer be – guaranteed by public institutions.<sup>58</sup>

In such cases, conceptualised merely as rights against the state, fundamental rights can create exclusions that crystallise existing power relations, rather than enabling the development of a participatory framework within which different groups and individuals can be heard.<sup>59</sup> This issue is heightened by the fact that fundamental rights lists do not always protect social and economic rights as extensively as civil and political rights. Even in cases where protections are in place (as is indeed the case through the EU Charter), courts have not always been as keen to enforce them against private parties, despite their crucial role in enabling equality of access to ‘first generation’ rights.<sup>60</sup>

More broadly, fundamental rights against the state may not always represent those who have had, for lack of social power, little input in the determination of what kind of rights would be granted a fundamental status.<sup>61</sup> Fundamental rights frameworks premised on negative liberty can sometimes be seen to protect vested interests (e.g. private property) without at the same time providing for the inclusion, through redistribution, of groups of right-holders that do not have *de facto* access to these rights (e.g. the homeless).<sup>62</sup> Focusing on state guarantees risks excluding those who have little access to public institutions, such as those who are mainly homebound (e.g. the elderly), and people in conditions of displacement or whose legal status within a state is unclear, such as irregular migrants. For these reasons, rather than recognising the political equality of

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<sup>58</sup> See A Sen, ‘Social Exclusion: Concept, Application and Scrutiny’ (2000) Asian Development Bank, Social Development Papers 1, 9ff. Teubner, Constitutional Fragments (n 38) 136-7.

<sup>59</sup> See Habermas, Internal Relation (n 30) 263.

<sup>60</sup> See K Vasak, ‘Human Rights: A Thirty Year Struggle: The Sustained Effort to Give Force of Law to the Universal Declaration of Human Rights’ (1977) 30:11 *Unesco Courier* 29. As will be further discussed in Chapter 4, despite the incorporation of a series of social rights in Chapter IV EUCFR, entitled ‘Solidarity,’ the Court’s case law has systematically excluded certain forms of horizontal effect for social and employment rights, as it has not recognised them as ‘general principles of EU law’ in the same way as other Charter provisions.

<sup>61</sup> CA MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press 1989) 163. Cf Jürgen Habermas’s convincing rebuttal of MacKinnon’s argument, to the extent that it aims at altogether rejecting, rather than reconstituting the modern fundamental rights paradigm: Habermas, Internal Relation (n 30) 260ff.

<sup>62</sup> MacKinnon, *ibid*, 163. Cf Habermas, Internal Relation (n 30) 260-261.

consociates within a democratic framework, an overly statist conception of rights can stall discourse in modern public spheres afflicted by social inequalities and the colonisation of public life by private interests.<sup>63</sup>

It is necessary, therefore, to reconceptualise political power based on its effects on the public sphere, rather than based on the status of its holder as public or private.<sup>64</sup> In turn, the horizontal effect of fundamental rights is simply a necessary implication of two important societal developments: firstly, that public interaction does not take place in purely public space only; and secondly, that the very construction of political communities as markets unduly privileges market actors in the sphere of political participation.<sup>65</sup> Thus, not only the state-individual relationship but also various forms of the ‘private authority relationship’ can amount to public power that needs to be accounted for when it comes to breaches of fundamental rights.<sup>66</sup>

The horizontal effect of fundamental rights has wide-ranging implications that require careful assessment in light of the goals of constitutional adjudication. Before horizontal effect can be considered, it must be shown that a dispute between private actors engages questions that fall within the domain of constitutional law.<sup>67</sup> It is the non-individualistic aspect of the breach of a fundamental right, i.e. the fact that such a breach raises issues of a public order that go beyond a legal dispute between private parties that renders it relevant from the perspective of constitutional law. Deciding that a particular private action violates fundamental rights *qua* constitutional rights imbues that private action with a public character.<sup>68</sup> Applying a fundamental right horizontally indicates that an important tenet of common life, effectuated through this right among others, will suffer or break down if it is not protected against some or all private parties, as well as against the state. When a private party invokes a fundamental right against another private party, their claim goes beyond any non-constitutional-

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<sup>63</sup> J Habermas, *The Theory of Communicative Action, Vol 2 – Lifeworld and System: A Critique of Functional Reason* (T McCarthy tr, Beacon Press 1992) 355ff. See also H Arendt, *The Human Condition* (2<sup>nd</sup> edn, University of Chicago Press 1998) 46-50.

<sup>64</sup> See PP Craig, ‘Theory, “pure theory” and values in public law’ (2005) *PL* 440, 445-7.

<sup>65</sup> See Streeck (n 55).

<sup>66</sup> Brysk (n 17) 24.

<sup>67</sup> R Alexy, *A Theory of Constitutional Rights* (tr Julian Rivers, OUP 2002) 364-5.

<sup>68</sup> See *Du Plessis v De Klerk and another* (CCT8/95) [1996] ZACC 10, per Sachs J, para 186.

order law that otherwise applies to their case. It requires a determination a) of whether an organisational rule of society has been breached and b) of what the best means of giving effect to that right in a private dispute would be. Thus, as Albie Sachs has put it, the horizontal application of the rights protected in constitutional law is not just ‘about our commitment to the *values* expressed by the Constitution, but about which *institutions* the Constitution envisages as being primarily responsible for giving effect to those values.’<sup>69</sup>

Indeed, the institutionalisation of rights against private actors raises concerns about legitimacy and legal certainty in the existing constitutional arrangement.<sup>70</sup> These can be ensured, to some extent, based on rational discussion of the content of the right in question. Some fundamental rights are particularly well attuned to horizontality. For example, where social rights are protected constitutionally, such as under the African Charter of Rights, or indeed the EU Charter itself, as Chapter 2 will discuss in further detail, it logically follows from the text of these provisions that they engage horizontal responsibilities (perhaps most clearly in the context of employer/employee relations).<sup>71</sup> At the same time, though, it is essential to bear in mind that every horizontal application of fundamental rights differs from the application of non-constitutional law, in the sense that it includes new pairings within the institutional relations to which a publicly agreed framework applies, such as employee/employer,<sup>72</sup> data subject/data controller,<sup>73</sup> or trade union/private company.<sup>74</sup> The position of the party committing the violation of a fundamental right can make a difference in terms of whether a fundamental right is judicially applied horizontally and in what

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<sup>69</sup> Ibid, para 190, emphasis added.

<sup>70</sup> Both guarantees, legal certainty and legitimacy, must be guaranteed for a procedurally adequate conception of law to operate: Habermas, *Between Facts and Norms* (n 31) 198.

<sup>71</sup> See Opinion of Advocate General Cruz Villalón, delivered on 18 July 2013, in Case C-176/12, *Association de médiation sociale v Union locale des syndicats CGT*, EU:C:2013:491, paras 38-40. See, for some examples, Articles 27-28, 30-33 EUCFR.

<sup>72</sup> See, for example: *Defrenne* (n 2).

<sup>73</sup> See, for example: Case C-131/12, *Google Spain, SL, Google Inc v Agencia Espanola de Proteccion de Datos*, EU:C:2014:317.

<sup>74</sup> See, for example, Case C-438/05, *The International Transport Workers' Federation and The Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779 and Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-1767.

manner.<sup>75</sup> While an individual, a corporation, or a state-like entity may cause grave harm to others so that they violate the content of a particular fundamental right (e.g. the right to life), an assessment of whether they are capable of violating its constitutional form is also required.

For example, it is not sufficient to prove that a private party has distributed false information about someone's personal conduct to reach the finding that they have violated their right to private life (including the right to reputation) as opposed to the tort of defamation. Similarly, if I have killed someone, I will normally not be held to account for a violation of their right to life as opposed to the crime of murder. While non-constitutional law including criminal law or the law of torts enshrines, in an abstract sense, a degree of horizontality insofar as it embeds constitutional principles into private relations, the notion of horizontality relates more precisely to the use of constitutional rules in private relations themselves. As such, the question of horizontality is not so much about the constitutionalisation of private law or indeed of other forms of non-constitutional law, as it is about the recognition of private relations that bear *public* significance.<sup>76</sup> At the same time, there can be differences in the way in which horizontal effect is applied to various disputes. In the following section, we turn to the different ways in which horizontal effect can be applied at the constitutional level, before bringing this discussion within the EU legal context and the Charter of Fundamental Rights, more specifically.

#### 1.4 Three types of horizontality

So far, this thesis has referred to horizontal effect in broad terms to denote the application of fundamental rights to legal relations between private parties. However, it would be misleading to suggest that fundamental rights can produce horizontality in one way only. In fact, the question of what kind of horizontal effect should be applied lies at the core of the debates in this field.

There are several ways of interpreting horizontality, just as there are many different types of private interaction and techniques through which relief for

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<sup>75</sup> In other words, the power they hold must not be merely personal, but having a substantively institutional character: P Morriss, *Power: A Philosophical Analysis* (2<sup>nd</sup> edn, Manchester University Press 2002) 107-115.

<sup>76</sup> See Parsons (n 56) 241-246. See Chapter 6 for further examples to this effect.



violations of fundamental rights can be granted. Three main types of horizontality can be identified: firstly, the imposition of direct obligations on private parties ('direct effect'); secondly, the indirect application of fundamental rights by the courts in disputes between private parties ('indirect effect'); and thirdly, the alteration of private relations by a right imposed on the state ('state-mediated effect').<sup>77</sup> Direct horizontal effect is the most wide-ranging of these forms of horizontality, as well as the most contentious, as it offers the possibility of invoking a fundamental constitutional right as such against another private party. In turn, the obligor's duties flow immediately from the absolute nature of the constitutional right.<sup>78</sup> Indirect effect enters horizontal disputes through the development of legal principles by the courts to ensure that the law is interpreted in the manner that is most favourable to fundamental rights.<sup>79</sup> State-mediated effect concerns cases where the right is invoked against the state, including the courts, but has an effect on a private relationship. The state is conceptualised as taking part in all private proceedings and is under an obligation to give effect to fundamental rights therein.<sup>80</sup> Another form of state-mediated effect is the creation of positive obligations to observe fundamental rights on the part of the state.<sup>81</sup> Further subcategories can be discussed, such as strong and weak forms of indirect

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<sup>77</sup> Alexy, *Constitutional Rights* (n 67) 355-6.

<sup>78</sup> See HC Nipperdey, 'Grundrechte und Privatrecht' in HC Nipperdey (ed), *Festschrift für Erich Molitor zum 75. Geburtstag* (CH Beck 1962) 17, 24. The reasoning of the CJEU in the *Defrenne* case (n 2), which discussed the mandatory nature of Treaty rules is a good example of how such a rule operates. See further Chapter 3.

<sup>79</sup> See Alexy, *Constitutional Rights* (n 67) 355. An example of this approach can be found in the jurisprudence of the German Federal Constitutional Court and, more specifically, *Lüth* – BVerfGE 7, 198 (Az: 1 BvR 400/51) 205 which speaks of constitutional rights as an 'objective order' ('eine objektive Wertordnung') of values that radiate into private law.

<sup>80</sup> See J Schwabe, *Die Sogenannte Drittwirkung der Grundrechte: zur Einwirkung der Grundrechte auf den Privatrechtsverkehr* (Goldmann 1971) 16. The state-mediated version of horizontality has been followed by the US Supreme Court: *Shelley v Kraemer*, 334 US 1 (1948), para 17. Horizontality in the US context is arguably developing away from strict conceptions of state-mediated effect: S Gardbaum, 'The 'Horizontal Effect' of Constitutional Rights' (2003) UCLA School of Law Research Paper 03-14, <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=437440](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=437440)> accessed 25 July 2016, 40.

<sup>81</sup> Schwabe's view, *ibid*, is restricted to a negative conception of rights, whereby the breach is attributable to the state (or a court) which has failed to uphold the fundamental right. However, as Alexy rightly points out (n 67) 360-361, the state's obligation also extends to a right to be actively protected from breaches of constitutional rights by other private parties. See, in this regard: *Blinkfuer* – BVerfGE 25, 256 (Az: 1 BvR 619/63).

horizontality.<sup>82</sup> These are not, however, essential to our discussion so that the three-stage model of direct, indirect and state-mediated horizontality will be used as a basis thereof.<sup>83</sup>

To illustrate more concretely these different dimensions of horizontal effect, it is worth considering the following scenario. Imagine that the top results returned by a Google search of a name, such as ‘Mario Costeja González,’ do not lead to that individual’s law practice (he is, in fact, a lawyer in northern Spain), or indeed to his personal achievements or choices. Rather, the search leads to two auction notices for the recovery of now settled social security debts from the 1990s. Let us leave to one side the question of whether the collection and publication of private data should, as a matter of principle, come within the notion of the fundamental right to private life. Let us assume that displaying personal information without the subject’s consent is an action that meets the level of severity required to amount to a breach of fundamental rights.<sup>84</sup> Let us also assume that Mr Costeja González has a valid claim to invoke his fundamental right to private life and the protection of his private data under Spanish constitutional law<sup>85</sup> or the EU Charter,<sup>86</sup> without delving at this stage into jurisdictional questions about which legal order is responsible for ensuring respect for fundamental rights.<sup>87</sup> How might, then, Mr Costeja González’s fundamental rights be protected in this situation?

As a matter of principle, the following claims might be available: Firstly, one might directly invoke fundamental rights against the search engine, thus

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<sup>82</sup> Although these are not necessary for the purposes of this discussion, they are masterfully explained in S Besson, ‘Comment Humaniser le Droit Privé Sans Commodifier les Droits de L’homme’ in F Werro, *La Convention Européenne des Droits de L’homme et le Droit Privé* (Stämpfli 2006) 14ff. In the EU context, a discussion regarding the ‘substitution effect’ or ‘exclusionary effect’ of directives was developed in the Opinion of Advocate General Saggio, delivered on 16 December 1999, in Joined Cases C-240/98 to C-244/98, *Océano Grupo Editorial SA and Salvat Editores v Murciano Quintero and Others* [2000] ECRI-4941, para 38. See further Chapters 3 and 4.

<sup>83</sup> See Alexy, *Constitutional Rights* (n 67) 358.

<sup>84</sup> There is a danger of rights inflation if we accept that any kind of claim can be considered a fundamental rights claim but this discussion is beyond the scope of this project. See, in this regard: JW Nickel, *Making Sense Of Human Rights* (2nd edn, Blackwell Publishing 2007) 96. See also M Cranston, ‘Human Rights, Real and Supposed’ in D Raphael (ed), *Political Theory and the Rights of Man* (Macmillan 1967) 36. See further G Letsas, *A Theory Of Interpretation Of The European Convention On Human Rights* (OUP 2009) 129.

<sup>85</sup> Article 18.4, Spanish Constitution.

<sup>86</sup> Articles 7 and 8 EUCFR.

<sup>87</sup> This question is discussed in further detail in Chapter 7.

requiring it to observe the right to privacy by putting in place adequate safeguards and/or providing compensation if it fails to do so (*direct effect*). A second avenue would be to argue that any private law statutes applicable in this case (e.g. defamation) should be interpreted in the manner that best serves fundamental rights (*indirect effect*). For instance, Mr Costeja González could argue that a directive or statute regarding data protection should be construed in a manner that accommodates the right to privacy by safeguarding against the disclosure of all or some types of private data without the data subject's consent, even against private actors. Thirdly, it may be possible to invoke the right against institutions of the state (*state-mediated effect* and *positive obligations*, respectively). In the first case, it may be argued that the court, as a state authority, is bound by fundamental rights and therefore prevented from applying any rules that put them in peril. Alternatively, Mr Costeja González could sue the state for failing to ensure that the right to privacy is respected within private relations in its jurisdiction.<sup>88</sup>

Thus, there are a variety of avenues for granting horizontal effect to a fundamental right in a particular factual scenario. Which one is chosen depends on a range of questions, already touched upon in Section 1.3 above. They include, *inter alia*, an assessment of the autonomy and legitimate expectations of private parties not to have obligations imposed on them that could not have been foreseen, the degree of power that the private party in question holds and whether there is an imbalance in the bargaining positions of the parties, the extent and impact of the breach on the enjoyment of the fundamental right, and the broader institutional structures for the attribution of private responsibility that a particular legal system has in place. It follows that it is not necessary to view vertical and horizontal obligations to protect fundamental rights as emphatically separate issues. Responsibility for violations of fundamental rights operates on a spectrum, which ranges from state obligations to the duties we owe to one another.

Of course, as a matter of fact, different legal systems use the horizontality doctrine in substantially different ways and do not necessarily accommodate all of these dimensions at present or view them in the way I have just discussed. For

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<sup>88</sup> The latter would nonetheless be a quasi-horizontal mechanism only, as it may eventually affect private parties but would not give effect to the fundamental right as such *within* the private dispute.

example, in South Africa it is possible to claim, under certain circumstances, constitutional rights directly against private parties, as well as indirectly and via the state.<sup>89</sup> In other legal systems, such as in Israel and Switzerland, courts only have an obligation to interpret the law in the light of fundamental rights (indirect effect).<sup>90</sup> By contrast, in the United States, horizontal effect is only applied through protective duties falling on courts *qua* state authorities.<sup>91</sup> In the ECHR context, horizontal relations are protected only vis-à-vis contracting states through positive obligations.<sup>92</sup>

Horizontal effect is also applied differently by the EU Member States in their national constitutions and, while some constitutional orders have a strong horizontality tradition, in others horizontal effect is still an evolving concept. It is therefore unsurprising that the way in which horizontality is offered within the EU can be contentious. While a thorough comparative assessment of the horizontal effect of constitutional rights in EU Member States is beyond the scope of this project, some examples highlight these discrepancies.<sup>93</sup> Most clearly, in Germany, an established indirect horizontality model, known as ‘third party effect’ (*Drittwirkung*), is in place. The Federal Constitutional Court has a broad duty of ensuring that all law is applied in accordance with the ‘objective order’ (*objective Wertordnung*) of constitutional law principles, which are inviolable in both public and private law proceedings.<sup>94</sup> The German model has been particularly influential throughout Europe and a number of other legal orders follow it.<sup>95</sup> At the same time, though, the third party effect model is not used throughout the EU.

<sup>89</sup> Article 8(2) of the South African Bill of Rights. See also *Khumalo and Others v Holomisa* (CCT53/01) [2002] ZACC 12, para 33, per O’Reagan J. Cf *Du Plessis* (n 68) paras 45-62, per Kentridge AJ.

<sup>90</sup> See Barak (n 16); Besson (n 82).

<sup>91</sup> *Shelley v Kraemer* (n 80); Gardbaum (n 80).

<sup>92</sup> Illustrative examples include: *IB v Greece*, App No 552/10 (ECtHR 3.10.2013); *Osman v United Kingdom*, App No 2345294 (ECtHR 28.10.1998); *Airey v Ireland*, App No 6289/73 (ECtHR 9.10.1979). See also, for an excellent discussion: D Spielmann, *L’Effet Potentiel de la Convention Européenne des Droits de l’Homme entre Personnes Privées* (Bruylant 1996).

<sup>93</sup> For more detailed comparative assessments, see Oliver and Fedtke (n 24); G Brüggemeier and others (eds), *Fundamental Rights and Private Law in the European Union, Vol 1* (CUP 2010); K Ziegler, *Human Rights and Private Law: Privacy as Autonomy* (Hart 2007).

<sup>94</sup> *Lüth* (n 79) 205.

<sup>95</sup> See, for example, the case of Estonia: T Kerikmäe, ‘EU Charter: Its Nature, Innovative Character, and Horizontal Effect’ in T Kerikmäe (ed), *Protecting Human Rights In The EU: Controversies And Challenges Of The Charter Of Fundamental Rights* (Springer, 2013) 14-16; or Denmark: J Christoffersen, ‘Denmark: Drittwirkung and Constitutional Rights – Viewed from National and International Perspectives’ in Oliver and Fedtke (n 24) 27ff.

For example, the Irish Constitution has been interpreted as being horizontally directly effective, where this construction is possible.<sup>96</sup> Furthermore, in the United Kingdom, a substantial body of case law and literature surrounding the horizontal effect of human rights have developed after the entry into force of the Human Rights Act.<sup>97</sup> It would now be fair to say that both direct and indirect forms of horizontal effect are available in the UK in respect of certain rights.<sup>98</sup>

Not all levels of horizontality give rise to an equal amount of dissonance, though. State-mediated effect and positive obligations flow from the duty of public institutions actively to protect fundamental rights, as opposed to simply refraining from breaching them.<sup>99</sup> They are a tricky aspect of the horizontality exercise because they can be seen as falling outwith the bounds of the horizontality doctrine, strictly construed. While they may appear to negate the idea of horizontal effect by imposing the relevant obligation on the state, as opposed to the private party responsible for the breach, they actually offer an agreeable compromise in the absence of direct and indirect forms of horizontality. In their strong form, they ensure that the court does not sanction an interpretation that is incompatible with fundamental rights. This approach can have very wide-ranging effects as it prevents the invocation of a law that is incompatible with fundamental rights before the courts. A US case, *Shelley v Kraemer*,<sup>100</sup> provides an interesting illustration of this function. In this case, a black couple purchased a property to which a restrictive covenant applied that prevented non-whites from buying into the neighbourhood. A neighbour, Mr Kraemer, sought to enforce the restrictive covenant, thus preventing the couple from taking possession of their house. In terms of land law, the covenant was valid. However, the court, as a public body bound by the US Constitution, was prevented from giving effect to it,

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<sup>96</sup> *Murtagh Properties v Cleary* [1972] IR 330.

<sup>97</sup> See G Phillipson and A Williams, 'Horizontal Effect and the Constitutional Constraint' (2011) 74:6 *MLR* 878, 878-9; P Morgan, 'Questioning the "True Effect" of the Human Rights Act' (2002) 22 *LS* 259, 260-61; SD Pattinson and D Beyleveld, 'Horizontal Applicability and Horizontal Effect' (2002) 118 *LQR* 623, 664. See also W Wade, 'Horizons of Horizontality' (2000) 116 *LQR* 217; M Hunt, 'The "Horizontal Effect" of the Human Rights Act' (1998) *PL* 423.

<sup>98</sup> See in particular Hunt, *ibid*. A substantial body of case law concerning the right to privacy had already developed a strong indirect effect doctrine in the UK, for example *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22.

<sup>99</sup> See Shue (n 13) 52.

<sup>100</sup> (n 80).

as this would amount to a breach of the equal protection clause enshrined in the Fourteenth Amendment. The Shelley family was thus allowed to move into their property. An alternative claim, albeit one falling outside of a private dispute strictly speaking, requires that the state should step in to protect private parties where their relations with others put their fundamental rights in peril. Failure to meet that positive obligation gives rise to a claim in compensation against the state. Thus, while neither of these claims fundamentally departs from a state-centric conception of rights as a matter of principle, they extend substantially the state's duties actively to ensure the observance of fundamental rights.

Furthermore, indirect horizontality, while not without its critics,<sup>101</sup> can overall be justified without posing as significant challenges for courts as direct effect does, because it flows from their obligation to observe the framework of fundamental rights that they are entrusted with protecting, more broadly. Indirect horizontality is a highly useful feature of the horizontal application of rights, which allows courts to interpret the law dynamically and to determine whether particular constitutional provisions envisage an application in situations involving private parties. As Stern points out, indirect horizontal effect mainly involves building on the fundamental rights case law, but without directly imposing obligations, where these have not been politically agreed.<sup>102</sup>

By contrast, horizontal direct effect has raised significant controversy in the field of fundamental rights.<sup>103</sup> If fundamental rights are understood as limits on the state to preserve the basic need for individuals to make free, autonomous choices about their lives, direct obligations going beyond the ordinary regulation of private conduct under criminal law or the law of torts or contracts could be considered incompatible with this very function.<sup>104</sup> Furthermore, direct horizontal effect is also thought to cause problems in constitutional adjudication because it concerns a dispute between right-holders whose fundamental rights may compete, as opposed to a dispute between a right-holder on the one hand and the state on

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<sup>101</sup> See Nipperdey (n 78) 16-17.

<sup>102</sup> K Stern, *Allgemeine Lehren der Grundrechte* (CH Beck 1988) 1556.

<sup>103</sup> Clapham (n 14) 438.

<sup>104</sup> Ibid.

the other.<sup>105</sup> In cases of competing fundamental rights, this can cause difficulties for the courts, which are asked effectively to determine which of the two claims has higher constitutional significance.<sup>106</sup> For instance, when a private party directly invokes the right to privacy against another private party, the court may have to balance the right to privacy against the equally fundamental right to freedom of expression. As most fundamental rights were not initially envisaged to apply to private relations, they are often considered incapable of accommodating this type of conflict.<sup>107</sup> The main tenet of this critique of horizontality lies in the fact that courts may need to make choices as to which right to protect and to what extent, which may be considered politically charged and as such, potentially inappropriate to the judicial function.

However, this argument is not necessarily convincing. Firstly, as discussed above, the effects of direct horizontality do not always differ from other forms of horizontal effect, except in a formal way. As our discussion of the privacy scenario above makes clear, both direct and indirect horizontal effect can play an important role in ensuring that the content and spirit of fundamental rights are preserved, even when non-state actors violate them.<sup>108</sup> In some cases, especially those concerning particularly unequal relationships, this may be done through direct effect, and in other cases, through the indirect effect mechanism. Indeed, both direct and indirect horizontality ensure that fundamental rights develop in tune with the demands of the constitutional order within which they apply. Both mechanisms take into account the increasing difficulties of setting out boundaries between the public and the private realms, especially in cases where the actions of some private parties can substantively interfere with matters of public policy.<sup>109</sup> In fact, indirect horizontal effect can be even more wide-ranging than direct horizontality, which has a case-specific nature, as it can have a strong jurisgenerative potential without openly altering the nature of existing legal structures. For instance, this has been manifest for some time in the EU context, by virtue of the wide-ranging duty on national courts to interpret legislation

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<sup>105</sup> Alexy, *Constitutional Rights* (n 67) 355.

<sup>106</sup> Barak (n 16) 17.

<sup>107</sup> Ibid.

<sup>108</sup> *DuPlessis* (n 68) para 120, per Kriegler J.

<sup>109</sup> See Knox (n 19) 19; See Human Rights Watch (n 20).

consistently with EU law (including EU fundamental rights).<sup>110</sup> The duty is so broad that it often blurs the boundaries between direct and indirect horizontality altogether.<sup>111</sup> In this sense, as Leisner has noted, a horizontal application of constitutional rights changes the legal relations between private parties and is, to some degree, always direct.<sup>112</sup>

Of course, when a fundamental rights catalogue is particularly extensive (such as the EU Charter) and includes a number of provisions that come into conflict with one another, such as the freedom to conduct a business on the one hand and the right to fair and just working conditions on the other,<sup>113</sup> direct horizontality can indeed be difficult. It will inevitably depend heavily on the constitutional adjudicator, who will need to weigh up what the aggregate effects of tilting the balance in favour of one right or the other will be.<sup>114</sup> For this reason, courts need to apply direct horizontality with prudence.<sup>115</sup> Indeed, as Alexy has pointed out, while it would be possible to extend direct horizontal effect ‘*ad absurdum*,’ thus entirely replacing private law claims, this would not be appropriate to its constitutional functions.<sup>116</sup> It is necessary to acknowledge that private law is not decided on the basis of a ‘normative *tabula rasa*’ but instead requires a consistent and principled adjudicative practice that can be harmoniously integrated into the broader constitutional order.<sup>117</sup>

Secondly, it is not true that every case involving a fundamental right will need to be ‘balanced’ against another right. Balancing only makes sense when it concerns competing constitutional entitlements, i.e. where both parties have an equally valid claim to a fundamental right.<sup>118</sup> To the extent that fundamental

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<sup>110</sup> Case C-106/89, *Marleasing v La Comercial Internacional De Alimentacion* [1990] ECR I-4135, para 8.

<sup>111</sup> See S Drake, ‘Twenty Years After Von Colson: The Impact of “Indirect Effect” on the Protection of the Individual’s Community Rights’ (2005) 30:3 *ELR* 329.

<sup>112</sup> W Leisner, *Grundrechte und Privatrecht* (CH Beck 1960) 378.

<sup>113</sup> Articles 16 and 31 EUCFR respectively.

<sup>114</sup> See T Scanlon, ‘Adjusting Rights and Balancing Values’ (2004) 74 *Fordham L Rev* 1477, 1478-81.

<sup>115</sup> C O’Cinneide C and M Stelzer, ‘Horizontal effect /State Action’ in M Tushnet, T Fleiner and C Saunders (eds), *Routledge Handbook of Constitutional Law* (Routledge 2013) 186.

<sup>116</sup> Alexy, *Constitutional Rights* (n 67) 364.

<sup>117</sup> Alexy, *ibid*. See also R Alexy, *A Theory of Legal Argumentation* (tr R Adler and N McCormick, OUP 1989) 248, 258ff.

<sup>118</sup> Scanlon (n 114) 1478-81; R Alexy, ‘Constitutional Rights, Balancing, and Rationality’ (2003) 16 *Ratio Juris* 131, 135-139.



rights are hierarchically superior to other legal rules, in many horizontal cases, this question will not arise. Furthermore, in cases where direct horizontality will indeed involve balancing between competing constitutional rights, this exercise does not differ substantially from cases of conflicts of rights in the adjudication of rights against the state. It is, rather, about finding a space in which both rights can co-exist without compromising their content and enabling functions. It follows that the objections of principle relating to direct horizontality are largely exaggerated. Its availability primarily depends on the way in which a legal system envisions the role of courts in the functioning of the constitutional order (e.g. its attitude towards judicial law-making and the nature of the claims that reach constitutional courts), rather than on any inherent attribute that this dimension of horizontality possesses.

Thus, it is not necessary to compartmentalise each manifestation of horizontality in an absolute way: an indirect application of a right through interpretation will almost necessarily have some direct consequences for private parties (e.g. those who may have relied on different interpretations of the legislation in question).<sup>119</sup> By the same token, if an obligation to observe the right to privacy and private data is read into private law or into legislation applying to search engine operators, the legal duties of that search engine vis-à-vis the holders of a right to privacy will change.<sup>120</sup> Its effect is to create an obligation for a private party that did not previously exist. It will often be immaterial whether we call this interpretation direct or indirect, as its effect will still be to create an obligation for a private party that did not previously exist. Finally, a state-mediated application of horizontal effect may result in the alteration of the legal framework in question in such a way that it resembles indirect horizontal effect.<sup>121</sup> It should be emphasised that, to the extent that horizontality entrusts to courts the delineation of legal relations in circumstances that attract private responsibility, the overall exercise of horizontal effect is intricate, and not just the attribution of direct effect. Even in a case where the fundamental right might be applied

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<sup>119</sup> Nipperdey (n 78) 16-17.

<sup>120</sup> Ibid.

<sup>121</sup> This is the case in particular under the ECHR framework. See D Spielmann, 'The European Court of Human Rights' in Oliver and Fedtke (n 24) 427 ff.

indirectly, by a reading-in of a fundamental right into private law, the effect is often that private parties alter their behaviour so as to comply with a new interpretation of the law. Thus, it may in practice matter very little whether the imposition of horizontality was directly addressed to them or not.<sup>122</sup>

It would therefore be mistaken to assume that the debate about the horizontal effect of fundamental rights can be resolved through a discussion of direct horizontality only. Of course, as Alexy puts it, ‘the fact that all three constructions are outcome-neutral does not make the question of which one is correct irrelevant.’<sup>123</sup> Whereas most legal systems accommodate only one of these forms of horizontal effect, in fact, each of them captures some aspects of the operation of constitutional rights in horizontal relations, but none is in itself conceptually complete, as they cover different aspects of a constitutional order.<sup>124</sup> In proposing a ‘three-stage model’ of horizontality, Alexy notes that an adequate system of horizontal effect in the constitutional context should accommodate all three dimensions.<sup>125</sup> This would acknowledge the complexities inherent in the adjudication of fundamental rights in disputes between private parties and offer a range of tools for addressing them.

Direct, indirect and state-mediated dimensions of horizontal effect are not mutually exclusive. Ideally, they should operate in parallel, so that a thorough system of horizontal application of rights that acknowledges the different ways in which these can reach into private relations can be delivered. That would allow courts to determine, where appropriate, whether the primary obligation in a horizontal situation rests: with the state under its legislative duty or the court in its capacity as a state authority prevented from acting in a way that infringes fundamental rights (positive obligations/state-mediated effect); the court in its interpretative capacity (indirect effect); or indeed with the private party bound to observe a fundamental right of structural value to a particular society (direct

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<sup>122</sup> This is very clear in the aftermath of the *Google* judgment (n 73): whereas the Court effectively read Articles 7 and 8 EUCFR into the Data Protection Directive, in reality this had direct implications for private actors (not only for Google, but also for other search engines, such as Bing), all of which have drawn up procedures of weighing up the fundamental right to privacy (*qua* right to be forgotten) themselves, so as to avoid further legal action.

<sup>123</sup> Alexy, *Constitutional Rights* (n 67) 358.

<sup>124</sup> *Ibid.*

<sup>125</sup> *Ibid.*, 358-365.

effect).<sup>126</sup> Thus understood, it is clear that if a state truly commits to a right as an organisational rule, it will also legislate to protect it even in disputes between private individuals and will be liable vis-à-vis those affected if it does not. If a law can be interpreted compatibly and incompatibly with a fundamental right, then the courts will naturally choose the compatible interpretation. Moreover, some cases, particularly when the private party in question has an institutionally significant role in the protection of a right, may necessitate a direct fundamental rights action against another private party.<sup>127</sup>

It is important to bear in mind, though, that all forms of horizontal effect in the fundamental rights context converge in terms of their purpose. Within a supranational constitutional order, where multiple systems of horizontality operate, this point can hardly be over-emphasised.<sup>128</sup> Horizontal effect in general and its specific mode of attribution in particular depend both on empirical questions of who holds power within a particular society, as well as on the normative question of whether private parties should be given constitutional duties to observe fundamental rights. If the underlying constitutional framework is a minimal one that seeks to protect a *laissez-faire* form of individual autonomy, then any degree of horizontality in the fundamental rights context may be unwarranted.<sup>129</sup> If, however, constitutional rights have a structural function in the society in question, in the sense that they assume the role of its normative foundations, and if that society is affected by substantial imbalances of power characteristic of a modern liberal market economy, then horizontal effect can be a useful feature therein.<sup>130</sup>

## **1.5 Conclusion: the horizontal effect of constitutional rights and the EU Charter**

While, as this chapter has sought to demonstrate, it is relatively clear that rights can be affected both by the state and by private entities, that is not in itself sufficient to conclude that a particular fundamental rights framework is

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<sup>126</sup> Ibid.

<sup>127</sup> Ruggie (n 29) 199–203. See also the thorough discussion of horizontality offered by Kriegler J in *Du Plessis* (n 68) paras 121ff.

<sup>128</sup> See further Chapter 7.

<sup>129</sup> See *DuPlessis* (n 68) para 120, per Kriegler J.

<sup>130</sup> See Teubner, *Constitutional Fragments* (n 53) 27.

transposable to private relations as such. At the heart of the horizontality question, there is a debate about the functions of constitutional rights, especially insofar as the equalisation of power relations and the effective operation of the institutions upon which a society is founded are concerned. As noted above, a dispute between private parties is relevant constitutionally only when its adjudication raises broader, organisational issues for a political community. Furthermore, the appropriate responses to the horizontality question can vary across different constitutional contexts, especially regarding form (i.e. whether horizontality is rendered through direct effect, indirect effect or through the state).

How, then, does our conversation relate to the EU context? Despite the divergences in the application of fundamental rights to private relations within the Member States' legal systems, horizontal effect was a prominent feature of the Union's case law.<sup>131</sup> Whereas a wide-ranging horizontality doctrine has been in place for some time in EU law, though, this was not necessarily tailored to fundamental rights in the sense described earlier (as constitutional order commitments). As will be further discussed in the following chapters, horizontality has mostly been a self-referential part of EU case law, which has not incorporated constitutional debates about the horizontal applicability of human rights or constitutional rights. Rather than examining the substance of the right in question and the form of horizontal effect that best served its goals, the Court drew a distinction between Treaty-based rights and directive-based rights, which was applied both in the sphere of fundamental rights and in other fields of EU law.<sup>132</sup> This approach has resulted in a mismatch between the way in which the different dimensions of horizontal effect are understood in EU law and the manner in which horizontality can be conceptualised in the context of constitutional-order, fundamental rights.

It is for this reason that the entry into force of the Charter of Fundamental Rights signals a new direction in respect of horizontal effect in the EU. In line with the discussion in the preceding sections, horizontal effect becomes a

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<sup>131</sup> Over 65 horizontal effect judgments can be identified in the pre-Lisbon case law in the sphere of fundamental rights: N Ferreira, 'The Horizontal Effect of Fundamental Rights and Freedoms in European Union Law' in Brüggenmeier (n 93) 12.

<sup>132</sup> As Chapters 3 and 4 discuss in more detail, a number of exceptions were developed to accommodate different cases around this overarching rule.

complex matter of constitutional adjudication when it concerns a specific legal instrument that collects a defined set of rights and labels them ‘fundamental’ within the EU polity. To the extent that, under the Charter framework, as well as in the broader constitutional landscape of the European Union today, political integration was envisioned,<sup>133</sup> the application of fundamental rights to private relations cannot be detached from the constitutional questions highlighted earlier. Indeed, even if the EU lacks some of the typical characteristics of constitutional democracies and, most notably, the existence of a singular demos,<sup>134</sup> it displays at least some constitutional features.<sup>135</sup> A self-standing EU rights catalogue changes the Union’s fundamental rights regime substantially, as it ascribes a clearer interpretive function to the Court of Justice as a fundamental rights arbiter.<sup>136</sup> It is therefore important to consider, in this analysis, the goals that the horizontal effect of a bill of rights is likely to assume in the EU constitutional context and how it can affect the way we perceive the role of private actors therein. As will be further discussed as this thesis unfolds, acknowledging the institutional role of private parties in the protection of fundamental rights in the EU is essential in order to re-evaluate the constitutional implications of the horizontality doctrine with conceptual consistency and clarity.

Indeed, as the following chapters demonstrate in more detail, narratives about the nature of private responsibility in the EU public sphere to date have not been prominent in the judicial discourse concerning horizontality, which has operated primarily as a mechanism for extending the application of direct effect in EU law. As this chapter has shown, though, what kind of horizontality is chosen is a secondary consideration from the perspective of constitutional coherence to that of whether and why it is offered in the first place. In attributing horizontal effect

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<sup>133</sup> See G De Búrca and B Aschenbrenner, ‘The Development of European Constitutionalism and the Role of the EU Charter of Fundamental Rights’ (2003) 9 *CJEL* 355; P Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’ (2002) 39:5 *CML Rev* 945.

<sup>134</sup> See D Grimm, ‘Does Europe Need a Constitution?’ (1995) 1:3 *ELJ* 303.

<sup>135</sup> D Grimm, ‘The Democratic Costs of Constitutionalisation: The European Case’ (2015) 21:4 *ELJ* 460, 469-471. Grimm argues that the EU actually displays symptoms of over-constitutionalisation.

<sup>136</sup> See A von Bogdandy, ‘The European Union as a Human Rights Organisation? Human Rights and the Core of the European Union’ (2000) 37:6 *CML Rev* 1307; K Lenaerts and J Gutiérrez-Fons, ‘The Constitutional Allocation of Powers and General Principles of EU law’ (2010) 47:6 *CML Rev* 1629.

to the Charter, questions about the role and functions of fundamental rights in society confront us plainly. They can only be assessed by delving more deeply into the structure and context of the Charter itself, in order to understand where it fits within the EU legal order as well as what its relationship to the values that underpin the European Union might be.

## 2 The Charter of Fundamental Rights and the Question of Horizontality

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### 2.1 Introduction

As Chapter 1 has highlighted, horizontal effect requires a constitutional analysis when it is applied to a list of public guarantees intended to regulate basic tenets of common life. In this field, horizontality does not merely concern specific intersubjective disputes but, rather, issues of public interest. This chapter builds on the constitutional perspective on horizontality put forward in Chapter 1 and assesses how it fits into the context of the EU Charter of Fundamental Rights in its binding dimension. By tracing the Charter's constitutional significance back to its drafting history and, especially, its links to the creation of a Constitution for Europe, the chapter relates the themes discussed earlier to a more focused discussion of the Charter's horizontality. It shows that the only way in which the horizontal effect of the Charter can be assessed meaningfully is by taking account of the Charter's constitutional functions and objectives.

The chapter firstly discusses the content and drafting process of the Charter, placing it within the EU constitutionalisation process. It then highlights the existing debates about horizontality, which mainly relate to textual issues, such as the Charter's drafting intricacies and scope of application under Article 51(1) thereof.<sup>1</sup> Overall, it will be argued that these debates are too thin to encapsulate the constitutional dimension of horizontality as envisioned in Chapter 1, which would require that such debates be combined with a more substantive constitutional assessment of the role of fundamental rights in the public order of the European Union. By reimagining horizontality as an idea that fits within the

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<sup>1</sup> See for example: L Pech, 'Between judicial minimalism and avoidance: the Court of Justice's sidestepping of fundamental constitutional issues in *Römer* and *Dominguez*' (2012) 49:6 *CML Rev* 1841; M De Mol, '*Dominguez*: A Deafening Silence' (2012) 8:2 *EuConst* 280; Opinion of Advocate General Cruz Villalón, delivered on 18 July 2013, in Case C-176/12, *Association de Médiation Sociale v Union locale des syndicats CGT*, EU:C:2013:491; cf Opinion of Advocate General Trstenjak, delivered on 8 September 2011, in Case C-282/10, *Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, EU:C:2011:559; and the Opinion of Advocate General Kokott in Case C-104/09 *Roca Álvarez v Sesa Start España ETT SA* [2010] ECR I-08661, para 55; Opinion of Advocate General Cruz Villalón, delivered on 22 May 2014, in Case C-201/13, *Deckmyn v Vandersteen*, EU:C:2014:458.

Charter's constitutionalising role in the EU, I hope that it will become clear that the relevance of this doctrine goes well beyond these, largely formalistic, issues. Rather, the creation and granting of binding effect to a list of fundamental rights can be seen as setting out conditions upon which legitimate EU governance can take place in a context of political integration and attempts at further civic engagement.<sup>2</sup>

The chapter thus advances two main arguments: firstly, it shows the development of fundamental rights in the EU over the years and highlights the Charter's role in the EU constitutionalisation process. It therefore argues that the Charter has a public law character and falls squarely within the realm of constitutional interpretation (Section 2.2). Secondly, this chapter argues that, while much of the existing judicial debate about horizontality – though mostly to be found in Opinions of its Advocates General rather than the rulings themselves – focuses on the text of the Charter, this is unhelpful. Neither the Charter's scope nor the designation of different provisions as rights or principles<sup>3</sup> conclusively determine the question of horizontality, both as a matter of principle as well as in terms of many of its specific parameters (Section 2.3).

## **2.2 Understanding the Charter's constitutional significance: its content, drafting history and links to further political integration in the EU**

The concept of fundamental rights was initially absent from the Treaties. It only entered EU law through judicial interpretation, in the form of general principles.<sup>4</sup> Fundamental rights protected as general principles of EU law included human rights and, more specifically, the rights enshrined in the ECHR, which has 'special significance' in the EU.<sup>5</sup> In addition, the general principles of EU law could cover rights protected under the common constitutional traditions of the

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<sup>2</sup> P Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 *CML Rev* 945, 946.

<sup>3</sup> Articles 51 and 52(5) EUCFR, respectively.

<sup>4</sup> Case 11/70, *Internationale Handelsgesellschaft v Einfuhr- Und Vorratsstelle Getreide* [1970] ECR I-1125, para 4.

<sup>5</sup> Case C-36/02, *Omega Spielhallen- Und Automatenaufstellungs v Oberbürgermeisterin Der Bundesstadt Bonn* [2004] ECR I-9609, para 33; See Case 4/73, *Nold v Commission* [1974] ECR 491, para 13; Case 44/79, *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727, paras 15–17; Case C-260/89, *Elliniki Radiofonia Tileorassi AE (ERT) v Dimotiki Etairia Pliroforissis and Others* [1993] ECR I-2925, para 41.



Member States.<sup>6</sup> This case law made clear that, where a constitutional right of an EU Member State was at stake, the Court would be prepared to examine reasons for protecting it at the EU level as well.<sup>7</sup> As the Court put it in its *Internationale Handelsgesellschaft* judgment:

The validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure. However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded [...] The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.<sup>8</sup>

In this sense, even though the Court had acknowledged that equivalent protections could exist in the EU to the extent that they could be accommodated within EU law, it was keen to make clear that the latter retained primacy over national law, even where constitutional rights were concerned.<sup>9</sup> In *Hauer*, it reaffirmed this position.<sup>10</sup> Fundamental rights were recognised in EU law but were not necessarily considered inherent in its functioning.

By contrast, certain social and economic rights and, most importantly, aspects of the principle of equality,<sup>11</sup> which did not always enjoy constitutional protection across the EU Member States, were much more actively protected within the EU framework. These rights related more directly to the objectives of the EU itself and the conditions that it sought to establish within the single market. Precisely because of the Union's free market origins, protections regarding equality and working conditions had already been protected in the Treaty of Rome. The latter included provisions such as Article 117 on improved living and working conditions,<sup>12</sup> Article 119 on equal pay between men and

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<sup>6</sup> *Internationale Handelsgesellschaft* (n 4) paras 3-4; See *Omega* (n 5).

<sup>7</sup> *Omega* (n 5) paras 34-35.

<sup>8</sup> *Internationale Handelsgesellschaft* (n 4) paras 3-4.

<sup>9</sup> Ibid. See also Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR I-00629.

<sup>10</sup> Case 44/79, *Hauer v Land Rheinland Pfalz* [1979] ECR 3727, para 14.

<sup>11</sup> See Joined Cases 117/76 and 16/77, *Ruckdeschel v Hauptzollamt Hamburg-St. Annen* [1977] ECR 1753, para 7.

<sup>12</sup> Now Article 151 TFEU.

women,<sup>13</sup> and Article 7 on non-discrimination on grounds of nationality,<sup>14</sup> in addition to protections against discrimination in the exercise of market freedoms.<sup>15</sup> This set of EU fundamental rights, focused on the promotion of a free and fair market, was gradually developed, both through subsequent Treaty amendments and by the Court, which demonstrated a laborious effort to protect them.<sup>16</sup>

Over time, both of these strands of fundamental rights protection have played an important role in constitutionally defining the European Union, even as uncodified commitments,<sup>17</sup> as they have been linked to foundational questions regarding the direction of EU law, as well as the ways in which it binds the Member States and their subjects.<sup>18</sup> For example, this has been the case in respect of establishing the extent of the CJEU's jurisdiction when encroaching upon nationally protected fundamental rights.<sup>19</sup> It is also important to recognise, though, that different types of fundamental rights have assumed a different role in the EU constitutional order. On the one hand, rights constitutionally protected in the Member States were incorporated in the EU to prevent constitutional conflicts and enhance legitimacy. On the other hand, quintessentially EU fundamental rights, such as the right to equal pay, defined the parameters of the common market and became avenues for inclusion within EU law of a broad range of claimants not necessarily possessing substantial market power.

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<sup>13</sup> Now Article 157 TFEU.

<sup>14</sup> Now covered by a broad commitment to non-discrimination under Article 2 TEU, as well as by Article 18 TEU.

<sup>15</sup> Articles 48(2), 52 and 59 EEC. Now Articles 45(2), 49 and 56 TFEU, respectively.

<sup>16</sup> This is most evident in the extension of the protection against discrimination to not predominantly economically active citizens. See for example: Case C-184/99, *Grzelczyk v Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193; Case C-413/99, *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091; Case C-200/02, *Zhu and Chen v Secretary of State for the Home Department* [2004] ECR I-09925; Case C-209/03, *The Queen, on the Application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECR I-02119; Case C-148/02, *Garcia Avello v Belgian State* [2003] ECR I-11613.

<sup>17</sup> With the exception of equal pay, which was already enshrined in Article 119 EEC.

<sup>18</sup> A Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (OUP 2009) 72.

<sup>19</sup> See *Solange II* – BVerfGE 73, 339 (Az: 2 BvR 197/83); *Solange I* – BVerfGE 37, 271 (Az: 2 BvL 52/71).

Today, the Charter collects fundamental rights in the EU and ascribes to them ‘the same legal value as the Treaties.’<sup>20</sup> The Charter is a comprehensive list of commitments spanning across different generations of rights and recognising their indivisibility.<sup>21</sup> Notably, all of its provisions are in principle afforded the same legal status.<sup>22</sup> Its 54 articles are divided into seven chapters: Dignity (I), Freedom (II), Equality (III), Solidarity (IV), Citizens’ Rights (V), and Justice (VI), as well as four general provisions regulating the technicalities of its application (VII). Its provisions draw on the Court’s case law and both EU and international standards, such as the Universal Declaration of Human Rights, the European Convention on Human Rights, the European Social Charter, and the Charter of the Rights of Workers.<sup>23</sup>

The Charter therefore contains protections such as the right to life,<sup>24</sup> the prohibition of torture and inhuman and degrading treatment or punishment,<sup>25</sup> and respect for private and family life,<sup>26</sup> as well as rights to fair working conditions,<sup>27</sup> to be informed and consulted in the workplace,<sup>28</sup> and the right to take collective action including the right to strike.<sup>29</sup> Moreover, it includes a series of provisions with a less universal character, such as the free movement of persons,<sup>30</sup> and political rights for EU citizens, such as the right to vote and to stand as a

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<sup>20</sup> Article 6(1) TEU. The Charter’s provisions, which encompass the Court’s case law to date, necessarily have the status of fundamental rights. This is not to say that further fundamental rights may not be developed in the future.

<sup>21</sup> Regarding the three ‘generations’ of rights, see K Vasak, ‘Human Rights: A Thirty Year Struggle: The Sustained Effort to Give Force of Law to the Universal Declaration of Human Rights’ (1977) 30:11 *Unesco Courier* 29. Cf J Kenner, ‘Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility’ in T Hervey and J Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective* (Hart 2003) 1-3.

<sup>22</sup> However, the UK and Poland have sought to obtain a declaration to the effect that most of the social and economic provisions contained in the Charter, which are collected in its solidarity chapter, do not change national laws. The Court has found that this protocol is merely declaratory and does not have the effect of an opt-out: Joined Cases C-411/10 and C-493/10, *N.S. v Secretary of State for the Home Department and M. E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform*, EU:C:2011:865, paras 119-120, 122.

<sup>23</sup> See PP Craig, ‘Oral evidence: The Application of the EU Charter of Fundamental Rights in the UK’ (2014), House of Commons European Scrutiny Committee, HC 979, 22 January 2014, <<http://data.parliament.uk/writtenevidence/WrittenEvidence.svc/EvidenceHtml/5574>> accessed 30 January 2015.

<sup>24</sup> Article 2 EUCFR.

<sup>25</sup> Article 4 EUCFR.

<sup>26</sup> Article 7 EUCFR.

<sup>27</sup> Article 31 EUCFR.

<sup>28</sup> Article 27 EUCFR.

<sup>29</sup> Article 28 EUCFR.

<sup>30</sup> Article 45 EUCFR.

candidate in European elections.<sup>31</sup> Finally, some of its provisions are afforded a particularly wide-ranging degree of protection: most clearly, this is the case for the right to equal treatment, which is now enshrined in seven provisions of a distinct chapter of the Charter,<sup>32</sup> thus highlighting the continued significance of this right within the EU.<sup>33</sup> As such, the breadth of the protection of fundamental rights within the Charter has come a long way from the instrumental role of fundamental rights in the Court's early case law.

Despite the wide-ranging nature of the protections it enshrines, though, the Charter's Preamble makes clear that this document does not introduce *new* rights, but merely enhances the visibility of existing rights within EU law.<sup>34</sup> For this reason, it has been argued that it does not change much in the EU fundamental rights regime because fundamental rights were already 'for the informed observer, there in the Court's case law prior to the entry into force of the Charter, in the form of general principles.'<sup>35</sup> To some extent this is indeed true. As noted above, the Court's case law had offered protection to human rights and national constitutional rights through its general principles. At the same time, it offered a high level of protection to rights concerning working conditions and equal treatment, in light of its conception of the EU market as a project aiming both at economic integration and at improved working and living conditions.<sup>36</sup> If the Charter does not change very much substantively in terms of the content of fundamental rights within the EU, though, what is its role therein and was there a need to incorporate a codified bill of rights in the EU legal order? In turn, against what standard should it be interpreted, vertically as well as horizontally, and is there a need to alter judicial narratives about fundamental rights that pre-existed its entry into binding force?

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<sup>31</sup> Article 39 EUCFR.

<sup>32</sup> Chapter III EUCFR, entitled 'Equality.'

<sup>33</sup> The Court had indeed previously found that the right to equal treatment has a special status in the European Union: *Ruckdeschel* (n 11) para 7.

<sup>34</sup> House of Lords EU Select Committee, 'The Treaty of Lisbon: An Impact Assessment' (2008) 10th Report of 2007-08 Session, HL Paper 62-I, <<http://www.publications.parliament.uk/pa/ld200708/ldselect/ldcom/62/62.pdf>> accessed 15 March 2015, paras 5.37–5.41.

<sup>35</sup> S Morano-Foadi and S Andreadakis, 'Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights' (2011) 17:5 *ELJ* 595, 599.

<sup>36</sup> See in particular Case 43/75, *Defrenne v Sabena* [1976] ECR 455, para 9.

While the Charter may not contribute to the EU fundamental rights regime in the sense of *creating* new content, it does have a clear constitutional import. It selects, collects and narrates fundamental rights in a novel manner from the perspective of EU law. As Paul Craig has put it, ‘the very fact of putting those pre-existing provisions in a thing called a Charter of Fundamental Rights does give them a degree of peremptory force that they would not otherwise have had.’<sup>37</sup> The creation and, subsequently, granting of binding effect to the Charter, are normatively rich actions in themselves. The Charter carried a symbolic meaning as EU Member States entered a phase of deeper political integration under the Lisbon Treaty.<sup>38</sup> Its fifty substantive provisions express a commitment, on the part of ‘the peoples of Europe [...] to share a peaceful future based on common values’ (human dignity, freedom, equality and solidarity, which are in turn to be delivered based on ‘the principles of democracy and the rule of law’).<sup>39</sup> The Charter therefore appears to be premised on the assumption that the language of fundamental rights is a code that the 28 Member States of the European Union<sup>40</sup> and their peoples, share.

As such, it is clear that the Charter does not *just* codify existing protections of fundamental rights: in doing so, it defines a set of politically negotiated rights that incorporate national constitutional traditions but remain subject to judicial review at the supranational level.<sup>41</sup> This process reflects a broader political culture premised on the protection of fundamental rights across different levels of the EU legal order, as well as a belief that the peoples that make up the EU, and not just the Member States, identify with their authorship.<sup>42</sup> The story the Charter tells operates in parallel with the Treaties: it is not primarily concerned with questions of EU law, such as free trade or competition, even

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<sup>37</sup> Craig (n 23).

<sup>38</sup> G De Búrca and B Aschenbrenner, ‘The Development of European Constitutionalism and the Role of the EU Charter of Fundamental Rights’ (2003) 9 *CJEL* 355, 364-65.

<sup>39</sup> Charter Preamble.

<sup>40</sup> At the time of writing, the United Kingdom has indicated that it intends to leave the EU, following a vote to this effect in the referendum of 23 June 2016. However, Article 50 TFEU has not yet been triggered.

<sup>41</sup> Opinion of Advocate General Cruz Villalón, delivered on 1 March 2011, in Case C-69/10, *Samba Diouf v Ministre du Travail, de l’Emploi et de l’Immigration* [2011] I-07151, para 39.

<sup>42</sup> It is noteworthy that, whereas the Charter’s Preamble states that ‘the peoples of Europe’ commit to these rights, and therefore retains the formulation used in the Constitutional Treaty, the Preambles of both the TEU and TFEU refer only to the heads of state of the Member States.

though it also comprises some of the most important features of the EU as a free trade union (such as the freedom to conduct a business).<sup>43</sup> Rather, it is about how the EU should operate at the most basic, foundational level, as a social, economic, *and* political union. This political function – or, at least, aspiration – sets the Charter apart from other conceptions of fundamental rights in the European Union. After all, it is only if the Charter is understood in this sense that the inclusion in Article 6 TEU of two additional, binding sources of rights protection, namely the European Convention and the general principles of EU law, can be justified.

A brief overview of the Charter's history and drafting context confirms its political overtones. While the Charter only acquired binding force on 1 December 2009, together with the Lisbon Treaty, it is important not to forget that it is in fact at least one decade older. The idea of the EU as 'far more than a market,' but rather 'a unique design based on common values' was very clear already by the 1996 Intergovernmental Conference.<sup>44</sup> The Charter was drafted soon afterwards, at the Cologne European Council in 1999, taking over the recommendations put forth in an influential report by Professor Simitis. The latter had expressed the worry that it was no longer sufficient for EU fundamental rights to mirror the ECHR and that a European Bill of Rights reflecting the 'Union experience' was required.<sup>45</sup> It was thus clear from the very beginning that the idea of an EU Charter would not be designed as a mere addition to regional and global human rights standards, but precisely because these standards were not a sufficient reflection of the things that made up a properly-so-called EU constitutional identity.<sup>46</sup>

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<sup>43</sup> Article 16 EUCFR.

<sup>44</sup> 'A Strategy for Europe,' Final Report of the Reflection Group on the 1996 Intergovernmental Conference, SN 520/95, 5 December 1995, iii; PP Craig, 'Democracy and Rule-making within the EC: An Empirical and Normative Assessment' (1997) 3:2 *ELJ* 105, 113.

<sup>45</sup> European Commission Directorate-General for Employment, Industrial Relations, and Social Affairs, 'Affirming Fundamental Rights in the European Union: Time to Act' (1999) Report of the Expert Group on Fundamental Rights, <[http://bookshop.europa.eu/en/affirming-fundamental-rights-in-the-european-union-pbCE2199181/downloads/CE-21-99-181-EN-C/CE2199181ENC\\_001.pdf;pgid=y8dIS7GUWMdSR0EAlMEUUsWb00008BR\\_Mmdd;sid=q4ng-7rouAbg\\_TN3ld-XNjN5ur-ib07rVo=?FileName=CE2199181ENC\\_001.pdf&SKU=CE2199181ENC\\_PDF&CatalogueNumber=CE-21-99-181-EN-C](http://bookshop.europa.eu/en/affirming-fundamental-rights-in-the-european-union-pbCE2199181/downloads/CE-21-99-181-EN-C/CE2199181ENC_001.pdf;pgid=y8dIS7GUWMdSR0EAlMEUUsWb00008BR_Mmdd;sid=q4ng-7rouAbg_TN3ld-XNjN5ur-ib07rVo=?FileName=CE2199181ENC_001.pdf&SKU=CE2199181ENC_PDF&CatalogueNumber=CE-21-99-181-EN-C)> accessed 15 May 2016, 10.

<sup>46</sup> See the references to this idea in Articles 2 and 4 TEU.

From its inception, therefore, the designation of a group of rights as ‘fundamental’ under EU law was intended to give these rights independent interpretative value vis-à-vis Member State and international standards, not necessarily by antagonising them but by emphasising that EU fundamental rights were derived from (and not simply reducible to) these standards alone. The Charter thus added structure to novel at that time concepts, such as EU citizenship, and aspirations, such as federalisation.<sup>47</sup> In other words, it was proposed as an attempt to distill – or even to construct – the things that define a collective ‘we’ to which EU citizens from different Member States would relate. This is confirmed by the clear links between the Charter and the creation of a Constitutional Treaty.

The Charter made its first appearance in the EU constitutional landscape with the 2001 Treaty of Nice, which included it as a merely declaratory document. However, the Treaty of Nice was only a provisional treaty laying the groundwork for a broader project – the Constitution for Europe. While its substantive provisions were not drastically altered, it was only in the negotiations concerning the Constitutional Treaty that the Charter would acquire its current Preamble, a more defined scope of application and, crucially, a binding legal status. The working documents of the Constitutional Convention reveal that the Charter was understood as an important civic bond. It is evident from the *travaux préparatoires* of the Constitutional Convention that all of the participants had either actively supported or at least favourably considered a form of incorporation in the Treaties that would give the Charter a constitutional – and not a merely legally binding – status.<sup>48</sup>

The reasons for this may, of course, be varied and not necessarily linked to a common commitment to a fully-fledged political union. As Lord Goldsmith has explained, the existence of fundamental rights as general principles did not solve the problem that the EU was not directly bound by the ECHR, even though its

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<sup>47</sup> See Eeckhout (n 2) 990.

<sup>48</sup> *Preparatory Working Documents for the European Convention*, EUR-OP 2004, 190-1, Final Report of Working Group II, CONV 354/02, 22 October 2002, 189.

competences had grown substantially.<sup>49</sup> Furthermore, some Member States were concerned about the development of EU fundamental rights through judicial interpretation through the general principles of EU law, which they considered too unpredictable, and instead favoured agreement on these rights at the intergovernmental level.<sup>50</sup> This is, to a great extent, understandable politically. While fundamental rights were initially only invoked as challenges to EU legislation,<sup>51</sup> EU legislation that enshrined fundamental rights had gradually started being invoked against the Member States themselves.<sup>52</sup> Thus, the idea of a self-standing EU rights catalogue that would collect and clarify the fundamental rights to which the EU would commit, started to acquire prominence.<sup>53</sup>

Alongside these considerations, though, it is clear that the Charter was also seen as a means of enhancing the European Union's democratic legitimacy and of affirming its focus on the citizen. A binding Charter signalled not only an institutional commitment to fundamental rights in respect of EU action, but also a potential basis for civil society to exert pressure on the EU to ensure that its actions complied with basic rights and freedoms.<sup>54</sup> As de Búrca and Aschenbrenner note, '[t]he decision to confer legal status on the Charter is thus necessarily linked with the discussion on a constitution for Europe and especially with the political debate on the future shape of the EU.'<sup>55</sup> Appreciating its symbolism as a platform for a minimum common constitutional identity is crucial to understanding the Charter's role in the EU project. Constitutional symbols are

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<sup>49</sup> Lord Goldsmith QC, 'A Charter of Rights, Freedoms and Principles' (2001) 38:5 *CML Rev* 1201, 1202.

<sup>50</sup> Lord Goldsmith QC, Lord Goldsmith QC, 'The Charter of Fundamental Rights' (2008) Speech to BIICL, 15 January 2008, <[www.biicl.org/files/3271\\_dpuk-50237553-v2-speech\\_to\\_biicl1.doc](http://www.biicl.org/files/3271_dpuk-50237553-v2-speech_to_biicl1.doc)> accessed 20 February 2014, 8.

<sup>51</sup> For example, *Internationale Handelsgesellschaft* (n 4); Case 5/88 *Wachauf v Bundesamt Für Ernährung Und Forstwirtschaft* [1989] ECR 2609.

<sup>52</sup> Case C-260/89, *Elliniki Radiofonia Tileorassi AE (ERT) v Dimotiki Etairia Pliroforissis and Others* [1993] ECR I-2925, para 41. See also, for example, cases regarding the right to family life: Case C-184/99, *Grzelczyk v Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193; Case C-413/99, *Baumbast and R v Secretary of State for the Home Department* [2002] ECR I-7091; Case C-200/02, *Zhu and Chen v Secretary of State for the Home Department* [2004] ECR I-09925; Case C-209/03, *The Queen, on the Application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* [2005] ECR I-02119; Case C-148/02, *Garcia Avello v Belgian State* [2003] ECR I-11613; Case C-34/09, *Ruiz Zambrano v Office National de l'Emploi* [2011] ECR I-01177.

<sup>53</sup> Goldsmith Speech (n 50) 8.

<sup>54</sup> Eeckhout (n 2) 990.

<sup>55</sup> De Búrca and Aschenbrenner (n 38) 372.



important in the forging of bonds and the creation of a public, especially in a postnational context, where the constitution does not stem from a cohesive demos with clearly identifiable characteristics.<sup>56</sup> Furthermore, as noted in Chapter 1, a bill of rights like the Charter can take on a constructional role in a transitional constitutional process, because it heightens trust in the new institutional arrangement.<sup>57</sup>

Of course, it is questionable whether the Charter was in fact capable of delivering outcomes such as heightened legitimacy, constitutional identification, or a sense of belonging. Its drafting process has been criticised precisely for a lack of civic participation and, thus, for a lack of representativeness.<sup>58</sup> Furthermore, it has been argued that, rather than indicating a sincere preoccupation with political participation, already at the time of the Constitutional Treaty, the Charter was used as a quick and easy solution to the very complex problem of the Union's democratic deficit.<sup>59</sup> The hope was that it would operate 'as a vaccine for democracy,' without addressing the core problem itself.<sup>60</sup> For this reason, as Baquero Cruz notes:

The Charter, like the ill-fated Constitutional Treaty, is a privileged locus for political and semiotic analysis. Its legal aspects are certainly important, but they are secondary to its mythological content. The Charter is mainly a symbolic, normative and political space in which the tensions and paradoxes of contemporary European integration are deployed.<sup>61</sup>

Indeed, despite the higher hopes of its drafters, in 2005, the Constitutional Treaty was rejected in referenda in France and the Netherlands and the constitutional project was abandoned, at least in the form it had then been envisaged. The failure of the Constitutional Treaty loomed over further negotiations and greatly affected

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<sup>56</sup> See N Walker, 'Postnational Constitutionalism and the Problems of Translation' in M Wind and JHH Weiler (eds), *European Constitutionalism Beyond the State* (CUP 2003) 27.

<sup>57</sup> G Souillac, 'From Global Norms to Local Change: Theoretical Perspectives on the Promotion of Human Rights in Societies in Transition' in SA Horowitz and A Schnabel (eds), *Human rights and societies in transition: causes, consequences, responses* (United Nations University Press 2004) 93.

<sup>58</sup> De Búrca and Aschenbrenner (n 38) 375-376.

<sup>59</sup> J Baquero Cruz, 'What's Left of the Charter? Reflections on Law and Political Mythology' (2008) 15:1 *MJ* 65, 74.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*, 65-66.

the way in which the Lisbon Treaty was drafted, signed and, ultimately, interpreted.

Unlike the Constitution, the Treaty of Lisbon did not represent a constitutional promise, but merely a compromise. The very mandate of the intergovernmental conference that gave rise to this treaty in 2007 was to resolve the stagnation that the rejection of the Constitution two years earlier had created in the EU integration process.<sup>62</sup> It was thus a pragmatic agenda rather than a grand political project. The solution the drafters reached was simple and well-documented in the literature: Lisbon removed most of the symbols attached to the Constitution but kept the realities of further EU integration in place.<sup>63</sup> The Charter was one of the few symbols that were salvaged from the failed constitutional project and indeed acquired binding legal status together with the Treaty's entry into force on 1 December 2009. Still, it is in many ways merely a shadow of its past self. This is not only true technically, insofar as it is now an annex to the Treaties, rather than an integral part thereof, as the Constitutional Treaty would have provided, but also more deeply.

In the aftermath of the Maastricht summit, Deirdre Curtin had persuasively expressed the concern that, while the EU treaty framework had produced some elements of progress in terms of political integration (e.g. by extending the European Parliament's powers and developing the notion of EU citizenship), at heart it still did not amount to more than a Union 'of bits and pieces,' which lacked coherence and an overarching constitutional narrative.<sup>64</sup> This state of affairs persists starkly in the context of the Lisbon treaty, even in the absence of the pillars. Today, the Charter can be seen as a striking exercise in 'rhetoric and grandiloquence'<sup>65</sup> in Europe's sombre political space, which has left the Court hesitant as regards its actual legal value. Even though the Charter still rests 'at the

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<sup>62</sup> Ibid, 73. See also PP Craig, *The Lisbon Treaty: Law Politics, and Treaty Reform* (OUP 2013) 21-23.

<sup>63</sup> Ibid. See also M Dougan, 'The Treaty of Lisbon 2007: Winning Minds, not Hearts' (2008) 45:3 *CML Rev* 617.

<sup>64</sup> D Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) 30:1 *CML Rev* 17, 67.

<sup>65</sup> Baquero Cruz (n 61) 73.

highest possible level of European Union law equal to the Treaties,<sup>66</sup> the grandiose opening of its Preamble, which appeared at home in the Constitution for Europe, now seems to some extent out of place against the background of the dry and formal tone that characterises the biggest part of the Treaty of Lisbon, the Treaty on the Functioning of the European Union. Furthermore, as Dieter Grimm has recently highlighted, the Charter does not have *higher* constitutional status than any of the provisions of the Treaties, including provisions of the TFEU.<sup>67</sup> This renders its role in respect of interpreting other aspects of the Treaty unclear and can result, as the case law shows, in tension in case of conflict between the constitutional order provisions enshrined in the Charter and the market freedoms, which also have constitutional status.<sup>68</sup>

One might wonder, though, in what way this, rather lengthy, discussion of the Charter's fit in the development of fundamental rights in the EU integration process matters for a legal question as specific as horizontal effect. Indeed, one might also wonder whether horizontal effect is worth considering at all, against a background with significant constitutional problems, even from a 'vertical' standpoint. Nonetheless, the Charter's background remains important in the analysis of the responsibilities the Charter creates today, for public and private entities alike. The incorporation of the Charter confirmed precisely that economic interests do not unconditionally prevail over other concerns in the EU public sphere and that the latter is defined by a democratic process in which fundamental rights are duly protected.<sup>69</sup> Furthermore, in light of the fact that the horizontal application of rights in EU law often concerns the interaction of fundamental rights with provisions of the Treaty that mainly pertain to the free market, such as the relationship between the right to strike and the freedom of establishment,<sup>70</sup>

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<sup>66</sup> Kokott J and Sobotta C, 'The Charter of Fundamental Rights of the European Union after Lisbon' (2010) EUI Working Paper 2010/6, <[http://diana-n.iue.it:8080/bitstream/handle/1814/15208/AEL\\_WP\\_2010\\_06.pdf?sequence=3&isAllowed=y](http://diana-n.iue.it:8080/bitstream/handle/1814/15208/AEL_WP_2010_06.pdf?sequence=3&isAllowed=y)> accessed 21 April 2016, 6.

<sup>67</sup> D Grimm, 'The Democratic Costs of Constitutionalisation : The European Case' (2015) 21:4 *ELJ* 460, 469-471. Grimm notes that this is a problem of 'over-constitutionalisation' of EU law.

<sup>68</sup> Ibid. See Case 294/83, *Parti Ecologiste "Les Verts" v Parliament* [1986] ECR 1339, para 23. See further Chapters 3-5.

<sup>69</sup> See P Eleftheriadis, 'Cosmopolitan Law' (2003) 9:2 *ELJ* 241, 260.

<sup>70</sup> Case C-438/05, *The International Transport Workers' Federation and The Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779.

understanding the place of the Charter within the EU legal order is essential in determining how it can be protected horizontally.<sup>71</sup>

Indeed, if properly placed in its historical and political context, the process of creating a Charter of Fundamental Rights in the EU legal order can be seen as an attempt at democratisation and not merely of an instrumental constitutionalisation of the EU.<sup>72</sup> Together with the Lisbon Treaty and following a long and rocky process of successive Treaty revisions, the introduction of a binding Charter signals the evolution of an important aspect of EU constitutional law: that of the overall role of rights in the EU legal order. As the introduction to this thesis already made clear, within the Charter, fundamental rights are presented as civic commitments. The Charter's Preamble states that this instrument creates 'responsibilities and duties with regard to other persons, to the human community and to future generations.'<sup>73</sup> Under the Charter, a discourse about rights is centred on the person, both in their capacity as a self-interested individual engaged in modern forms of survival (e.g. commodity and services exchange within the single market) but also, importantly, as a political actor and part of a community shared with others.

Thus, while the Charter's background may not tell us much about the development of the horizontality doctrine specifically, it sheds light on the functioning of the EU constitutional order. In this context, horizontality can only be assessed through the prism of public law analysis concerned with the role and extent to which private actors impact fundamental rights as (at least tentatively) commonly authored commitments of a postnational process of public deliberation, as highlighted in Chapter 1. There is, therefore, something special about the Charter as a collectivity<sup>74</sup> that serves an institutional role within a process of further integration, even if this did not come about in the manner, or as fully as, it had been envisaged. It is only as a set of provisions gathered together that the Charter adds to the EU constitutional landscape, especially to the extent that, one

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<sup>71</sup> See further Chapter 5.

<sup>72</sup> See PP Craig, 'Constitutions, Constitutionalism, and the European Union' (2001) 7:2 *ELJ* 125, 141-142. See also Eeckhout (n 2).

<sup>73</sup> Charter Preamble, recital 6.

<sup>74</sup> See, generally, G Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP 2012) 144-145.

by one, many of its provisions may have formerly been enshrined in the Court's case law.

The Charter's constitutional fabric means that a casuistic approach to horizontality would be inappropriate in this context, as it would only incompletely represent its political symbolism. Indeed, the more the Charter's background is unpacked, the clearer it becomes that its horizontality concerns structural questions about the role of fundamental rights in the EU constitutional order. To what extent does the EU differentiate between the attribution of horizontal effect to private parties and the obligations of the state and does it recognise a public/private divide at all? To what extent are individuals – the grantees of all Charter rights and the only participants in political deliberation – to be distinguished from other private actors (e.g. corporations) within the EU legal order? Should all private relations be considered as potentially subject to a horizontality formula and, if so, what limits could be drawn to define it? For instance, are we to understand, per Brysk, the 'private authority relationship' as the external normative standard for assessing horizontality?<sup>75</sup> Or is it more appropriate to utilise principles such as dignity as the conceptual foundation of horizontality in the field of fundamental rights, delineating the relevant obligations based on the nature of what is protected rather than the degree of power that the potential obligor might hold?<sup>76</sup> As the remainder of this chapter demonstrates, the focus on formalism that has characterised debates in this field largely overlooks these significant questions.

### **2.3 The current debate about the Charter's horizontality**

In EU case law, fundamental rights have not been defined by the vertical/horizontal distinction. While initially only few Treaty provisions, such as the regulation of competition, were intended to apply to non-state actors,<sup>77</sup> the

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<sup>75</sup> A Brysk, *Human Rights and Private Wrongs: Constructing Global Civil Society* (Routledge 2005) 24. See also for an argument in this regard: D Leczykiewicz, 'Horizontal Application of The Charter of Fundamental Rights' (2013) 38 *ELR* 479, 492-4.

<sup>76</sup> A Clapham, *Human Rights Obligations of Non-state Actors* (OUP 2006) 533-534.

<sup>77</sup> Most illustratively, this was the case in the field of competition law. See Articles 85 and 86 TEC, subsequently Articles 81 and 82 TEC and, currently, Articles 101 and 102 TFEU.

Court quickly expanded the concept of horizontal effect in its case law.<sup>78</sup> By now, some fundamental rights have had a horizontal dimension in the EU for over forty years, with the Court of Justice construing them as entitlements invocable not only against states, but also as between private parties.<sup>79</sup> EU rights derived from primary law have, traditionally, been capable of horizontal application.<sup>80</sup> Since its entry into legally binding force, the Charter has had the status of primary EU law, bearing ‘the same legal value as the Treaties.’<sup>81</sup> In principle, therefore, it must be capable of being invoked horizontally, where a particular provision fulfils the conditions for direct effect.<sup>82</sup> But can these conditions be meaningfully applied in the constitutional context?

The fact that EU law accepted the application of rights, including some of the rights now listed in the Charter, to private parties, also means that the way in which this issue is tackled today has implications for legal certainty and the conceptual coherence of the EU fundamental rights regime. However, while there have been some constitutional debates about the Charter’s horizontality, these have focused mostly on aspects of the Charter’s applicability from a technical perspective (e.g. Article 51 regarding the Charter’s scope of application and a distinction between rights and principles), rather than discussing the overall constitutional salience of horizontal effect in the Charter context. This section engages with these debates and seeks to demonstrate that they are insufficient in conceptualising horizontality in respect of the Charter: they unconvincingly focus on form over substance, whereas both of these elements are necessary components of a discussion of constitutional rights.<sup>83</sup> The text of the Charter itself is unhelpful in determining the question of its horizontal applicability.

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<sup>78</sup> Case 36/74, *Walrave and Koch v Association Union Cycliste Internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* [1974] ECR 1405, para 18.

<sup>79</sup> *Ibid.* *Defrenne* (n 36) para 39.

<sup>80</sup> *Ibid.*

<sup>81</sup> Article 6(1) TEU.

<sup>82</sup> As is well known, these conditions are that the provision in question should be clear, unconditional, sufficiently precise and not requiring further implementing measures. See Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

<sup>83</sup> R Alexy, *A Theory of Constitutional Rights* (tr Julian Rivers, OUP 2002) 350.

### 2.3.1 Article 51 EUCFR

Article 51(1) EUCFR states that the Charter applies to the EU institutions ‘and to the Member States only when they are implementing Union law.’ As this provision makes no mention of private parties, it has been argued that the Charter cannot create any horizontal effects.<sup>84</sup> The crux of this argument is that, since Article 51(1) identifies a specific set of addressees, it would be impossible for the Court to apply it to disputes between private parties without acting contrary to the Charter’s text and therefore beyond the reach of its jurisdiction.<sup>85</sup> To do so would risk extending the scope of EU law via the Charter, contrary to Article 51(2) thereof.<sup>86</sup> These objections to horizontality are nonetheless unconvincing.

First of all, even though the Charter ‘is not literally freestanding’<sup>87</sup> and presupposes ‘some lock on to EU law’<sup>88</sup> in order to apply, an expansive approach in respect of what actually falls within its scope has been favoured in the literature, which has focused on whether a case is materially covered by EU law.<sup>89</sup> Furthermore, while, as Sarmiento points out, difficult dynamics operated within the Court of Justice in respect of the interpretation of the Charter’s scope

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<sup>84</sup> Opinion of Advocate General Trstenjak, delivered on 8 September 2011, in Case C-282/10, *Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, EU:C:2011:559, paras 80-83; In the academic literature, see, *inter alia*, M De Mol, ‘Küçükdeveci: Mangold Revisited – Horizontal Direct Effect of a General Principle of EU Law’ (2010) 6 *EuConst* 302; K Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (2012) 8 *EuConst* 375, footnote 11. Cf C Ladenburger, ‘FIDE Conference 2012 Institutional Report’ (2012) XXV FIDE Congress, Tallinn, 30 May – 2 June 2012, <[http://www.fide2012.eu/index.php?doc\\_id=88](http://www.fide2012.eu/index.php?doc_id=88)> accessed 5 March 2014, 34-35.

<sup>85</sup> *Dominguez* Opinion, *ibid*, paras 80, 128.

<sup>86</sup> *Ibid*. Article 51(2) EUCFR provides: ‘This Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.’

<sup>87</sup> PP Craig, ‘The ECJ and *Ultra Vires* Action: A Conceptual Analysis’ (2011) 48:2 *CML Rev* 395, 434. See also A Rosas, ‘When is the EU Charter of Fundamental Rights Applicable at National Level?’ (2012) 19:4 *Jurisprudence* 1269, 1277-1278; Ladenburger (n 84) 16. S Iglesias Sánchez, ‘The Court and the Charter: The Impact of the Entry Into Force of the Lisbon Treaty on the ECJ’s Approach to Fundamental Rights’ (2012) 49:5 *CML Rev* 1565, 1587.

<sup>88</sup> Craig, *ibid*, 434.

<sup>89</sup> Rosas (n 87) 1277-1278. See also Craig, *Ultra Vires* (n 87) 431-432; T von Danwitz and K Paraschas, ‘A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights’ (2012), 35 *For Int’l L.J* 1396, 1408-09. See, more generally, A Ward, ‘Article 51: Field of Application’ in S Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014). D Sarmiento, ‘Who’s Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe’ (2013) 50:5 *CML Rev* 1267, 1275-1256.

initially,<sup>90</sup> in *Fransson* the Grand Chamber resolved the question in favour of the broader interpretation.<sup>91</sup> It follows logically from that ruling that, to the extent that the Charter applies ‘within the scope of EU law,’ at least certain horizontal situations – a core part of EU law to date – will come within it as well.<sup>92</sup> Indeed, Article 51 does not specifically exclude horizontal effect. On the contrary, not only is such an exclusion absent from the Charter’s text, but horizontality is in fact supported, as I have already mentioned, by clear references to the duties of individuals and the community as a whole in the Charter’s Preamble.<sup>93</sup>

Advocate General Cruz Villalón powerfully expressed this argument in his Opinion in *Association de Médiation Sociale* (‘AMS’). He pointed out that the ‘inference that, since the provisions of that Charter are addressed to the institutions of the Union and to the Member States, they are *not* addressed to individuals,’ was ‘clearly hasty.’<sup>94</sup> He reasoned as follows:

In my view, and without there being any need to undertake an exhaustive interpretation of Article 51(1) of the Charter, it is quite clear that the issue which that provision essentially sought to address was the extent to which the fundamental rights enshrined in the Charter are binding, first, on the institutions of the Union and, secondly, on the Member States. In my opinion there is nothing in the wording of the article or, unless I am mistaken, in the preparatory works or the Explanations relating to the Charter, which suggests that there was any intention, through the language of that article, to address the very complex issue of the effectiveness of fundamental rights in relations between individuals.<sup>95</sup>

Indeed, a strict textual approach finds little support in the Court’s practice regarding the horizontal effect of the Treaties, especially in respect of fundamental rights.<sup>96</sup> In its judgment in *Defrenne*, the Court was unimpressed by

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<sup>90</sup> Sarmiento, *ibid*, 1276. The chamber in *Iida*, for example, seemed to take a narrower view: Case C-40/11, *Iida v Stadt Ulm*, EU:C:2012:691, para 79.

<sup>91</sup> Sarmiento, *ibid*, 1276-1278.

<sup>92</sup> Case C-617/10, *Åklagaren v Åkerberg Fransson*, EU:C:2013:105, para 19.

<sup>93</sup> Charter Preamble, recital 6.

<sup>94</sup> *AMS* Opinion (n 1) paras 29-30.

<sup>95</sup> *Ibid*, para 31.

<sup>96</sup> See by analogy, PP Craig, ‘Directives, Direct Effect, Indirect Effect and the Construction of National Legislation’ (1997) 22 *ELR* 519, 520. The Court has not discussed this issue in its recent case law. However, it has indicated that certain provisions may be capable of being applied horizontally, suggesting that horizontal effect does fall within the Charter’s scope: Case C-176/12, *Association de Médiation Sociale v Union Locale des Syndicats CGT Hichem Laboubi Union Départementale CGT des Bouches-du-Rhône Confédération Générale du Travail (CGT)*, EU:C:2014:2.



arguments focusing on the wording of the provision in question, preferring instead an approach that drew on the spirit of the right to equal pay between men and women and maximised its effectiveness. It held that:

The fact that certain provisions [...] are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down. [...] In fact, since Article 119 is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.<sup>97</sup>

This approach is also relevant in the Charter context. Firstly, the Charter's Explanations expressly take over the fundamental rights case law.<sup>98</sup> Secondly, in light of the settled nature of the doctrine of horizontality in EU law to date, a more explicit exclusion would be required to restrict its application to the Charter.<sup>99</sup> It would be difficult to imagine some of the Charter's provisions which reproduce horizontally effective Treaty rights, such as the right to equal pay itself, now enshrined in Article 23 EUCFR, as being stripped of that feature in respect of the Charter's application alone.<sup>100</sup> As Advocate General Cruz Villalón put it in his Opinion in *AMS*:

Since the horizontal effect of fundamental rights is not unknown to European Union law, it would be paradoxical if the incorporation of the Charter into primary law actually changed that state of affairs for the worse.<sup>101</sup>

Another argument for restricting the horizontal effect of the Charter on the basis of Article 51 was put forward by Advocate General Trstenjak in her Opinion in *Dominguez*. The Advocate General conceded that the horizontality doctrine might need to be maintained in respect of certain provisions of the Charter, such

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<sup>97</sup> *Defrenne* (n 36) paras 31-39; See also Case C-438/05 *The International Transport Workers' Federation & The Finnish Seamen's Union v Viking Line. ABP & Oü Viking Line Eesti* [2007] ECR I-10779, paras 58-59.

<sup>98</sup> Explanations Relating to the Charter of Fundamental Rights [2007] (OJ C 303/17) 17.

<sup>99</sup> *Sarmiento* (n 89) 1277-1278.

<sup>100</sup> This is now confirmed by the Court's judgment in *AMS* (n 96) para 47, which suggests that there are distinctions between different Charter rights in respect of horizontality: some rights and, more specifically, the Charter's non-discrimination provision under Article 21 thereof, may give rise to a horizontal assessment, to the extent that they are 'rights-conferring' See further Chapter 4.

<sup>101</sup> *AMS* Opinion (n 1) paras 34-35.

as equal pay, in order to ensure coherence with prior case law and legal certainty for claimants, as well as to maintain the existing level of protection.<sup>102</sup> She argued that it should not, however, be further extended.<sup>103</sup> To apply it to rights that have not enjoyed horizontal effect in the case law in the past *would* go beyond the Charter's scope of application.<sup>104</sup>

This argument is also unconvincing, though, as it appears to discuss Article 51 EUCFR in isolation from the Charter's substantive protections, many of which do not have a statist focus. Indeed, in addition to the Charter's Preamble, several of the Charter's substantive provisions either directly or implicitly extend to private conduct. Many of the protections enshrined in titles I-IV of the Charter<sup>105</sup> are phrased in a universal manner that guarantees minimum individual rights without specifying that they apply to public authorities only. For example, the rights to human dignity<sup>106</sup> and non-discrimination<sup>107</sup> suggest a wide-ranging application.<sup>108</sup> Aspects of non-discrimination, in particular, have been understood as horizontal entitlements both in the EU and in many of the Member States. Convincing reasons as to why this interpretation should now change in respect of not yet litigated parts of that provision would need to be advanced.<sup>109</sup> Furthermore, the rights to privacy and the protection of private data enshrined respectively in Articles 7 and 8 of the Charter are not restricted to public action.<sup>110</sup> Last but not least, provisions such as the protection of human integrity,<sup>111</sup> the prohibition of slavery and forced labour,<sup>112</sup> the rights of the child,<sup>113</sup> and the rights that relate to the employment sphere, such as employee representation and rights

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<sup>102</sup> *Dominguez* Opinion (n 84) paras 128-135.

<sup>103</sup> *Ibid.*

<sup>104</sup> *Ibid.*

<sup>105</sup> These are respectively entitled: Dignity, Freedoms, Equality, and Solidarity.

<sup>106</sup> Article 1 EUCFR.

<sup>107</sup> Article 21 EUCFR.

<sup>108</sup> Explanations (n 98) 17 (regarding Article 1 EUCFR), 24 (regarding Article 21 EUCFR).

<sup>109</sup> In line with Artles 52(3-4) and 53 EUCFR.

<sup>110</sup> As already discussed in Chapter 1, these provisions do in fact create obligations for private parties in certain circumstances, in conjunction with secondary legislation: See Case C-131/12, *Google Spain, SL, Google Inc v Agencia Espanola de Proteccion de Datos*, EU:C:2014:317.

<sup>111</sup> Article 3 EUCFR and, particularly, Article 3(2) EUCFR concerning the fields of medicine and biology.

<sup>112</sup> Article 5 EUCFR. The Explanations (n 98) 18-19, confirm that Article 5 was intended to regulate private as well as public conduct, most notably in the field of human trafficking.

<sup>113</sup> Article 24 EUCFR and, particularly, Article 24(2).

at work,<sup>114</sup> expressly include the actions of private parties in their text in addition to the obligations they may create for Member States and Union institutions. For instance, in its extensive protection of the rights of the child, Article 24 EUCFR provides that ‘in all actions relating to children, *whether taken by public authorities or private institutions*, the child’s best interests must be a primary consideration.’<sup>115</sup>

It follows that a degree of horizontality is clear from a plain reading of the Charter. Whereas the latter does not stipulate a particular way of applying rights horizontally, it creates rights that affect, at least to some extent, the legal relations between private parties in the Union. Thus, when considered in the light of other Charter provisions, the Charter’s context and its Preamble, Article 51 EUCFR does not seem to affect fundamentally the question of the Charter’s horizontality. Rather, as the above discussion has sought to demonstrate, it is clear that a horizontal *conception* of at least some rights is envisaged within the Charter.

Of course, as Chapter 1 has already highlighted, it is one thing to assume horizontality as a matter of principle and quite another to determine what *kind* of horizontality is appropriate to give effect to the Charter (i.e. direct, indirect or state-mediated effect). However, the potential for horizontal effect should remain conceptually distinct from an argument that all provisions of the Charter should produce horizontal effects at all times, or that they should do so directly. The latter discussion (that is *how*, rather than *if*) the Charter should be horizontally applied, raises complex issues in this field that will need to be unpacked further in subsequent chapters. As Advocate General Cruz Villalón has put it, the problem with horizontality:

Is not so much the idea itself, or the concept or representation of it in our constitutional culture, which it would be difficult to challenge. The problem is the proper understanding of its effectiveness in concrete terms,

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<sup>114</sup> Articles 27-28 and 30-33 EUCFR, respectively. Despite the fact that these rights address employers directly, in the aftermath of the *AMS* judgment, it is disputable whether the provisions that make reference to national laws and practices or indeed any of the Solidarity provisions at all, can be applied horizontally. See *AMS* (n 96) para 49.

<sup>115</sup> Article 24(2) EUCFR (emphasis added). It is noteworthy that Article 3(1) of the UN Convention on the Rights of the Child states: ‘In all actions concerning children, whether undertaken by *public or private social welfare institutions*, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration’ (my emphasis). It thus only mentions private social welfare institutions. The Charter seems to go beyond this formulation.

a problem which is growing at a time when that effectiveness is, almost by necessity, protean, in the sense that it adopts very varied forms.<sup>116</sup>

The manner in which the Charter should enter private relations is an issue that requires an assessment both of how a fundamental right can be most effectively rendered and what the role of the supranational fundamental rights standard is in the EU.<sup>117</sup> In this regard, though, Article 51 EUCFR has limited interpretative value. Rather, to quote once again Advocate General Cruz Villalón, ‘an interpreter of the Charter is faced with the same, often uncertain, prospect that an interpreter of the Constitutions of the Member States generally faces.’<sup>118</sup> A dynamic interpretation looking beyond Article 51 is required in order to analyse the question of the Charter’s horizontality meaningfully.

### ***2.3.2 The Charter’s drafting intricacies and the distinction between rights and principles***

The Charter’s authors have often been criticised for bad drafting, which fails to make the case for legal certainty.<sup>119</sup> While it was instituted as an instrument intended to emphasise existing rights, the Charter actually appears to introduce a number of constitutional novelties, but leaves most of the questions regarding its application, including its operation in private disputes, open to judicial interpretation. Importantly, at first glance, the Charter places all of its provisions on the rank of fundamental rights and seemingly grants them equal legal validity.<sup>120</sup> However, to assume that all Charter provisions give rise to the same degree of justiciability and, as such, to horizontal obligations enforceable in courts, could be misleading. Several legal distinctions are in fact made amongst the Charter’s provisions, despite their overarching ‘fundamental’ designation. These distinctions require that the Court interpret the Charter’s content and assess the meaning of its protections by actually looking at how private parties can affect their operation.

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<sup>116</sup> *AMS Opinion* (n 1) para 36.

<sup>117</sup> Rather than, for example, national standards of rights protection. See Chapters 6 and 7, respectively, for a more thorough discussion of these issues.

<sup>118</sup> *AMS Opinion* (n 1) para 33.

<sup>119</sup> T Tridimas, *The General Principles of EU Law* (2<sup>nd</sup> edn, OUP 2006) 354.

<sup>120</sup> See Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* [2008] ECR I-271, paras 63-64.

One of the main issues that arise in the interpretation of the Charter's horizontality is a differentiation between rights and principles,<sup>121</sup> which may influence the justiciability of certain provisions and, hence, the question of whether and in what manner they are applied horizontally. According to Article 51(1) EUCFR, Member States and Union institutions shall 'respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.' Thus, while the Member States and EU institutions appear to have duties to promote both rights and principles, the distinction is important insofar as the former must be 'respected,' whereas the latter shall only be 'observed.' The distinction is outlined in more detail in Article 52(5) EUCFR, which provides:

The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.<sup>122</sup>

The substantive difference between rights and principles may not be immediately apparent from Article 52, which sheds little light on its meaning.

Some commentators have taken a conservative stance, suggesting that principles are of a merely aspirational character: they were enacted in the hope that they may, eventually, reach the level of rights properly so called, but do not yet have that status.<sup>123</sup> The distinction was indeed linked to controversies that arose during the Charter's drafting process, in respect of social and welfare rights.<sup>124</sup> Labelling many of the provisions falling under the Solidarity Chapter as 'principles' was considered the best way of seeing to their incorporation in the Charter without creating justiciable standards that would be a cause for concern in some Member States.<sup>125</sup> According to the Charter's Explanations, though, the distinction simply means that principles require observance, but they do not 'give

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<sup>121</sup> See Article 52(5) EUCFR. The term 'principle' in relation to Charter provisions is not to be confused with the general principles of EU law.

<sup>122</sup> Article 52(5) EUCFR.

<sup>123</sup> Goldsmith (n 49) 1212-1213.

<sup>124</sup> This is also evidenced in the creation of Protocol 30 on the application of the Charter in respect of the UK and Poland.

<sup>125</sup> Particularly the UK: Goldsmith (n 49) 1212-1213.

rise to direct claims for positive action.<sup>126</sup> They are provisions that the EU and its Member States must ‘recognise and respect,’ whereas rights must be ‘actively ensured.’<sup>127</sup>

There are important drawbacks to interpreting the rights/principles distinction strictly. Some articles are unclear as to whether they introduce a right or a principle, while others may contain elements of both, such as Article 23 EUCFR on equality between men and women, Article 33 EUCFR on family and professional life, and Article 34 EUCFR on social security.<sup>128</sup> The wording of a particular provision is not indicative of its classification.<sup>129</sup> Where the line between rights and principles is drawn is particularly unclear in the Charter and the list of examples provided in the Explanations fails to shed light on the distinction in question. Indeed, the Explanations mention only Articles 25 (integration of persons with disabilities), 26 (provision of healthcare) and 37 (environmental protection) as examples of principles. They do not discuss the status of the most controversial provisions of the Charter, such as rights to collective action (e.g. Article 28 EUCFR) and consultation within the undertaking (Article 27), which had caused the main disagreements during the drafting process.<sup>130</sup> As these rights apply in the sphere of employment, there are compelling arguments to apply them not only to public but also to private employers. To allow principles to fall outwith justiciability altogether would seriously challenge their effective application and their normatively equal status to other provisions.<sup>131</sup>

In light of the lack of certainty that surrounds these provisions, it is necessary to consider horizontality, as Chapter 1 suggested, as a tiered principle for the application of fundamental rights, rather than confining it to the question

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<sup>126</sup> Explanations (n 98) 35. Of course, it must be noted that while the Charter’s Explanations have an important interpretative role they do not bind the Court as to the relevant interpretation of the Charter’s provisions.

<sup>127</sup> B Hepple, *Rights At Work: Global, European And British Perspectives* (Sweet & Maxwell 2005) 35; See also H Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press 1996) 52.

<sup>128</sup> Ibid.

<sup>129</sup> For example, Article 25 on the rights of the elderly, is considered a principle under the Explanations but is actually phrased as a right: Explanations (n 98) 35.

<sup>130</sup> Goldsmith (n 49) 1212-1213.

<sup>131</sup> See Hepple (n 127).

of whether a particular provision can be invoked directly. Thus, even if the Court interpreted the distinction between rights and principles strictly, this should not be taken to mean that principles have no role to play in constitutional adjudication. Ultimately, the incorporation of principles in the binding Charter does, as Article 52(5) makes clear, create some obligations. It therefore does not negate the question of horizontal applicability altogether. It may only affect some of its specific manifestations, and most notably that of direct effect. By contrast, it would not necessarily address the question of indirect horizontality, i.e. the development of non-constitutional law compatibly with fundamental rights.

It follows that the question of whether *any* form of horizontal effect is required concerns all of the Charter's provisions, irrespective of whether they are designated as rights or as principles. Even though the distinction between different types of provisions in the Charter is becoming central to the application of horizontality post-Lisbon,<sup>132</sup> it does not actually address horizontality as a principle in the supranational constitutional interpretation of fundamental rights, but only some of its specific parameters.

#### **2.4 Conclusion: The horizontal effect of the Charter from a constitutional perspective**

Neither the preoccupation with Article 51 EUCFR nor the question of whether a provision of the Charter introduces a right or a principle go to the heart of the constitutional dimension of horizontality, which depends on both formal/legal and political/directional considerations. These debates are overly focused on technical analyses, which seem to overlook the main constitutional issue at stake. In particular, a formalistic discussion of horizontality concerned with the Charter's general provisions leaves unanswered the questions of when and how the Charter's provisions can be applied effectively, as a set of common constitutional commitments defining the conditions of interaction between different actors in the European Union.

The Charter applies not only to EU institutions but also within the Member States and concerns them not merely as signatories of an international

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<sup>132</sup> See further Chapter 4 and, particularly, the distinction between rights-conferring and non-rights-conferring provisions, which is being developed in the Court's current case law.

treaty, but also as providers of welfare and the primary *loci* of political will formation. When discussing the Charter's horizontal applicability, questions arise regarding the extent to which the EU can and should regulate at the supranational level public-order questions previously addressed through national constitutional law when these concern private parties, and even to alter deeply felt constitutional traditions regarding horizontality insofar as EU law applies.<sup>133</sup> Thus, horizontality is not just about interpreting the Charter's provisions independently, but also about understanding the context in which they were introduced and the nature of the EU constitutional space, which is characterised by a diffused public sphere that includes both national and supranational issues.<sup>134</sup>

The application of the Charter can, therefore, be distinguished, at least at the level of justification, from the application of individual rights within EU law to date, which mostly attached these claims to the exercise – albeit in some cases very loosely<sup>135</sup> – of market freedoms.<sup>136</sup> Whereas in the past individual rights were largely a *product* of other EU action, the Charter represents a substantial change in this field. It defines a set of rights that must be met in order for *any* activity to be compliant with the basic premises on which the EU is founded. Even though the Charter may not extend the situations in which the EU can act, it adds a constitutional layer to the way in which it can act, that its members have an active role in preserving. It thus displays organisational characteristics radiating across the EU legal system.<sup>137</sup>

Under the Charter, the horizontality question is interwoven with the way in which the public/private divide is understood within the EU, insofar as public life can no longer be associated merely with the state but, rather, includes multiple forms of organisation within civil society. It therefore requires an explicit

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<sup>133</sup> Such as the *Drittwirkung* principle under German law. See further Chapter 1.

<sup>134</sup> The nature of the EU public sphere is further discussed in Chapters 5 and 6.

<sup>135</sup> See, illustratively, *Baumbast* (n 52); *Zhu and Chen* (n 52); *Zambrano* (n 52).

<sup>136</sup> The Court has interpreted the Charter's scope of application broadly, thus ensuring its application in all matters pertaining to EU law: See *Fransson* (n 92) para 19; Case C-650/13, *Delvigne v Commune de Lesparre-Médoc* ECLI:EU:C:2015:648.

<sup>137</sup> It is important to note that the special nature of fundamental rights as constitutional rights may not always be self-evident, especially in legal orders which do not have a codified constitution, such as the UK. By contrast, in the EU, the danger is one of over-constitutionalisation, meaning that, in theory, many rights that enjoy a constitutional label do not necessarily display the organisational characteristics that define fundamental constitutional rights. This problem is discussed further in Chapter 1.



assessment of how private autonomy, which includes essential tenets of the free market, such as the freedom to contract, to move freely and to run a company, should interact with public autonomy, in the sense of the ability equally to participate in public life. In other words, a constitutional order question relating to the Charter as a whole precedes any legal assessment of whether a *particular* provision thereof can or should, on a particular instance, bind private parties.

The unclear state in which questions of scope under Article 51, the indivisibility of the Charter's provisions, and the distinction between rights and principles, are left in the Charter and its Explanations renders horizontal effect a particularly terse subject. As Chapters 3 and 4 demonstrate in more detail, the lack of clarity about these issues becomes very problematic if we seek to understand the horizontal effect of the Charter in the context of the horizontality doctrine in EU law more broadly and, especially, the horizontal effect of directives. It is therefore important to delve more deeply into the way in which horizontal effect has been applied in the past to the fundamental rights now enshrined in the Charter, both in order to unpack the reasons for the Court's hesitation in addressing horizontal effect, as well as to survey suitable alternatives. As we will go on to discuss in the following pages, if the horizontal effect of fundamental rights is understood within the constitutional parameters of the Charter, it entails, as Menéndez puts it,

Taking very seriously both the *substance* of fundamental rights (and not merely their structure, as the [Court] tends to do) and the *power relationships* which rights aim at reshaping and reframing. This is so because the doctrine of horizontal effect is the answer not to a formal, but to a normative question: the extent and depth of the *emancipatory potential* of fundamental rights.<sup>138</sup>

Through the following chapters, I hope to demonstrate that an assessment of horizontality in the Charter context needs to move beyond the existing horizontal effect doctrine, which has privileged certain types of claims (those impinging on

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<sup>138</sup> AJ Menéndez, 'In this issue' (2015) 21:5 *ELJ* 569, 571 (emphasis original).

the vindication of individual interests) but marginalised questions relating to the public sphere.<sup>139</sup>

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<sup>139</sup> The Court has indeed never used the terms ‘public sphere’ or ‘common life’ in its rulings. The term ‘public life’ was first used in the judgment in *Google*. As I will go on to show in Chapter 5, though, the Court’s assessment of this concept remained superficial.

### 3 From *Defrenne* to the Charter: Understanding the EU Horizontality Heritage

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#### 3.1 Introduction

By now, it will have become clear to the reader that in this thesis horizontal effect is considered as a means of effectively applying fundamental rights within the EU as a political community that depends on them as legitimating conditions, and not merely as a doctrinal tool in the application of EU law.<sup>1</sup> However, it is primarily in the latter sense that horizontal effect has been integrated into the EU legal order to date. A reconstruction of the case law is required in order to assess the suitability of the existing horizontality doctrine in the Charter context.<sup>2</sup> This chapter analyses the horizontality doctrine within the Court's pre-Lisbon case law and assesses its main dynamics.

As discussed in Chapter 1, while there is no unitary definition of horizontal effect,<sup>3</sup> three levels of horizontality can generally be identified: direct effect, indirect effect and state-mediated effect.<sup>4</sup> Unlike most other legal orders, the EU can be seen as incorporating, in some form, all three of these dimensions of horizontality, at least at first glance. However, upon closer examination of the case law, it quickly becomes clear that the horizontality doctrine in fact entails fundamental misunderstandings about the relevance of its different dimensions in practice. Indeed, despite in principle offering recourse to each of its manifestations, EU law to date has largely failed to reflect the different role that these play in constitutional adjudication.<sup>5</sup>

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<sup>1</sup> See K Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (2007) 44:6 *CML Rev* 1625, 1625-1626.

<sup>2</sup> This is so, especially to the extent that the Charter's explanations take over the Court's prior fundamental rights case law: See Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/17.

<sup>3</sup> See M De Mol, 'The Novel Approach of the CJEU on the Horizontal Direct Effect of the EU Principle of Non-Discrimination: (Unbridled) Expansionism of EU Law?' (2011) 18(1-2) *MJ* 108, 110.

<sup>4</sup> The features of each of these are discussed further in Chapter 1.

<sup>5</sup> R Alexy, *A Theory of Constitutional Rights* (tr J Rivers, OUP 2002) 355-356. See further Chapter 1.

For a long time, the horizontal effect narrative in the case law has been dominated by a stark discrepancy between the horizontal application of rights enshrined in directives and those enshrined in Treaty articles. It is trite EU law that, while Treaty-based rights could enjoy direct effect,<sup>6</sup> ‘a directive may not of itself impose obligations on an individual and [cannot] be relied upon as such against such a person.’<sup>7</sup> Thus, even though a number of fundamental rights such as the freedom from discrimination, the right to strike or the rights to private life and data protection have featured in horizontal situations, they have often been applied inconsistently over the years.<sup>8</sup> Additionally, different fundamental rights have been protected to vastly different degrees.<sup>9</sup>

As the following pages will demonstrate, the EU horizontality tradition overall lacks constitutional coherence. Whereas this may have been understandable against the background of the initial Treaty framework, the horizontality case law has not developed over the years, as the EU Treaties did, in a constitutional direction. Instead, it has remained rooted in formalistic, *ad hoc* distinctions between different sources of EU law, which have substantively revealed very little in terms of the role of private responsibility for violations of fundamental constitutional rights. The chapter firstly retraces the idea of horizontality back to the Court’s seminal rulings in *Van Gend en Loos* and *Defrenne* (Section 3.2). It then discusses the developments that marked the case

<sup>6</sup> Case 43/75, *Defrenne v Sabena* [1976] ECR 455, para 39.

<sup>7</sup> Case C-271/91, *Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECR 723, para 48.

<sup>8</sup> See, most illustratively: *Defrenne* (n 6); Case 157/86, *Murphy and Others v Bord Telecom Eireann* [1988] ECR 673; Case C-177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum Voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941; Case C-32/93, *Carole Louise Webb v EMO Air Cargo (UK) Ltd* [1994] ECR I-03567; Case C-394/96, *Brown v Rentokil Ltd* [1998] ECR I-04185; Case C-438/99, *Jimenez Melgar v Ayuntamiento De Los Barrios* [2001] ECR I-06915; Case C-109/00, *Busch v Klinikum Neustadt* [2003] ECR I-020341; Case C-109/00, *Tele Danmark A/S v Handels-Og Kontorfunktionærernes Forbund I Danmark (HK) Acting on Behalf of Brandt-Nielsen* [2001] ECR I-06693; Cf Case C-438/05, *The International Transport Workers’ Federation and The Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779 and Case C-341/05, *Laval Un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets Avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767.

<sup>9</sup> See respectively *Defrenne* (n 6); Case C-438/05, *The International Transport Workers’ Federation and The Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779 and Case C-341/05, *Laval Un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets Avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767; Case C-131/12, *Google Spain, SL, Google Inc v Agencia Espanola de Proteccion de Datos*, EU:C:2014:317.

law through the years and, particularly, the introduction of the exception to the horizontal direct effect of directives – a distinction that has been inconsistently applied in the field of fundamental rights (Section 3.3). Ultimately, it will be argued that this line of case law sets out a false starting point for conceptualising horizontality: while it may be possible to understand it in the pre-Charter, uncodified context of fundamental rights protection in the EU, the vision of horizontality it presents fails to provide answers to the question of why it remains necessary as a constitutional principle within a supranational order.

### **3.2 Vertical and horizontal individual rights as means of advancing integration within the common market**

As Chapter 2 has already discussed, initially, EU law was primarily preoccupied with obstacles to the free market, showing a rather superficial concern for substantive fundamental rights questions.<sup>10</sup> This did not mean that the Court was unconcerned with questions of justice, welfare and living standards, or social progress more generally. On the contrary, in the post-WW2 context, functional integration through the market was considered the most effective way of serving these goals, in the aftermath of a series of failed attempts to establish such standards through political means.<sup>11</sup> Rather than serving merely the particularistic interests of market participants, during the early development of EU law in the late 1960s and 70s, a narrative of market integration was seen as a tool for democratisation and development.<sup>12</sup> An instrumental understanding of the law as a means of removing market obstacles consequently became prominent.<sup>13</sup> This history in turn shaped the horizontal application of individual rights in the early stages of development of the EU legal order.<sup>14</sup>

By setting out the doctrines of direct effect and supremacy, the Court became engaged in a novel form of constitutionalisation of the EU,<sup>15</sup> which was

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<sup>10</sup> J Coppel and A O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 29:4 *CML Rev* 669, 669–70.

<sup>11</sup> See P Pescatore, *The Law of Integration* (Sijthoff 1974) 3.

<sup>12</sup> Ibid. See also J Baquero Cruz, 'What's Left of the Charter? Reflections on Law and Political Mythology' (2008) 15:1 *MJ* 65, 75.

<sup>13</sup> Ibid.

<sup>14</sup> See JHH Weiler, 'The Transformation of Europe' 100:1 *Yale LJ* 2403.

<sup>15</sup> D Grimm, 'The Democratic Costs of Constitutionalisation: The European Case' (2015) 21:4 *ELJ* 460, 465; See also Weiler, *ibid.*

driven by *effet utile* and a legal, rather than political, approach to market building.<sup>16</sup> Starting with *Van Gend en Loos* and *Defrenne*, the Court put forth an effectiveness-oriented approach to the application of EU law, which was highly compatible with horizontality. However, especially in the absence of a codified list of fundamental rights, horizontal effect did not (until relatively recently)<sup>17</sup> offer responses tailored to the protection of fundamental rights.

### 3.2.1 A horizontal conception of rights: *Van Gend en Loos* and *Defrenne II*

In its seminal ruling in *Van Gend en Loos*, the Court of Justice famously held that ‘the Community constitutes a new legal order [...] the subjects of which comprise not only Member States, but also their nationals.’<sup>18</sup> Of course, in reaching this finding, the Court initially only meant that private parties could directly invoke the rights contained in the EU Treaties against the Member States. At a time when regulatory control of the market was still limited, the granting of rights to individuals was, as the Court put it, a means of enhancing ‘vigilance’ over the Treaties: private actors, such as companies seeking to sell their goods in other EU Member States and individuals seeking to work abroad, could be counted on to seek the enforcement of EU law when Member States failed to provide them with the freedom to do so.<sup>19</sup>

The rationale for the granting of rights was therefore clear: most EU rules restricted the regulatory powers of states in respect of the free market, imposing common standards across the EU. Private claimants with an interest in having these standards observed made up an ingenious and particularly effective tool for the application of EU law within the legal orders of the Member States, complementing the European Commission’s task of enforcing it. Whenever EU rules furthered private interests within the market, the interest-holders would be keen to assert them against non-complying states, both before national courts and before the Court of Justice.

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<sup>16</sup> See F De Witte, ‘The Architecture of a Social Market Economy’ (2015) LSE Law, Society and Economy Working Paper 13/2015, <<http://ssrn.com/abstract=2613907>> accessed 28 March 2016, 6. See also, more generally, A Stone Sweet, *The Judicial Construction Of Europe* (OUP 2004).

<sup>17</sup> Case C-144/04, *Mangold v Helm* [2005] ECR I-9981.

<sup>18</sup> Case 26/62, *Van Gend En Loos v Nederlandse Administratie Der Belastingen* [1963] ECR1.

<sup>19</sup> *Ibid.*

It soon became evident, however, that the protection of EU law against the Member States would not be a sufficient means of ensuring its effective application if private actors, the very driving force of the EU single market, remained free to breach them. Several regulatory powers were increasingly devolving from the Member States to non-state entities.<sup>20</sup> Additionally, certain key Treaty rules, particularly relating to discrimination – initially on grounds such as nationality and gender – had strong roots in the public and private employment sectors alike. Since, from the perspective of free movement and commodity exchange, it is irrelevant whether rules are broken by public or private market participants, EU integration could be stalled if private parties could simply ignore EU law.<sup>21</sup> It is thus unsurprising that horizontality quickly became a crucial part of the EU rights-granting framework.

The EU horizontality doctrine can be traced back to the early 1970s and, more specifically, the *Walrave* case. *Walrave* concerned two pacemakers in cycling tournaments, Mr Walrave and Mr Koch, who had been excluded from a series of tournaments due to their nationality. The Court found that rules imposed by sporting associations excluding nationals of other EU Member States from participating in cycling tournaments were incompatible with the Treaty.<sup>22</sup> The discriminatory rules imposed by the private sporting associations gave rise to a violation of the ‘individual rights which national courts must protect.’<sup>23</sup> This was so, irrespective of whether these associations were publicly or privately constituted, as the application of EU law would otherwise be compromised.<sup>24</sup>

The Court thus further developed the rationale it had employed in *Van Gend en Loos* and applied it to the actions of private parties. Already in that judgment, it had used a telling pairing: that of rights and duties.<sup>25</sup> Having founded the enforcement of EU law against Member States upon a wide-ranging culture of

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<sup>20</sup> See W Streeck, ‘Citizens as Customers: Considerations on the New Politics of Consumption’ (2012) 76 *New Left Rev* 27.

<sup>21</sup> See O Odudu ‘The Public/Private Distinction in EU Internal Market Law’ (2010) 46 *Revue trimestrielle de droit européen* 826; Case 36/74, *Walrave and Koch v Association Union Cycliste Internationale, Koninklijke Nederlandsche Wielreveren Unie and Federación Española Ciclismo* [1974] ECR 1405, para 18.

<sup>22</sup> *Walrave*, *ibid*, paras 28, 33-34.

<sup>23</sup> *Ibid*, para 34.

<sup>24</sup> *Ibid*, paras 18-21.

<sup>25</sup> *Van Gend en Loos* (n 18).

directly effective rights, which formed part of the ‘legal heritage’ of EU citizens, the Court was eager to also recognise a corresponding set of obligations.<sup>26</sup> Horizontal effect was therefore incorporated early on in the EU fundamental rights regime, assuming an important role in the application of a highly litigated set of EU rights: those arising mainly in the field of employment and, particularly, contracts and pensions.<sup>27</sup> Furthermore, at a time when the free market was not yet fully established, horizontal effect ensured that EU law was effectively applied and uniformly interpreted across a growing number of countries operating on the basis of different legal systems, each having its own rules regarding the application of supranational rights in private relations.<sup>28</sup>

The Court articulated its reasoning in respect of horizontal effect in the fundamental rights context in clearer and more wide-ranging terms in *Defrenne II*, which concerned the right to equal pay for men and women. It is well worth recalling the background of this case in more detail, as we will return to it repeatedly. Ms Defrenne was working as an airhostess for a Belgian airline, the now-defunct SABENA,<sup>29</sup> when she found out that she was being paid less for the work she did than her male counterparts. She sued the company, asking for compensation and for a recalculation of her pension entitlement. It was not disputed that Ms Defrenne actually carried out the same work as and had equivalent formal qualifications to her male colleagues. However, her claim failed twice before Belgian courts, as she was not automatically entitled to a remedy upon proving that discrimination had occurred. She was only entitled to a bare right to institute proceedings against her employer under Article 14 of Royal Decree No 40 of 24 October 1967 on the employment of women. At final instance, she resorted to EU law, arguing that she was entitled to equal pay under

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<sup>26</sup> Ibid.

<sup>27</sup> N Ferreira, ‘The Horizontal Effect of Fundamental Rights and Freedoms in European Union Law’ in G Brüggemeier and others (eds), *Fundamental Rights and Private Law in the European Union*, Vol I (CUP 2010) 16-17.

<sup>28</sup> Ibid. The Court’s reasoning in respect of the effective and uniform application of EU law is most clearly evident in see *Walrave* (n 21) para 18 and Case C-415/93 *Union Royale Belge des Sociétés de Football Association and Others v Bosman and Others* [1995] ECR I-4921, para 83. Case C-281/98, *Angonese v Cassa Di Risparmio Di Bolzano SpA* [2000] ECR I-4139, para 33.

<sup>29</sup> Sabena was in fact, the national airline of Belgium and, at the time the case was litigated, the Belgian government was its principal shareholder. Nonetheless, it acted as a private employer for labour law purposes and the claim was not disputed before the CJEU.



Article 119 of the (then) EC Treaty.<sup>30</sup> The Belgian court referred two questions to the CJEU regarding the direct effect of EU law. Crucially, the first of these questions asked whether or not a provision of primary EU law, such as the right to equal pay between men and women, could determine the outcome of a legal dispute between private parties at the national level, regardless of what the national legislation applying thereto actually provided.

The CJEU replied in the affirmative. Firstly, it dismissed the textual argument that a Treaty rule *formally* addressed to the Member States necessarily needed to remain reserved to claims against states only.<sup>31</sup> It then held that, in applying the principle of equal pay, courts would unavoidably need to invalidate agreements concluded privately.<sup>32</sup> Finally, it famously noted:

Since Article 119 is mandatory in nature, the prohibition on discrimination between men and women applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.<sup>33</sup>

It is clear even from a superficial reading of the judgment that the Court was advocating a wide-ranging application of horizontality and that it reached its decision based on outcome (the application of an individual right that it considered ‘mandatory’), rather than form. This is evident from its reasoning, which does not merely discuss direct effect: rather, both direct and indirect manifestations of horizontal effect can be deduced from the judgment. A private employer was required to observe the fundamental right to non-discrimination under EU law directly, irrespective of whether the obligation had been transposed into national law or not.<sup>34</sup> At the same time, the courts would have to interpret the national law in the light of the provisions of the Treaty based on the principle of equal pay.

Indeed, *Defrenne* is particularly noteworthy, because it highlights most clearly the Court’s willingness, at that early stage, to complement its market

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<sup>30</sup> Now Article 157 TFEU.

<sup>31</sup> *Defrenne* (n 6) paras 30–31.

<sup>32</sup> *Ibid*, para 38.

<sup>33</sup> *Ibid*, para 39.

<sup>34</sup> Although it must be noted that, in light of the potentially wide-ranging effect of the judgment, its temporal effect was limited.

reasoning with considerations pertaining to the role of gender equality in the establishment of a broader social order. On the one hand, the Court did suggest that Member States which had implemented the principle of equal pay and, by extension, private employers within those states, suffered a ‘competitive disadvantage’ within the free market vis-à-vis those that had not.<sup>35</sup> It then went further, though, noting that the right to equal pay:

Forms part of the social objectives of the Community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of [its] peoples, as is emphasized by the Preamble to the Treaty [...] This double aim, which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the Community.<sup>36</sup>

Further case law built on this finding. For instance, in *Angonese*, the Court found that a requirement set by a bank in Bolzano that applicants should produce a certificate of bilingualism in Italian and German (which could only be issued in the province of Bolzano) was disproportionate to the aim of assessing the equivalence of qualifications.<sup>37</sup> This was not only the case because the requirement of a certificate gave an undue advantage to Bolzano residents and therefore posed an obstacle to the free market. The primary reason for the ruling was that the right not to suffer discrimination was considered to form one of the bases of the EU labour market, such that its breach had a structural dimension that needed to be observed by public and private entities alike.<sup>38</sup> This line of case law was therefore crucial both in promoting the effectiveness (*effet utile*) and uniformity of Union law, but also in improving the lives of the individuals who invoked it, such as Ms Defrenne or Mr Angonese, by affirming their fundamental rights and recognising their significance.<sup>39</sup>

Nevertheless, the claims encountered in these cases were generally uncontroversial both from a market angle and from a fundamental rights angle. Cases of gender or nationality-based discrimination clearly contravened the

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<sup>35</sup> *Defrenne* (n 6) para 9.

<sup>36</sup> *Ibid*, para 12.

<sup>37</sup> *Angonese* (n 28) para 44.

<sup>38</sup> *Ibid*, paras 35ff.

<sup>39</sup> *Brügge-meier* (n 28) 33-34.

Treaty and benefitted neither the free market nor the affected individuals, who additionally found themselves in positions of relative powerlessness compared to the actors on whom the fundamental rights obligation had been imposed (corporate employers). At the same time, particularly in the case of gender discrimination in the 1970s, the imposition of horizontal obligations was addressing an important market obstacle for those Member States, especially France, which had implemented the principle of equal pay and would therefore be in a disadvantageous position compared to the Member States that were underpaying women.<sup>40</sup>

As such, horizontality in this context was addressing not only a fundamental rights issue, but also a specific distortion in the functioning of the internal market.<sup>41</sup> Indeed, it is perhaps for this reason that, while *Defrenne* and its progeny provided a solid starting point for conceptualising horizontal effect as part of a free and fair EU market, these cases did not in fact engage with the potential problems that horizontal effect could create in respect of balancing with other rights, or with the potential conflicts that the double purpose of the EU, ‘at once economic and social,’ was bound to eventually give rise to. These problems soon arose in the context of the direct horizontal effect of directives and in cases concerning the tension between labour rights and market freedoms. Over the years, a deficiency of this early case law started to become more evident: the constitutional dimension of the Court’s reasoning in *Defrenne* consisted more in the designation of the right to equal pay as a Treaty obligation and less in an assessment of its content and functions – in other words, its substantive fundamentality.<sup>42</sup>

### **3.2.2 The lack of direct horizontal effect of directives**

Since *Defrenne*, direct and indirect horizontal effect have both been reaffirmed on multiple occasions in the Court’s case law.<sup>43</sup> However, a distinction between them

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<sup>40</sup> De Witte (n 16) 8.

<sup>41</sup> Ibid. See also C Barnard, *EU Employment Law* (OUP 2012) 6.

<sup>42</sup> See R Alexy, *A Theory of Constitutional Rights* (tr J Rivers, OUP 2002) 350.

<sup>43</sup> However, it is worth pointing out that direct horizontal effect has been far more common in the field of EU fundamental rights than indirect effect: Brügge-meier (n 28) 116 - Annex B. They find that, until 2006, out of 65 horizontal effect cases, 40 produced direct effect while only 25 produced indirect effects. Of course, this finding needs to be considered with some caution as, in view of the

in fact acquired central significance over the years. Subsequent case law did not display the concern for fundamental rights, the improvement of living standards and the distilment of a common good (a social market economy in which equality was guaranteed) that characterised the *Defrenne* judgment. Instead, it focused almost exclusively on the creation of limitations to the application of direct horizontal effect.

The *Marshall* case brought to the fore one of the policy questions that would create problems for the Court: discrimination on grounds of gender in respect of retirement age – a question not directly addressed in the Treaty, but only covered by secondary legislation. The case concerned the dismissal of a woman who had passed the ordinary retirement age in the United Kingdom, at which point social security contributions became payable. The retirement age for women was 60 years, while for men it was 65. Ms Marshall sued her employer, arguing that her dismissal constituted discrimination on grounds of gender, based on the fact that the retirement age was lower for women than it was for men, contrary to Articles 14 and 15 of Directive 79/7/EEC on the progressive implementation of the principle of equal treatment in matters of social security.<sup>44</sup> The main legal question that arose in this case was whether the Directive created duties for an independently employing local authority and, more generally, whether the obligation to observe directives could be extended to all employers, public and private. The Court held that the Directive was enforceable against public authorities only. Even though it found that, on the facts, Ms Marshall should be considered as being employed by one such authority,<sup>45</sup> it went on to limit the effects of directives by holding that private parties are not required to observe them.<sup>46</sup>

On the one hand, it could be argued that this finding was understandable from a constitutional perspective. At the time of the *Marshall* ruling, fundamental rights had not yet been codified. Furthermore, only a few months later, in its

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European Union's dispersed judicial structure and of the fact that indirect effect is an obligation primarily falling on national courts, as it requires them to interpret national legislation consistently with EU fundamental rights, CJEU case law is not necessarily representative of all instances in which EU fundamental rights have been given indirect effect.

<sup>44</sup> [1979] OJ L6/24.

<sup>45</sup> *Marshall* (n 7) paras 46–7, 49.

<sup>46</sup> *Ibid*, para 48.

ruling in *Les Verts*, the Court confirmed that the Treaties made up the Union's 'constitutional charter.'<sup>47</sup> This meant that only some claims to the protection of individual rights had constitutional status in EU law, as they were directly covered in the Treaty, while others did not, as they were sourced in directives. As such, the Court seemed to follow a strictly positivist approach towards fundamental rights, which distinguished Treaty rules from other legislation, but was nonetheless methodologically sound.

On the other hand, though, there are two important objections to interpreting *Marshall* in this way. Firstly, this interpretation sits uneasily with the Court's justification for the distinction in the judgment itself. Rather than raising a constitutional argument against the horizontal direct effect of secondary legislation, the distinction was primarily justified by reference to the differences between two sources of secondary law listed in Article 288 TFEU (regulations and directives).<sup>48</sup> The Court noted that the distinction between these instruments would be eroded if directives gave rise to direct horizontality.<sup>49</sup> Regulations do indeed enjoy horizontal direct effect.<sup>50</sup>

The second objection to a forgiving account of the constitutional soundness of the *Marshall* ruling is substantive. The Court failed to consider in any detail how its ruling fit within the broader purposes of the right not to be discriminated against. The judgment had a disruptive effect on the coherence of employment law in some Member States<sup>51</sup> and, more broadly, on the principle that like cases should be treated alike. It effectively granted privileged status to those working for the state compared to those working, in sometimes identical positions, for non-state actors.<sup>52</sup> The Court's reasoning on this point was not convincing. It had found that the Member States themselves could easily avoid

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<sup>47</sup> Case 294/83, *Parti Ecologiste "Les Verts" v Parliament* [1986] ECR 1339, para 23.

<sup>48</sup> *Marshall* (n 7) para 48. The justification put forward by Advocate General Slynn, which concerned the availability of information about new directives at the time and the costly legal burden that private parties would bear if obligations were imposed on them, were not considered in the judgment: See Opinion of Advocate General Slynn, delivered on 18 September 1985 in *Marshall* (n 7) 734.

<sup>49</sup> *Ibid.*

<sup>50</sup> Case C-253/00 *Antonio Muñoz* [2002] ECR I-7289.

<sup>51</sup> This would be the case for Member States like the United Kingdom that treated public and private employment contracts similarly. See *Marshall* (n 7) para 44.

<sup>52</sup> Opinion of Advocate General Lenz, delivered on 9 February 1994, in Case C-91/92, *Faccini Dori v Recreb Srl* [1994] ECR I-03325, paras 50-57.

any differences in treatment within national law, if they properly implemented EU law and thus removed the need for private claimants to rely on it directly.<sup>53</sup> The judgment therefore appeared to marginalise the role of the supranational standard in ensuring adjudicative coherence. Additionally, the Court did not discuss the extent to which the equality legislation in question, despite merely having the status of secondary law, was in fact required as part of a market that was striving towards social objectives (as the Court had noted in *Defrenne*). In other words, it did not assess whether the Directive's content – in fact very similar to the rule on gender equality protected in *Defrenne* – was a structural rule within a normative framework that served both economic and social functions.

In the absence of a properly conceptualised system of horizontality of constitutional law as well as of a codified system of fundamental rights protection, the rationale behind the stark discrepancy between the horizontal application of provisions enshrined in directives and those enshrined in Treaty articles, which was put forward in *Marshall* and reaffirmed in *Faccini Dori*,<sup>54</sup> is far from self-evident.<sup>55</sup> At the time of the *Marshall* judgment, the fundamental rights based on the Treaty were limited and directives were one of the EU's main regulatory mechanisms for the harmonisation of the free movement of workers, including several aspects of employment law and equality. The limitation created by this ruling therefore excluded a number of direct fundamental rights claims from the Court's jurisdiction, without explaining in what way they differed substantively from cases where direct horizontality was employed.<sup>56</sup> Indeed, in order to avoid making the distinctions that logically followed from this rule, the Court sought ways to circumvent the lack of direct horizontality, thus compromising on legal certainty.<sup>57</sup> The result has been, as we will go on to discuss, a misconstrual of the

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<sup>53</sup> *Marshall* (n 7) para 51.

<sup>54</sup> Case C-91/92, *Faccini Dori v Recreb Srl* [1994] ECR I-3325, paras 23-25 (it must of course be noted that this case concerned the cancellation of an order as part of a consumer contract and not a fundamental right strictly speaking).

<sup>55</sup> PP Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions' (2009) 34:3 *EL Rev* 349, 355.

<sup>56</sup> See, by analogy, the Opinion of Advocate General Jacobs, delivered on 27 January 2000, in Case C-443/98, *Unilever Italia SpA v Central Food SpA* [2000] ECR I-7565, paras 80-81. The Advocate General argued that it is the purpose and nature of a particular legal instrument and not its designation that should matter in the discussion of horizontality.

<sup>57</sup> PP Craig, 'Directives, Direct Effect, Indirect Effect and the Construction of National Legislation' (1997) 22:6 *EL Rev* 519, 527.

different dimensions of horizontal effect, which has profound implications for its application to the Charter today.

### **3.3 Counteracting the distinction between Treaty rights and directives**

Amidst broad academic criticism of its reasoning,<sup>58</sup> the Court has mitigated the effects of the distinction between Treaty rights and directives. In many of the cases brought before it, it chose to grant direct horizontal effect by construing the obligation in question as flowing from the Treaty.<sup>59</sup> In cases where doing so would have been impossible, it developed further rules to counteract the source-based distinction. Thus, a series of sub-doctrines acquired prominence, such as the concept of ‘emanations of the state’; the development of a strong model of indirect horizontality (consistent interpretation); the reversion of duties to states through liability in damages; and, most recently, an explicit exception to the non-horizontality principle for fundamental rights that constitute general principles of EU law. However, the fragmentation of the rules on horizontal effect further complicates this field, without necessarily offering justifications for horizontality that can be readily applied to the Charter.

#### **3.3.1 *Emanations of the state***

Keen to apply rights horizontally in cases where private actors had a strong regulatory role, the Court construed many obligations as applying to a state, rather than to a private party, by using an inflated notion of public authorities.<sup>60</sup> A broad conception of the state was clear already from *Marshall*, but it was articulated in further detail in *Foster v British Gas*. In that case, the Court famously found that:

A body, *whatever its legal form*, which has been made responsible [...] for providing a public service under the control of the state and has for that purpose special powers beyond those which result from the normal rules

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<sup>58</sup> Craig (n 50); T Tridimas, ‘Horizontal Direct Effect of Directives: a Missed Opportunity?’ (1994) 19:6 *EL Rev* 621, 635-636; S Prechal, *Directives in European Community Law: A Study of Directives and Their Enforcement in National Courts* (Clarendon Press, 1995), Chapter 5; D Kinley, ‘Direct Effect of Directives: Stuck on Vertical Hold’ (1995) 1:1 *EPL* 79; R Mastroianni, ‘On the Distinction Between Vertical and Horizontal Effects of Community Directives: What Role for the Principle of Equality?’, (1999) 5:3 *EPL* 417.

<sup>59</sup> See, for example, *Angonese* (n 28).

<sup>60</sup> Case C-188/89, *Foster v British Gas* [1991] ECR I-3313, para 20; For a recent application of *Foster* see Case C-361/12, *Carratù v Poste Italiane SpA*, EU:C:2013:830.

applicable in relations between individuals, is included [...] among the bodies against which [...] direct effect may be relied upon.<sup>61</sup>

Effectively, the *Foster* rule meant that parties with no official status in the administration of public affairs were treated in the same way as states, in respect of the application of EU law, and this approach even applied to private companies, such as British Gas, which had assumed certain state-ceded functions.

There is great strength in this line of reasoning. In starkly imbalanced relations, the challenge to the idea that fundamental rights should only be invoked against states is small. The horizontality question does not concern the nature of the obligation and the aims it serves but, rather, the more pragmatic question of whether the same obligation should be applied, for the same reasons, to an entity that is only formally private. In other words, the application – even the direct application – of fundamental rights obligations to these private parties can be considered a quasi-vertical matter. Additionally, since much of the Court's horizontality case law concerned market integration, it was clear that the position of a private party within the common market, as well as its potential impact thereon, mattered greatly. Entities with regulatory powers had a more clearly discernible potential impact on the common market than 'ordinary' private parties.<sup>62</sup> They were deemed to have a duty to be informed about legal developments and were therefore considered obliged to observe EU law at all times.<sup>63</sup> As such, a tradition of recognising obligations was developed, for a much broader range of actors than a streamlined, narrow conception of the state might have suggested. In respect of quasi-public or regulatory bodies, the Court was prepared to apply rights horizontally, and to apply them directly, as the addressees were treated *as if* they were the state.<sup>64</sup> There was no question of principles that needed to be applied by courts or of the state acting in its positive obligations: in respect of these entities, the obligation to protect EU fundamental rights was considered a vertical matter and was, therefore, always direct.<sup>65</sup>

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<sup>61</sup> *Foster*, *ibid*, para 20, emphasis added.

<sup>62</sup> *Walrave* (n 21) para 18.

<sup>63</sup> *Ibid*, paras 18–19.

<sup>64</sup> See *Foster* and *Carratù* (n 61).

<sup>65</sup> Opinion of Advocate General Poiares Maduro, delivered on 23 May 2007, in Case C-438/05, *The International Transport Workers' Federation and The Finnish Seamen's Union v Viking Line*



This position is largely in line with our discussion in Chapter 1. It recognises the substantial institutional impact that some private parties can have on the application of the law under modern conditions, and rightly includes them within the fundamental rights framework. Indeed, if one criticism can be made of this line of case law, this would be that the Court's reasoning therein did not go far enough in labelling horizontality as a problem concerning inequality in power relations. The *Foster* test is premised on a conception of the state as the main addressee of constitutional obligations: on a strict construction of *Foster*, state-like entities which were not in fact emanations of the state – even if the latter concept was broadly construed – would not be subject to direct horizontal obligations stemming from directives, in line with *Marshall*.<sup>66</sup> As such, this case law remained, as a matter of principle, held up in a formal distinction between state and society.<sup>67</sup>

However, there are private relations which can be defined by a formal difference in the bargaining positions of the parties, even if they cannot be attributed to the state as such (even a broad conception thereof). For instance, this is evident when it comes to undertakings that dominate particular fields of the market but have never been subject to state control, such as Google and Facebook. These actors may also possess an ability institutionally to determine, within their spheres of influence, the application of fundamental rights<sup>68</sup> despite never having enjoyed an official public, quasi-public, or regulatory role. There seems to be little scope for distinguishing them from emanations of the state in practice.

The argument can be taken further. There are cases where one of the parties is acting in an expert capacity (e.g. a doctor/patient relationship), or is in a

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*ABP and OÜ Viking Line Eesti* [2007] ECR I-10779, para 49, paras 83–87; *Walrave* (n 21) para 18.

<sup>66</sup> As Chapter 4 discusses further, recent case law does clarify that a broad construction of *Foster* should be employed.

<sup>67</sup> See J Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Polity Press 1989) 27. The divide between the state and society and the appropriate conceptualisation of the public and private spheres is further discussed in Chapter 5.

<sup>68</sup> See most clearly Case C-131/12, *Google Spain, SL, Google Inc v Agencia Espanola de Proteccion de Datos*, EU:C:2014:317. As will be further discussed in Chapter 4, in that case the Court does not mention the non-horizontality principle and only implicitly applies the directive indirectly. The non-recognition of institutional power explicitly in this type of cases raises concerns about the consistency with which horizontality will be applied in such, highly sensitive – and purely non-state – contexts.

disadvantageous position (e.g. the sign-or-be-fired scenario), or, more generally, has limited opportunity of choosing whether and under what conditions to enter into the relationship in question. This group of claims includes a broad range of contracts and, particularly, employment relations, pensions and insurance schemes. Claims in such cases can, and in the past have, come within the scope of EU law. For example, violations in this field have resulted, among other things, in unequal pay for women;<sup>69</sup> in the exclusion of part-time workers from occupational pension schemes (disproportionately affecting women);<sup>70</sup> in the exclusion of pregnant women from work;<sup>71</sup> in discriminatory rules employed by insurance companies in automatic pension schemes for the survivors of the insured;<sup>72</sup> and in rules effectively preventing non-resident job-seekers from finding work.<sup>73</sup> As Advocate General Maduro rightly noted in his Opinion in the *Viking* case, breaches of fundamental rights in these fields tend to occur on a wide scale and often reveal employment practices and policies within a particular sector, rather than being case-specific occurrences.<sup>74</sup> They are, to put the matter differently, cases in which concerns about the institutional power held by certain private actors are particularly obvious.<sup>75</sup> While the Court's case law has often included vulnerable claimants within the protection of EU law,<sup>76</sup> it has done so without argumentative consistency or a thorough discussion of the power inequalities in which violations of fundamental rights are often sourced.

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<sup>69</sup> *Defrenne* (n 6).

<sup>70</sup> Case 170/84, *Bilka-Kaufhaus GmbH v Weber Von Hartz* [1986] ECR 1607.

<sup>71</sup> Case C-177/88, *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum Voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941; Case C-32/93, *Carole Louise Webb v EMO Air Cargo (UK) Ltd* [1994] ECR I-03567; Case C-394/96, *Brown v Rentokil Ltd* [1998] ECR I-04185; Case C-438/99, *Jimenez Melgar v Ayuntamiento De Los Barrios* [2001] ECR I-06915; Case C-109/00, *Busch v Klinikum Neustadt* [2003] ECR I-020341; Case C-109/00, *Tele Danmark A/S v Handels-Og Kontorfunktionaerernes Forbund I Danmark (HK) Acting on Behalf of Brandt-Nielsen* [2001] ECR I-06693.

<sup>72</sup> Case C-200/91, *Coloroll Pension Trustees Ltd v James Richard Russell, Daniel Mangham, Gerald Robert Parker, Robert Sharp, Joan Fuller, Judith Ann Broughton and Coloroll Group Plc* [1994] ECR I-04389.

<sup>73</sup> For example, *Angonese* (n 28).

<sup>74</sup> See *Viking Opinion* (n 65) para 47.

<sup>75</sup> P Morris, *Power: A Philosophical Analysis* (2<sup>nd</sup> ed, Manchester University Press 2002) 107.

<sup>76</sup> JHH Weiler and NSJ Lockhart, "Taking Rights Seriously Seriously": The European Court and Its Fundamental Rights Jurisprudence – Part I' (1995) 32:1 *CML Rev* 51, 70-71.

### **3.3.2 Application of indirect horizontality as a substitute for the lack of direct horizontal effect**

Where it was impossible to construe the obligation as a direct one and, especially, in cases where directives had been disregarded under national law, the Court turned to indirect horizontal effect under the national courts' duty of consistent interpretation i.e. an obligation to interpret national law, as far as possible, in conformity with EU law.<sup>77</sup> However, in many cases, neither the nature of the right in question nor the context to which the right was applied necessarily presented significant differences to the cases where direct effect was used.

For example, from a fundamental rights perspective, it is hard to explain why the right to equal pay between men and women (a Treaty-based right) should generate direct horizontal effect against a private employer,<sup>78</sup> but the, rather similar in nature, right to non-discrimination on grounds of gender concerning access to employment (until recently a directive-based right), should only result in indirect horizontal effect, if similarly invoked against a private employer.<sup>79</sup> Substantively, both of these provisions are manifestations of the right to equal treatment. While it may be possible to distinguish different aspects of equality, and indeed different rights, more thorough explanations as to why this is done are required than merely referring to the type of legislation enshrining the right or the status of the defendant.<sup>80</sup> Indeed, whereas questions of effectiveness, uniformity, and primacy may have underpinned the horizontality regime in EU law more broadly, fundamental rights also raise added concerns, such as the impact they can have on the parties involved, who are often in a precarious position,<sup>81</sup> as well as

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<sup>77</sup> Case C-106/89, *Marleasing v La Comercial Internacional de Alimentacion* [1991] 1 ECR 4135; Case 157/86, *Murphy and Others v Bord Telecom Eireann* [1988] ECR 673, para 11; *Coloroll Pension* (n 72) para 29.

<sup>78</sup> E.g. *Defrenne* (n 6) para 39.

<sup>79</sup> E.g. Case 14/83 *Von Colson and Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, para 28. It must be emphasised that it is not argued here that the application of indirect horizontality in the Court's judgment in *Von Colson* is necessarily incorrect altogether but, rather, that the outright negation of direct horizontal effect for directives establishing analogous rights to those established by Treaty articles needs to be reconsidered.

<sup>80</sup> See *Dori* Opinion (n 52) para 51; Craig (n 57) 536-537; Opinion of Advocate General Jacobs, delivered on 27 January 1994, in Case C-316/93, *Vaneetveld v SA Le Foyer* [1994] ECR I-763, para 29.

<sup>81</sup> It is noteworthy that vulnerability is increasingly a factor that is considered in the ECtHR context: See L Peroni and A Timmer, 'Vulnerable Groups: The Promise Of An Emerging Concept In European Human Rights Convention Law' (2013) 11 *ICON* 1056.

the central role that fundamental rights play in post-war EU constitutional orders, which renders disagreement regarding their application particularly sensitive.<sup>82</sup>

Moving away from the principles it had set out in *Defrenne*, the Court did not examine the purposes of the right that was being invoked and whether its institutionalisation as a direct horizontal obligation was necessary in light of the goals and values of the Union (which were both economic and social). Likewise, though, it also did not consider ways in which the spirit and purport of the obligation could, indirectly, be applied to the dispute in question. Rather, the Court's approach seemed to be a mechanical one: while it was eager to afford some form of horizontal effect, it only affirmed direct horizontality for fundamental rights enshrined in primary law and, where the right was enshrined in a directive, indirect effect was applied with no further questions asked. The treatment of indirect effect as a fall-back measure applying to, in practical terms, hierarchically inferior rights, is nonetheless unsatisfactory, as it does not reflect well the different role that each of these forms of horizontality plays in constitutional adjudication.<sup>83</sup>

Since the introduction of the *Marshall* test, the strong indirect horizontality envisaged in *Walrave* and in paragraph 38 of the *Defrenne* judgment, which had placed on the courts a duty to apply fundamental rights to disputes between private parties, seems to have disappeared. Instead, the version of indirect horizontality favoured (consistent interpretation *as far as possible*) is mostly a weak one: it is confined to a 'reading in' function, rather than engaging national courts more actively, as constitutional actors responsible for the application of fundamental rights as building blocks of a legal order with social dimensions.<sup>84</sup> Indeed, indirect horizontality has merely been associated with the national courts' duty to interpret national law consistently with EU law,<sup>85</sup> in accordance with the primacy principle, which applies irrespective of whether a

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<sup>82</sup> See, for example, in Germany: *Solange II* – BverfGE 73, 339 (Az: 2 BvR 197/83); and in the UK: *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) para 62, per Laws LJ.

<sup>83</sup> See further Chapter 1.

<sup>84</sup> This is the function most notably played by the German *Drittwirkung* (third party effect) doctrine, for example.

<sup>85</sup> *Marleasing* (n 77) para 8; Joined Cases C-397/01 to C-403/01, *Pfeiffer and Others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECR I-8835, para 115; Case C-213/89, *The Queen v Secretary of State for Transport, Ex Parte Factortame Limited and Others* [1990] ECR I-2433, para 19.

certain right had constitutional character or not.<sup>86</sup> As such, while in practice indirect effect *qua* consistent interpretation has had wide-ranging effects, the reason for this is not primarily connected to the nature of fundamental rights as common constitutional commitments to a set of basic public safeguards that influence the interpretation of EU and Member State laws.<sup>87</sup> Rather, it was mainly used to affirm the principle of supremacy, even in the absence of direct effect.

It follows that the idea of indirect horizontality in EU law bears little relevance to its constitutional counterparts in the adjudication of fundamental rights in the Member States, or to the idea that fundamental rights have a ‘radiating’ effect across the EU constitutional order, more broadly.<sup>88</sup> Thus, despite the important role that indirect horizontality can have in this field, it seems that in EU law the debates about the horizontal effect of fundamental rights have been debates about direct horizontality only. In turn, the interpretation and proper functioning of indirect horizontality under EU law requires more coherent examination and assessment.

### ***3.3.3 A conceptually flawed application of state-mediated effect***

State-mediated effect in the sense of a discourse regarding the duties of state authorities (including courts and the legislature) to protect fundamental rights in private disputes has also been largely absent from much of the Court’s case law in this field, in stark contrast to the ECtHR’s position.<sup>89</sup> Whereas in its early fundamental rights case law the Court had demonstrated an adequate understanding of the operation of positive obligations to safeguard fundamental rights, in cases involving directives its approach was confined to state liability under the *Francovich* doctrine. The latter was principally discussed in cases where both direct and indirect horizontal effect had failed.<sup>90</sup>

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<sup>86</sup> See Case 106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR I-00629.

<sup>87</sup> And, therefore to have an indirect, radiating effect on the constitutional order. See further Chapter 1.

<sup>88</sup> See R Alexy, *A Theory of Constitutional Rights* (J Rivers tr, OUP 2002) 355; *Lüth* – BverfGE 7, 198 (Az: 1 BvR 400/51).

<sup>89</sup> Indeed, the ECtHR has substantially expanded the reach of the positive obligations doctrine: see, for a recent example, *IB v Greece*, App No 552/10 (ECtHR 3.10.2013).

<sup>90</sup> Case C-6/90, *Francovich and Bonifaci v Italy* [1991] ECR I-5375, paras 31-35.

On the one hand, in cases not involving the direct horizontal effect of directives, the Court's interpretation of the duties falling on states was extensive and comprised not only a negative obligation to refrain from violating EU rights, but also duties to protect them. The Court's rationale in this regard was most clearly set out in *Spanish Strawberries*.<sup>91</sup> The case arose out of the French farmers' protests in the 1990s and concerned acts of vandalism committed by an association of French farmers against foreign produce and, particularly, strawberries imported from Spain. The protests included violent threats to shopkeepers to prevent them from stocking foreign goods, and the destruction of Spanish products at the French border by farmer blockades.

The European Commission started proceedings against France, despite the fact that the alleged breaches resulted exclusively from private conduct. It argued that France had failed to protect the Union freedom to provide goods and, by extension, the Spanish farmers' property rights. The French state had not itself done anything to actively breach its Treaty obligations, it had condemned the private acts of vandalism and had, at times, taken measures to restrict the farmers' actions. However, the Court of Justice found that the French position had in fact been insufficient in protecting rights and held the French state liable, as it had 'manifestly and persistently abstained from adopting appropriate and adequate measures.'<sup>92</sup> Indeed, the Court found that Member States should not only abstain from breaching Treaty rules but that they should also take 'all necessary and appropriate measures' to ensure that the Treaties were observed in their territory.<sup>93</sup>

While distinguishable from *Spanish Strawberries* both on the facts and as regards the outcome, *Schmidberger* is also an excellent illustration of the Court's use of positive obligations in the field of fundamental rights.<sup>94</sup> *Schmidberger*, a private company, had been prevented from transporting goods through the

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<sup>91</sup> Case C-265/95, *Commission v France (Spanish Strawberries)* [1997] ECR I-06959. Of course, it must be noted that, as the case concerns infringement proceedings, it is distinguishable from cases regarding the application of EU fundamental rights in intersubjective disputes. The Court's reasoning regarding positive duties is, however, noteworthy.

<sup>92</sup> *Ibid.*, para 65

<sup>93</sup> *Ibid.*, para 32.

<sup>94</sup> Case C-112/00, *Schmidberger v Austria* [2003] ECR I-5659. For a thorough review of the EU tools for balancing competing rights and, most importantly of all, proportionality, see the Opinion of Advocate General Jacobs, delivered on 11 July 2002, in Case C-112/00, *Schmidberger v Austria* [2003] ECR I-5659, paras 96-118.

Brenner motorway, which links Austria to Northern Italy, as the motorway had been temporarily closed to allow a demonstration to take place. *Schmidberger* then started proceedings against Austria, arguing that the Austrian government's failure to protect the free movement of goods was incompatible with EU law. In turn, Austria argued that the closure was justified on the basis of the fundamental right to freedom of assembly and that its obligation to protect that right had prevented it from affording, at the same time, full protection to the free movement of goods (although it had taken steps to provide alternative means of transport).

The Court highlighted that both the free movement of goods and the freedom of assembly have a fundamental status in EU law and Member States must take all necessary steps to protect both. Nonetheless, while it reviewed the proportionality of the Austrian measures, it explicitly allowed a wide margin of discretion to the national authorities in respect of the weighing of competing interests in the field of fundamental rights.<sup>95</sup> Thus, the Court of Justice and, particularly, the Opinion of Advocate General Jacobs in that case, offered a balanced approach towards positive obligations, in a manner analogous to the case law of the European Court of Human Rights in the same field.<sup>96</sup>

This line of case law has not, so far, been related to *Defrenne* and the case law concerning the non-horizontality of directives. Nonetheless, to view positive obligations as separate to the horizontality discussion would be a misleading representation of the relationship between vertical and horizontal fundamental rights obligations, as discussed in Chapter 1.

While a conception of state-mediated effect / positive obligations existed in EU law in respect of the application of fundamental rights in the Member States, the application of the case law was distorted in cases involving directives. In such cases, positive duties were not considered in the same sense. Rather than assessing the obligations that fell on Member States more broadly, the Court confined its analysis to the principle of state liability in damages, once it had

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<sup>95</sup> *Schmidberger*, *ibid*, para 82.

<sup>96</sup> *Ibid*, paras 77-80; *Plattform "Ärzte Für Das Leben" v Austria*, App No 10126/82 (ECtHR 21.06.1988) para 34.

considered and rejected other forms of horizontality. They were thus used as a last resort, in cases where both direct effect and consistent interpretation had failed.<sup>97</sup>

This approach is exemplified in the *Francovich* ruling.<sup>98</sup> In *Francovich*, the claimants, who had been employed by an undertaking that became insolvent at a time when it still owed their salaries, sought to recover arrears of pay from the state in the form of damages. They brought a case against Italy for failing to transpose Directive 80/987 into national law.<sup>99</sup> That Directive was intended to protect employees if their employer became insolvent. The non-horizontality of directives would have precluded a direct action against the employer and consistent interpretation (indirect horizontal effect) would have been impossible, since Italy had altogether failed to implement the Directive. The Court nonetheless found that the effective protection of the rights afforded by EU law would be substantially compromised in the absence of a remedy.<sup>100</sup> It therefore granted the right to claim damages from the state.

At the same time, though, the Court set out strict conditions for state liability to be granted. The Directive needed to confer specific rights upon individuals, the content of which was identifiable through the wording of the directive itself. Furthermore, a direct causal link between the state's actions (non-implementation or incorrect implementation) and the damage suffered was required.<sup>101</sup> As the judgment in *Brasserie du Pêcheur*<sup>102</sup> made clear a few years later, often, a merely bad transposition of EU law will not be sufficient for the rules of state liability to bite. A breach must be 'sufficiently serious'<sup>103</sup> and this will be the case only when a Member State has 'manifestly and gravely disregarded the limits of its discretion.'<sup>104</sup> Effectively, this means that there must

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<sup>97</sup> S Prechal, 'Direct Effect and State Liability: What's the Difference after All?' (2006) 17 *EBLR* 299.

<sup>98</sup> See *Francovich and Bonifaci* (n 90).

<sup>99</sup> Council Directive of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (80/987/EEC) [1980] OJ L283/23.

<sup>100</sup> *Ibid*, paras 32-36.

<sup>101</sup> *Ibid*, paras 39-40.

<sup>102</sup> Cases C-46 and 48/93, *Brasserie du Pêcheur* [1996] ECR I-1029.

<sup>103</sup> *Ibid*, para 51.

<sup>104</sup> *Ibid*, para 55.



be either non-implementation altogether<sup>105</sup> or a wholly incorrect transposition of a directive.<sup>106</sup> State liability is, therefore, a remedy that operates by nature without any assessment of the merits of a fundamental rights question but, rather, focuses on the technical question of how and how well a piece of EU legislation has been transposed at the national level. Furthermore, the case law on state liability does not demonstrate a preoccupation with the content of the obligations protected in directives, many of which have now been included in the Charter, thus leading to particularly troublesome developments in the interpretation of the Charter itself in more recent case law.<sup>107</sup> While it could be argued that a failure to take into account the effect of implementing legislation on EU fundamental rights would necessarily amount to ill transposition, this is not always the case.

In the horizontal context, the deficiencies of this standard have become particularly clear in cases such as *Allonby*.<sup>108</sup> There, the Court considered that, as the claimants' right not to be discriminated against had not been breached by a single private party acting on the basis of ill transposition of EU law (but rather by a series of private actors, whose actions were causally linked to implementing measures to differing degrees), the criteria for state liability had not been met. However, the Court did not consider whether the state also had, in virtue of the fundamental right to equal pay, a *positive* obligation, properly-so-called, not merely to implement EU law but also, in doing so, to protect against systematic discrimination by private employers in the employment contracts they offered.

It follows that, although state liability might *prima facie* appear similar in terms of rationale to cases like *Spanish Strawberries* or *Schmidberger*, it is actually of a very different nature. Firstly, rather than being the first step of the horizontality assessment, by posing the question of whether the state has protected fundamental rights sufficiently from breach by private parties (e.g. by putting in place appropriate legislation and seeing to its enforcement), it is in fact the last.<sup>109</sup> Operating as an alternative to horizontality, it becomes available to those who

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<sup>105</sup> Joined Cases C-178-179 and C-188-190/94, *Dillenkofer and Others v Germany* [1996] ECR I-4845, paras 21-23.

<sup>106</sup> See for example, Case C-5/94, *R v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas* [1996] ECR I-2553, paras 28-29.

<sup>107</sup> This is discussed further in Chapter 4.

<sup>108</sup> Case C-256/01, *Allonby v Accrington & Rossendale College* [2004] ECR I-00873.

<sup>109</sup> See Case C-150/99, *Stockholm Lindopark* [2001] ECR I-493.

have used and failed, or almost certainly would have failed, in the application of direct and indirect horizontal effect.<sup>110</sup> Indeed, puzzlingly, the *Francovich* rule operates only to the extent that the Court considers that a directive has been breached by a private party not falling within the exceptions set out above and where consistent interpretation is impossible.<sup>111</sup>

Thus, EU law before the entry into force of the Charter has neither clearly delineated the scope of the EU and the Member States' responsibility to protect fundamental rights, nor distinguished it from the obligations of private parties, as a matter of principle.<sup>112</sup> In particular, it does not appear to enshrine an understanding of fundamental rights that comprises a duty to respect, protect and fulfil them,<sup>113</sup> also instantiated through a coherent doctrine of positive obligations to actively protect citizens from violations of these rights by others. In thinking about horizontality in the fundamental rights context, though, it is necessary to move away from the assumption that this consists only in the direct imposition of obligations to observe fundamental rights on private parties. Guidance as to when national law can be read consistently with fundamental rights, as well as when positive obligations arise is needed in the field of fundamental rights, where breaches can involve multiple actors, both private and public.<sup>114</sup> This need is not limited to cases where directives are at stake and therefore direct horizontal effect is unavailable. It is a question that, as Chapter 1 explained, applies more broadly in the fundamental rights context.

### ***3.3.4 Fundamental rights-specific horizontality: direct horizontal effect through the general principles of EU law***

Despite the different rules that were developed to counteract the lack of direct horizontal effect of directives, eventually, the extensive academic criticism of the

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<sup>110</sup> Prechal (n 91).

<sup>111</sup> P Craig and G De Búrca, *EU Law: Text, Cases, and Materials* (5<sup>th</sup> edn, OUP 2011) 215.

<sup>112</sup> View of Advocate General Jääskinen, delivered on 22 September 2010 in Case C-400/10 PPU, *J. McB. v L. E* [2010] ECR I-08965, did contain a discussion of this issue in relation to the right to family life (paras 68–69). The Court did not however discuss this in its judgment. See also the Opinion of Advocate General Jacobs in *Schmidberger* (n 94) para 102.

<sup>113</sup> J Ruggie, 'Protect, Respect And Remedy: A Framework For Business And Human Rights' (2008) 3 *Innov Technol Gov Glob* 189, 199–203.

<sup>114</sup> See further: O De Schutter, 'The Implementation of the EU Charter of Fundamental Rights through the Open Method of Coordination' (2004) NYU Jean Monnet Working Paper 07/04, <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2446896](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2446896)> accessed 25 July 2016, 16, 19–21.

Court's methodology led to a more thorough revision of the case law (without explicitly overruling it). This jurisprudential turn was based on the general principles of EU law, i.e. the mechanism that had justified the introduction of fundamental rights in the EU legal order.<sup>115</sup> The 'general principles' mechanism was specifically designed to accommodate fundamental rights reasoning in cases which would normally have fallen within the non-horizontality doctrine but where, substantively, the Court considered the directive-based rights in question to be of a constitutional order in virtue of their content. More specifically, the references to the general principles of EU law have been made mostly in order to grant direct horizontal effect in non-discrimination cases involving the Framework Equality Directive.<sup>116</sup>

The Court set out the parameters of the general-principles-based exception to the non-horizontality rule in one of its most controversial rulings to date, in *Mangold*. German legislation allowed the employment of older workers (over 52 years old) on fixed term contracts of up to two years, thus offering them reduced protection from dismissal compared to younger workers. The rule was intended to facilitate the employment of older workers. Mr Mangold, who was employed on such a contract by a private party, argued that the German legislation was discriminatory and therefore incompatible with the general principle of EU law protecting against discrimination, as defined in the Equality Directive. The Court agreed. It noted that the protection from discrimination on grounds of age was common to the constitutional traditions of the Member States and thus constituted a general principle of EU law.<sup>117</sup> The Equality Directive did not set out a new right. It merely enshrined the general principle of non-discrimination on grounds of age, which was not subject to any exemptions from horizontal invocation.<sup>118</sup> As such, even if the specific parameters of a right to equal treatment were sourced in

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<sup>115</sup> Case C-555/07, *Kücükdeveci v Swedex GmbH* [2010] ECR I-365; Case C-144/04 *Mangold v Helm* [2005] ECR I-9981.

<sup>116</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16.

<sup>117</sup> *Mangold* (n 115) para 74.

<sup>118</sup> *Ibid*, paras 75-76.

the Equality Directive, and despite the fact that the implementation period for that directive had not yet expired, direct horizontal effect was available.<sup>119</sup>

In the *Kücükdeveci* case, which was decided soon after the entry into force of the Lisbon Treaty (but the law applicable to the facts predated it), the Court confirmed this exception. The facts were almost the reverse of *Mangold* and concerned age discrimination against younger workers. Ms Kücükdeveci was employed by Swedex GmbH, a private company, since the age of 18. She was dismissed ten years later, on a month's notice. Whereas, pursuant to Article 622 of the German Civil Code, an employee having worked for ten years for the same employer would normally have been entitled to four months' notice, periods of employment before the age of 25 were excluded from this calculation. Ms Kücükdeveci successfully argued that the provision ran counter to Article 1 of the Equality Directive. The Court confirmed its ruling in *Mangold*, noting that fundamental rights merely find 'specific expression' in directives, rather than stemming from them. They are in themselves non-derogable, primary sources of EU law requiring observance by public and private parties alike.<sup>120</sup> As the Court put it:

It is the general principle of European Union law prohibiting all discrimination on grounds of age, as given expression in Directive 2000/78, which must be the basis of the examination of whether European Union law precludes national legislation such as that at issue in the main proceedings.<sup>121</sup>

The justifications advanced by Germany (notably of greater flexibility in employment opportunities for the young and providing a disincentive to employers to dismiss the more vulnerable category of older workers) were rejected. They were considered disproportionate to the aims pursued, as they applied in an exclusionary way to the group of workers under 25 years old.<sup>122</sup>

It is clear that, through its rulings in *Mangold* and *Kücükdeveci*, the Court rightly tried to bring substantive fundamental rights questions back into the horizontality equation and to remove the untenable distinctions between

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<sup>119</sup> Ibid.

<sup>120</sup> *Kücükdeveci* (n 115) para 21.

<sup>121</sup> Ibid, para 27.

<sup>122</sup> Ibid, paras 37-40.

fundamental rights enshrined in the Treaties and fundamental rights enshrined in directives. However, this line of case law in fact gives rise to important problems. In particular, these cases unduly complicate the Court's use of horizontality, rather than redressing its deficiencies.<sup>123</sup> The 'specific expression' terminology appears largely artificial. The idea (now enshrined in Article 6(3) TEU) that general principles are drawn from the 'common constitutional traditions of the Member States,' has not in fact been accompanied by comparative analysis by the Court of Justice of what these concepts entail across the Member States' jurisdictions, or what degree of incorporation into EU law is sufficient to grant them a 'general principle' status.

This stance may not necessarily have been problematic if the Court had construed the concept of general principles narrowly and with a focus on the structural elements of the EU legal order that these principles protect (such as the rule of law, safeguarded among other things through the principles of proportionality, legal certainty and equality).<sup>124</sup> In reality though, the concept has been extended to cover a number of individualised protections, applied in vastly different ways across the Member States (such as the protection of human dignity).<sup>125</sup> Furthermore, as the concept of 'general principles' is judicially determined on a case-by-case basis, it almost entirely lacks precision.<sup>126</sup> It is only used when the Court decides that a fundamental, inalienable right has been violated by a private party on a particular instance, without this being the subject of a consistent methodology. As such, the case law does not allow private parties to plan their actions cognisant in advance of their potential legal implications.<sup>127</sup>

That is an important concern insofar as the Court's reasoning regarding the qualities of the general principles in question remains thin.<sup>128</sup> Despite discovering

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<sup>123</sup> See A Dashwood, 'From *Van Duyn* to *Mangold* via *Marshall*: Reducing Direct Effect to Absurdity?' (2006-2007) 9 *CYELS* 81-109.

<sup>124</sup> See T Tridimas, *The General Principles of EU Law* (OUP 2006) 3-7.

<sup>125</sup> See most clearly Case C-36/02, *Omega Spielhallen- Und Automatenaufstellungs v Oberbürgermeisterin Der Bundesstadt Bonn* [2004] ECR I-9609.

<sup>126</sup> Tridimas (n 124) 7.

<sup>127</sup> PP Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions' (2009) 34 *EL Rev* 349, 355.

<sup>128</sup> Some discussion to this effect was offered by Advocate General Trstenjak in her Opinion in *Audiolux*, but this has not found specific articulation in final judgments: See Opinion of Advocate General Trstenjak, delivered on 30 June 2009, in Case C-101/08, *Audiolux and Others v Groupe Bruxelles Lambert SA (GBL) and Others* [2009] ECR I-9823.

a general principle of non-discrimination on grounds of age in *Mangold*, it is questionable whether this principle in fact stemmed from a truly common EU constitutional tradition. As Marlene Schmidt has pointed out, most Member States did not constitutionally protect against discrimination on grounds of age.<sup>129</sup> Therefore, the creation of direct obligations for private parties that departed from prior case law based on a general principle of EU law without clear grounding in Member State constitutions raised concerns about *vires* and constitutionality.<sup>130</sup> Furthermore, the use of direct horizontal effect in particular remains problematic from the perspective of coherence for national constitutional orders in which this mechanism is not otherwise available, as it involves significant constitutional changes in respect of the situations that come within the scope of EU law.<sup>131</sup> For this reason, the general principles case law has raised substantial concerns on the part of national constitutional courts.<sup>132</sup>

It follows that, despite introducing a less market-focused standard for the attribution of private responsibility for breaches of fundamental rights, the application of this mechanism has been controversial and largely ill-suited to the development of a coherent constitutional doctrine of horizontality. Whereas fundamental rights are general principles,<sup>133</sup> this cannot be the case simply for the purpose of overcoming a lack of horizontal direct effect, but for substantive reasons relating to the protection of the core values of the EU constitutional order. In turn, it is particularly unsatisfactory to relate the application of fundamental rights to a directive in the strict way that the Court mentions only (i.e. specific expression). The reasoning provided in these cases, namely that it is a general principle and not a directive that produces horizontal effects, is rather strained. The law on which the Court relies to render the general principle applicable is,

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<sup>129</sup> M Schmidt, 'The Principle of Non-discrimination in Respect of Age: Dimensions of the ECJ's *Mangold* Judgment' (2006) 7:5 *GLJ* 505, 519. She notes that, at the time, only Finland had an explicit ban on discrimination on grounds of age in its constitution. See also PP Craig, 'The ECJ and *Ultra Vires* Action: A Conceptual Analysis' (2011) 48:2 *CML Rev* 395.

<sup>130</sup> Craig, *ibid*.

<sup>131</sup> See R Herzog and L Gerken, 'Stop the European Court of Justice,' *EU Observer*, 10 September 2008, <<https://euobserver.com/opinion/26714>> accessed 14 May 2016.

<sup>132</sup> This was made particularly clear in the *Honeywell* decision of the German Constitutional Court: *Honeywell* – BVerfGE 126, 286 (Az: 2 BvR 2661/06); this case is discussed in further detail in Chapter 7.

<sup>133</sup> See K Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8:3 *EuConst* 375, 376.

after all, a directive.<sup>134</sup> These cases inevitably do question the reach of the rule on the non-horizontality of directives, as Advocate General Bot had rightly noted in his Opinion in *Kücükdeveci*. In particular to the extent that the Charter<sup>135</sup> contains rights which are already part of EU law in the form of directives, the Court inevitably was faced with the question ‘whether the designation of rights guaranteed by directives as fundamental rights does or does not strengthen the right to rely on them in proceedings between private parties.’<sup>136</sup> However, these concerns have not been addressed in the case law.

It is therefore essential to set out the meaning of these judgments more clearly. The reason for affording horizontal protection to non-discrimination on grounds of age in the EU legal order follows directly from *Defrenne* and the Court’s finding that a comparable right, that of equality between men and women, was applicable to private and public actors. It is the fundamental, constitutional status of certain rights in EU law that determines their horizontal applicability, and not the extent to which they are sufficiently expressed in a directive.<sup>137</sup> The rulings in *Mangold* and *Kücükdeveci* simply appear to redress a rule on non-horizontality that had not been justifiable in the first place. As Peers persuasively puts it:

It would be absurd to privilege one particular aspect of the right to non-discrimination over other aspects of that right, other social rights, or other human rights, and so the principle should logically apply whenever any general principle of EU law, as regards human rights protection, is sufficiently connected to the application of an EU Directive.<sup>138</sup>

As Chapter 4 will go on to highlight, though, the *Mangold* and *Kücükdeveci* exception has not been applied in a consistent manner to all social rights or indeed

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<sup>134</sup> M De Mol, ‘*Kücükdeveci*: *Mangold* Revisited – Horizontal Direct Effect of a General Principle of EU Law’ (2010) 6:2 *EuConst* 293, 300-304. See also E Muir, ‘Of Ages in – and Edges of – EU law’ (2011) 48:1 *CML Rev* 39, 57-59; E Muir, ‘The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges’ (2014) 51:1 *CML Rev* 219, 230.

<sup>135</sup> The Charter had become legally binding by the time of the *Kücükdeveci* judgment.

<sup>136</sup> Opinion of Advocate General Bot, delivered on 7 July 2009, in *Kücükdeveci* (n 115) para 90.

<sup>137</sup> See E Spaventa, ‘The Horizontal Application of Fundamental Rights as General Principles of EU Law’ in A Arnall and others (eds), *A Constitutional Order of States? Essays in Honour of Sir Alan Dashwood* (Hart 2011) 208-9.

<sup>138</sup> S Peers, ‘Supremacy, Equality and Human Rights: Comment on *Kücükdeveci* (C-555/07)’ (2010) 35:6 *EL Rev* 849, 855-6 (emphasis added).

to all rights enshrined in the Charter. It therefore raises significant difficulties for its horizontal adjudication, as some of its provisions may not actually have the status of general principles.

### 3.4 Conclusion: ‘a law of diminishing coherence’<sup>139</sup>

This chapter has traced the evolution of the horizontality doctrine over the years, from *Van Gend en Loos* and *Defrenne* to its final pre-Lisbon developments in *Mangold* and *Kücükdeveci*. It has thus sought to understand the EU horizontality heritage in the field of fundamental rights before assessing its suitability to the Charter. The findings to which the reconstruction of the case law leads are, nonetheless, underwhelming. The Court’s pre-Lisbon case law is characterised by multiple rules and exclusions regarding horizontal effect. These were applied erratically in the fundamental rights sphere, so that it is difficult to map out the Court’s approach, as well as the value of each of the rules it applied in this field. Indeed, perhaps due to the fact that the horizontality doctrine did not concern fundamental rights alone, but rather all provisions of EU law, its application started lacking, over the years, the rights-oriented reasoning that initially seemed to resound in the *Defrenne* approach. Overall, the case law appears to have been shaped so as to ensure the observance of Union law in all of its fields of application, safeguarding its primacy, effectiveness, and uniformity.<sup>140</sup> However, the case law of the pre-Lisbon years did not manage adequately to grapple with the constitutional implications of horizontal effect in the fundamental rights context.

It is difficult to rationalise the inconsistencies in the Court’s approach on the basis either of a coherent authority-based scheme or of the normative content of the right in question. Rather, an emphasis on the source of the right, i.e. whether it was derived from primary law or directives, is the pattern that has most clearly characterised the development of the horizontality doctrine in EU law to

<sup>139</sup> Editorial comments, ‘Horizontal Direct Effect – A Law of Diminishing Coherence?’ (2006) 43:1 *CML Rev* 1.

<sup>140</sup> Ferreira (n 27) 33–34; Vaneetveld Opinion (n 76) para 29; See also S Drake, ‘Twenty Years after Von Colson: The Impact of “Indirect Effect” on the Protection of the Individual’s Community Rights,’ (2005) 30:3 *EL Rev* 329; E Frantziou, ‘The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality’ (2015) 21:5 *ELJ* 657, 665.



date. Before considering the nature of a private relationship, the Court examined the legal source of the fundamental right at stake. The development of a broad conception of the state, as well as of wide-ranging indirect obligations for private employers, responded to a highly unsatisfactory overarching decision to distinguish directives from other sources of EU law.

There was thus a significant mismatch between the horizontal effect doctrine described in Chapter 1 — a tiered mechanism geared towards ensuring the application of fundamental rights across a constitutional order — and the functional, case-specific approach that underpinned horizontal effect in EU law pre-Lisbon. The Court's approach primarily relied on a mechanical process, whereby the default position eventually became that of direct horizontality and, failing that, an application of indirect effect or state liability, without a discussion of the merits of each of these tools. The Court did not examine the purposes of the fundamental right that was being invoked and whether its institutionalisation as a direct horizontal obligation was necessary in light of the goals of that right or the reasons why the Union observes it. It also did not consider ways in which the spirit and purport of the obligation could, indirectly, be applied in the dispute in question. As such, rather than reflecting principled decisions about how a particular right should enter private relations, the horizontality doctrine was particularly one-dimensional, and resulted in a failure to discuss the appropriateness of the remedies offered by its different expressions.

As a 2006 editorial of the Common Market Law Review aptly put it in the aftermath of the *Mangold* ruling, the EU horizontality doctrine over the years became 'a law of diminishing coherence.'<sup>141</sup> Developments were largely *ad hoc*, accommodating the difficult case law that was presented to the Court through a series of exceptions, but hardly providing for a meaningful conceptualisation of the horizontality doctrine and the specificities it presents in the field of fundamental rights, more generally. Rather, the application of horizontal effect in the pre-Lisbon case law contained fragments of rules relating to the source of the right, the authority held by the addressee of the obligation and, in later case law, the inherent value of certain principles within EU law, but these fragments can

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<sup>141</sup> Editorial (n 139).

hardly be said to amount to a coherent framework for the application of fundamental rights to disputes between private parties. While some general themes can be identified in the case law, overall these are neither conducive to legal certainty nor revealing of a clear agenda determining the horizontal effect of fundamental rights in Union law.<sup>142</sup>

Of course, these findings are not particularly novel. The horizontal effect model in the EU has been strongly criticised.<sup>143</sup> Nonetheless, in light of the discussion in Chapters 1 and 2, I hope that the reconstruction of the case law carried out in the preceding sections has brought to sharper relief an important drawback of applying the existing horizontality to the Charter. The case law in this field does not speak to the question of *why* fundamental rights were granted horizontal effect in the Union but only to the question of *how* they could do so. Yet assessing the operation of horizontality without firstly having set out its goals and usefulness in a particular context (that of fundamental rights) is highly problematic from a constitutional perspective. To the extent that the Court's case law was mainly premised on the position of the addressee of an obligation within the single market and on the formal qualification of a right as directive-based or not, it failed to capture the functions of fundamental rights within public law. As already noted in Chapter 1, these go beyond particular intersubjective disputes and impinge on broader questions of access to rights distorted particularly by the increasing prominence of the market in society.<sup>144</sup>

In this sense, it is possible to question whether EU law has in fact had quite as radical an inclusionary impact for the fundamental rights of individuals not otherwise involved in cross-border exchange as has at times been suggested.<sup>145</sup> In reality, in the EU fundamental rights context pre-Lisbon, the Court never applied horizontal effect in a case involving two private parties, both acting in their capacity as right-holders within the EU, but always – even in

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<sup>142</sup> Craig, *Directives*, (n 57) 527; See also T Tridimas, 'Black White and Shades of Grey: Horizontality of Directives Revisited' (2002) 21 YEL 327, 327; Editorial (n 139) 2.

<sup>143</sup> See for example: T Tridimas, 'Horizontal Direct Effect of Directives: a Missed Opportunity?' (1994) 19 *EL Rev* 621; Craig (n 57); Mastroianni (n 51).

<sup>144</sup> See W Streeck, 'Citizens as Customers: Considerations on the New Politics of Consumption' (2012) 76 *New Left Review* 27, 43. J Habermas, *The Theory of Communicative Action, Vol 2 – Lifeworld and System: A Critique of Functionalist Reason* (Polity Press 1984) 318ff.

<sup>145</sup> A Stone Sweet, *The Judicial Construction Of Europe* (OUP 2004) 53.

*Defrenne* – included them as actual or potential participants in the single market.<sup>146</sup> Whereas the outcomes of the case law may have benefitted specific individuals, the Court's approach did not make up a satisfactory overall representation of the emerging issues concerning the distinction between verticality and horizontality that could eventually be applied to a public order broader than the market (even a market with social dimensions).

Just as it would be misleading not to acknowledge the potency of the Union's rights-granting features in the horizontal context, it would be equally problematic to simply assume that the instances on which horizontal effect has been used to the benefit of individual claimants necessarily indicate the existence of a *system* of horizontal protection which has served – and can continue to serve – fundamental rights as features of a coherent constitutional order. Despite the strength of the *Defrenne* legacy, the Court's pre-Lisbon case law in this field rested mainly on unstable foundations in need of reassessment for several years. As the following chapters will highlight in further detail, the case law in this field demonstrates a tension, which consists in evaluating the role of different constitutional norms in the European Union's 'new legal order,'<sup>147</sup> and in linking them not to market integration through direct effect and supremacy but also to civic participation in EU public life. While horizontality has been centre-stage as a doctrine serving the uniform and effective application of EU primary law, when it comes to its application as a constitutional mechanism bearing on matters of public concern, its coherence has been greatly tested.<sup>148</sup>

Reconceptualising horizontal fundamental rights as a cause of action is therefore important in the EU system and its developing constitutional order. The Court's pre-Lisbon approach has led to an unworkable framework for the horizontality of the Charter, if the latter is seen, as discussed in Chapter 2, as a constitutional document seeking actively to emphasise EU-wide commitment to a

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<sup>146</sup> See *Viking Opinion* (n 65) para 49.

<sup>147</sup> *Van Gend en Loos* (n 18).

<sup>148</sup> See further, to this effect, Chapter 5. This is particularly clear in cases involving social and collective rights, such as *Viking* and *Laval*: Case C-438/05, *The International Transport Workers' Federation and The Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779 and Case C-341/05, *Laval Un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets Avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767.

politically foundational set of rights. Furthermore, in the Charter context, horizontal cases are increasingly likely to be brought before the Court of Justice in a broader and less market-focused set of circumstances.<sup>149</sup> The Charter includes, for example, protections against trafficking<sup>150</sup> and social exclusion,<sup>151</sup> confirming the relevance of these issues in the development of the EU. It is, therefore, essential to move away from functional approaches to horizontality and to explore its role in the constitutional adjudication of rights. Arguments about the horizontal effect of fundamental rights have already been raised in disputes regarding custody and the right to family life as well as, as already discussed, in respect of the protection of data in the internet era.<sup>152</sup> These edgier horizontality issues require a much more conscious approach to horizontal effect than the Union's casuistic approach has been able to offer, to date. Rather than redressing these problems, though, additional questions have arisen in this field post-Lisbon, as Chapter 4 goes on to explain.

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<sup>149</sup> See Eurofound, 'Horizontal Direct Effect' (2011), <<http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/horizontaldirecteffect.htm>> accessed 20 August 2013.

<sup>150</sup> Article 5(3) EUCFR.

<sup>151</sup> See Articles 21-27 and 34-36 EUCFR.

<sup>152</sup> See Case C-400/10 PPU, *J. McB. v L. E* [2010] ECR I-08965. There, an unmarried father argued that he possessed inchoate rights of custody flowing from his fundamental right to family life, which he sought to enforce against the child's mother; See also View of Advocate General Jääskinen delivered on 22 September 2010 in *J. McB. v L. E*, paras 68–69: While the Court decided that inchoate rights did not exist and, therefore, did not discuss the issue of the horizontal application of the right to family life, the Advocate General argued that the right was only recognisable against the state. In respect of data protection and the right to privacy, see *Google* (n 68).

## 4 Old Problems, No New Responses: The Horizontal Effect of the Charter in the Court's Case Law

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### 4.1 Introduction

While there has been some debate about the proper application of the horizontality doctrine to the Charter since its entry into binding force,<sup>1</sup> there has not been a real change of direction in the understanding of horizontality in the Court's more recent fundamental rights case law. As Chapter 3 has shown, the pre-Lisbon case law focused on a problematic distinction between Treaty rights and directives, which in turn gave rise to a complicated and largely unsatisfactory conceptualisation of the attribution of private responsibility for violations of fundamental rights. The concerns relating to the Charter's scope, as well as the difficult problems of interpretation associated with its drafting, have led to significant deficiencies in the more recent case law of the Court of Justice, which has largely avoided tackling these issues directly.<sup>2</sup> Although in *Küçükdeveci* the Court made the first mention of the Charter after it was rendered legally binding,<sup>3</sup> it has not since then changed its approach towards horizontality in view of the Charter's binding status. Furthermore, even though a series of rights not previously mentioned in the Treaties have now acquired constitutional status under the Charter, constitutional analysis in this field has nonetheless remained marginal.

This chapter discusses in more detail the way in which horizontal effect features in the Court's fundamental rights case law after the entry into force of the Charter. It demonstrates that the inconsistencies that characterised the application of horizontality pre-Lisbon and, crucially, the lack of a discussion tailored to

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<sup>1</sup> The Opinions of Advocate General Cruz Villalón in *Prigge* and *Association de Médiation Sociale* have been particularly mindful of the Charter's constitutional status. However, they have not been followed by the Court in its judgments in these cases. See Opinion of Advocate General Cruz Villalón, delivered on 19 May 2011, in Case C-447/09 *Prigge and Others v Deutsche Lufthansa*, EU:C:2011:321. See Opinion of Advocate General Cruz Villalón, delivered on 18 July 2013, in Case C-176/12, *Association de Médiation Sociale v Union Locale des Syndicats CGT*, EU:C:2013:491.

<sup>2</sup> See L Pech, 'Between Judicial Minimalism and Avoidance: The Court of Justice's Sidestepping of Fundamental Constitutional Issues in *Römer* and *Dominguez*' (2012) 49:6 *CML Rev* 1841.

<sup>3</sup> Case C-555/07, *Küçükdeveci v Swedex GmbH* [2010] ECR I-365, para 22.

fundamental rights, become important obstacles in assessing the horizontal effect of the Charter today. Two strands in the Court's post-Lisbon case law can be identified, both of which raise profound constitutional concerns: firstly, there is a line of cases directly addressing horizontality in response to preliminary references on this point by national courts. In these cases, the Court has foregone the opportunity to revisit its prior case law (Section 4.2). Rulings such as *Association de Médiation Sociale*<sup>4</sup> and *Dansk Industri*<sup>5</sup> confirm that only *some* of the fundamental rights enshrined in the Charter (such as non-discrimination on grounds of age but not information and consultation within the undertaking) constitute general principles of law capable of direct horizontal effect when given more specific expression in secondary legislation. This position is problematic both from the perspective of legitimacy (it second-guesses the equal designation of these rights as 'fundamental' in the Charter) and from the perspective of legal certainty (it fails to provide overall guidance regarding the operation of the horizontality doctrine to claimants and national courts alike).

The second strand that can be identified in the Court's recent horizontality case law stems from the interpretation of EU measures (Section 4.3). It is exemplified by cases such as *Costeja González v Google*<sup>6</sup> and *Test-Achats*.<sup>7</sup> The outcome of these cases emphatically reaffirms horizontality. Through its interpretation of directives<sup>8</sup> in the light of the rights to privacy and the protection of private data enshrined in Articles 7 and 8 of the Charter and the right not to be discriminated against in Article 21 EUCFR, the Court effectively imposed wide-ranging obligations to safeguard these rights on search engine operators and

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<sup>4</sup> Case C-176/12, *Association de Médiation Sociale v Union Locale des Syndicats CGT and Others*, EU:C:2014:2.

<sup>5</sup> Case C-441/14, *Dansk Industri (DI) v Estate of Karsten Eigil Rasmussen*, EU:C:2016:278.

<sup>6</sup> Case C-131/12, *Google Spain SL, Google Inc v Agencia Espanola de Proteccion de Datos (AEPD) and Costeja González*, EU:C:2014:317.

<sup>7</sup> Case C-236/09, *Association Belge des Consommateurs Test-Achats ASBL v Conseil des Ministres* [2011] ECR I-00773.

<sup>8</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31 and Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37, respectively.

private insurance companies respectively.<sup>9</sup> However, it did not mention horizontal effect at all in these judgments.

The chapter goes on to argue that both of these lines of case law stem from the following overarching problems: firstly, there appears to be a lack of consensus within the Court regarding the status and goals of the Charter and, secondly, there is a lack of adequate constitutional reasoning about substantive (rather than technical) questions of the role of fundamental rights within the EU legal order (Section 4.4). Thus, the case law on horizontal effect in the Charter context continues to display both methodological and conceptual problems. The judgments remain rooted in highly unpredictable, case-by-case assessments, which marginalise the significance of horizontality in this field and, at the same time, appear to undermine the constitutional dimension of the Charter.

## 4.2 Affirming pre-Lisbon case law in respect of the horizontal effect of the Charter

In its post-Lisbon case law, the Court has affirmed the rules developed in the pre-Lisbon years. For example, the Court has used the *Foster* rule on emanations of the state<sup>10</sup> and has rightly developed it by confirming its application to public-interest services (such as a supplier of gas), irrespective of whether state control has been exercised within the undertaking's governing structure or not.<sup>11</sup> However, by the same token, the Court has not departed from its case law regarding the non-horizontality of directives, so that the focus in this field has been, primarily, on the fundamental-rights-based exception thereto.<sup>12</sup> As Chapter 3 has already discussed, in the *Mangold* and *Kücükdeveci* line of cases, the Court had established that the general principle of non-discrimination, including non-

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<sup>9</sup> Case C-131/12, *Google Spain, SL, Google Inc v Agencia Espanola de Proteccion de Datos*, EU:C:2014:317. See also E Frantziou, 'Further Developments in the Right to be Forgotten: The European Court of Justice's Judgment in Case C-131/12, *Google Spain, SL, Google Inc v Agencia Espanola de Proteccion de Datos*' (2014) 14:4 HRLR 761.

<sup>10</sup> Case C-614/11, *Niederösterreichische Landes-Landwirtschaftskammer v Kuso*, EU:C:2013:544, para 32; Case C-361/12, *Carratù v Poste Italiane SpA*, EU:C:2013:830, para 29.

<sup>11</sup> Case C-425/12, *Portgás SA v Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território*, EU:C:2013:829, paras 24-29. See also Opinion of Advocate General Wahl, delivered on 18 September 2013, in Case C-425/12, *Portgás SA v Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território*, EU:C:2013:623, paras 30ff and particularly 60-61.

<sup>12</sup> See further Chapter 3.

discrimination on grounds of age, was capable of having direct horizontal effect and could thus counteract the non-horizontality of a directive giving specific expression to that general principle.<sup>13</sup> While initially cautiously applied, this line of case law has acquired prominence after the entry into force of the Charter, presenting the most significant legal hurdles for the assessment of its horizontality in a number of recent cases.

#### **4.2.1 *Prigge and Dominguez: the continued salience of general principles***

After the entry into force of the Charter, the Court has dealt with cases displaying substantial similarities with *Mangold* and *Kücükdeveci*, without however taking into account the effect of the incorporation of non-discrimination in Article 21 of the Charter. Most notably, in *Prigge*, the Court reaffirmed its position in *Mangold* and *Kücükdeveci*. The case concerned the lawfulness of a collective agreement for pilots employed by Lufthansa, which set their retirement age at 60 years, rather than the ordinary retirement age of 65. The Court found that the collective agreement was discriminatory on grounds of age.<sup>14</sup> The different age threshold could not be justified as an occupational requirement, as it was applied in a blanket way without regard for the employees' ability to perform their tasks.<sup>15</sup> However, in so finding, the Court only mentioned Article 21 EUCFR once in its judgment, merely in order to *confirm* the existence and binding nature of the general principle of non-discrimination in EU law, before applying it to Lufthansa.<sup>16</sup> It then continued its reasoning on the basis of the general principle.

Furthermore, the Court did not adopt the Advocate General's reasoning, which would have entailed an explicit departure from prior case law. In his Opinion in the case, Advocate General Cruz Villalón had advised the Court not to

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<sup>13</sup> Case C-144/04, *Mangold v Helm* [2005] ECR I-9981; *Kücükdeveci* (n 3); Case C-282/10, *Dominguez v Centre Informatique du Centre Ouest Atlantique and Préfet de la Région Centre*, EU:C:2012:33. It is notable that, in his Opinion in *Kücükdeveci*, AG Bot had heavily relied on the impact that the Charter was going to have in the future in the field of fundamental rights: Opinion of Advocate General Bot, delivered on 7 July 2009, in Case C-555/07, *Kücükdeveci v Swedex GmbH* [2010] ECR I-365, para 90. More specifically, he addressed the criticisms following *Mangold*, which concerned the fact that most Member States did not actually recognise a general principle of non-discrimination on grounds of age, by arguing they were nonetheless going to have to comply with this principle, in light of its inclusion in Article 21 of the Charter: paras 77-78.

<sup>14</sup> Case C-447/09, *Prigge and Others v Deutsche Lufthansa*, EU:C:2011:573, paras 63, 76.

<sup>15</sup> *Ibid*, paras 71ff.

<sup>16</sup> *Ibid*, para 48.



continue using general principles to justify horizontality but, rather, to rely on the Charter alone, in virtue of its constitutional significance. The Advocate General's reasoning merits a detailed discussion, as it strikes at the heart of the debate. As he had put it:

Although the Charter of Fundamental Rights of the European Union, which contains an express prohibition of discrimination on grounds of age (Article 21), had already been solemnly proclaimed at the time of the judgment in *Mangold*, it was not until the entry into force of the Treaty of Lisbon that it acquired full legal status as a primary source of law, and with it the ground of discrimination in question, being the penultimate explicit prohibition of discrimination set out in this article. This means, in my view, that, due to the fact that this prohibition has become part of a 'written constitution,' the source par excellence in EU law of this principle of non-discrimination is Article 21 of the Charter. [...] In other words, although the statement made in *Mangold* (and confirmed in *Küçükdeveci*) that the prohibition of discrimination on grounds of age is a general principle of EU law 'the source of [which is to be] found ... in various international instruments and in the constitutional traditions common to the Member States,' still holds absolutely true, *the fact is that this principle has been enshrined in the 'Lisbon Charter' and it is therefore from this source that the possibilities and limitations of the principle's usefulness must flow.*<sup>17</sup>

Thus, the Advocate General made clear that, in the binding Charter context, continuing to rely on general principles would be constitutionally incoherent, in light of the Charter's status and role in the EU legal order. He continued his reasoning by articulating more specifically how he understood the evolution of the horizontality case law in this field, in light of the Charter's entry into binding force:

Regarding the secondary legislation, Directive 2000/78,<sup>18</sup> there is little to be said at this stage. Suffice it to say, first, that the directive serves as the measure which 'gives effect to' the competence of the EU in the area and, in that sense, constitutes the foundation of such competence at the EU level. Second, as the Court has stated, the directive "gives expression", in the relevant area, to the general prohibition of discrimination on grounds of age.<sup>19</sup>

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<sup>17</sup> *Prigge* Opinion (n 1) para 26 (emphasis added).

<sup>18</sup> [2000] OJ L303/16.

<sup>19</sup> *Prigge* Opinion (n 1) para 27.

This reasoning is convincing. There was no longer any reason to discuss whether a general principle of law found ‘specific expression’ in a directive or not, as had been the case in prior case law. To the extent that the Charter had been put in place with the status of primary law, a directive merely had the effect of bringing the case within the scope of EU law, but the question of horizontality concerned the interpretation of the Charter provision itself. Insofar as the right not to be discriminated against on grounds of age had been enshrined in the Charter, the Advocate General rightly pointed out that it had to be observed in all situations falling within the scope of EU law, both vertical and horizontal, and that all secondary legislation had to be interpreted in its light.<sup>20</sup> Indeed, very much in line with the discussion of horizontality as a constitutional mechanism presented in Chapter 1, the Advocate General went on to emphasise that the operative issue in this field did not concern the remedy of direct effect. Rather, the question that needed to be answered concerned the reach of the non-discrimination provision enshrined in Article 21. He therefore reformulated the question that had been submitted to the Court as follows, highlighting the radiating effect of the Charter on other legislation:

Must Article 2(5), Article 4(1) and the first sentence of Article 6(1) of Directive 2000/78, *as construed in the light of Article 21 of the Charter*, be interpreted as precluding an age-limit of 60 for pilots established by collective agreement?<sup>21</sup>

Nonetheless, despite its argumentative rigour, the Advocate General’s Opinion was not discussed in the judgment.

*Prigge* is not an isolated occurrence. The Court has further maintained this position in a series of judgments where a general principle now enshrined in the Charter has been at issue, such as *DEB* and *Samba Diouf*, as well as, even more strikingly, in cases like *Rosenbladt*, *Römer* and, most notably, *Dominguez*.<sup>22</sup> In

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<sup>20</sup> Ibid, paras 26-30.

<sup>21</sup> Ibid, para 30.

<sup>22</sup> Case C-147/08, *Römer v Freie und Hansestadt Hamburg* [2011] I-03591; Case C-279/09, *DEB v Germany* [2010] ECR I-13849, para 59; Case C-45/09, *Rosenbladt v Oellerking Gebäudereinigungsges.mBH* [2010] ECR I-09391; Case C-69/10, *Samba Diouf v Ministre du Travail, de l’Emploi et de l’Immigration* [2011] I-07151 para 49; *Dominguez* (n 5); See also Case C-34/09, *Ruiz Zambrano v Office national de l’Emploi (ONEm)* [2011] ECR I-01177; Case C-

some of these judgments, the Court acknowledged the existence of the Charter, but still carried out its compatibility review on the basis of the general principle, as exemplified by *Prigge*.<sup>23</sup> In other judgments, the existence of the Charter has been ignored altogether. In cases such as *Römer* and *Dominguez*, which concerned sexual orientation-based discrimination and a horizontal claim to the right to paid annual leave, respectively, the Court failed entirely to discuss the Charter provisions in these fields.<sup>24</sup>

In *Römer*, the relevant question was whether Art 21 EUCFR, which prohibits discrimination *inter alia* on the basis of sexual orientation, allowed different treatment in respect of pension entitlements by an employer because of the employee's sexual orientation (and why).<sup>25</sup> In *Dominguez*, the question effectively concerned whether Article 31 EUCFR, which protects the right to paid annual leave, could create obligations for a private employer in the same way as provisions such as Article 21.<sup>26</sup> These issues were not discussed by reference to the Charter in the judgments, which were both premised on an unusually vague language of principles without a discussion of the relevant Charter provisions. As Pech rightly notes:

The most regrettable feature of the Court's judgments in *Römer* and *Dominguez* lies in their unnecessary ambiguity regarding the status of what the Court refers to as the 'principle' of non-discrimination on grounds of sexual orientation and the 'particularly important principle' of EU social law whereby every worker is entitled to paid leave.<sup>27</sup>

In these judgments, the Court opened up the potential of inconsistencies between the protection afforded by the Charter on the one hand and the general principles

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434/09, *McCarthy v Secretary of State for the Home Department* [2011] I-03375; Case C-256/11, *Dereci and Others v Bundesministerium für Inneres*, EU:C:2011:734.

<sup>23</sup> *Prigge* (n 16).

<sup>24</sup> *Römer* (n 22) and *Dominguez* (n 13); See also, *Rosenbladt* (n 22), where neither the general principles nor the Charter is discussed in relation to a claim regarding indirect discrimination and collective agreements in respect of pensions.

<sup>25</sup> It must be noted that *Römer* (n 22) concerned a state employer. However, the fifth question of the German court concerned the duty of consistent interpretation and the application of the principle of non-discrimination on grounds of sexual orientation in employment relations in Germany: see paras 53-64 of the ruling.

<sup>26</sup> This is especially true in relation to rights in the employment realm: See T Von Danwitz, 'The Charter of Fundamental Rights of the European Union: Between Political Symbolism and Legal Realism' (2000) 29 *Denver J Int'l Law & Policy* 289, 298.

<sup>27</sup> Pech (n 2) 1857.

on the other and clearly demonstrated that it was not ready to discuss sensitive issues under the Charter, rather than the general principles jurisprudence.<sup>28</sup>

Despite this deficiency, though, it is worth discussing another aspect of the ruling in *Dominguez* in more detail. The judgment suggested a turn in the interpretation of indirect horizontal effect (consistent interpretation), which appeared to revise the sequence in which direct and indirect horizontality operate in EU law. While, as Chapter 3 has already highlighted, the Court had until then only used the duty of consistent interpretation once it had found that the remedy of direct effect was unavailable,<sup>29</sup> in *Dominguez* its reasoning started from indirect horizontality. The Court emphasised that, in line with the national courts' duty to interpret the whole body of national law consistently with EU law as far as possible, it was unnecessary to discuss direct horizontal effect *unless* a consistent interpretation was impossible.<sup>30</sup> Two more recent judgments, *AMS* and *DI*, confirm this change of direction in respect of indirect horizontality, but at the same time highlight the tensions that the existing doctrine regarding horizontality *via* general principles presents with regard to different provisions of the Charter.

#### ***4.2.2 Association de Médiation Sociale: rights-conferring and non-rights-conferring provisions of the Charter as the test for horizontality***

The inconsistencies that were apparent from the abovementioned case law were affirmed most starkly in the Court's judgment in *Association de Médiation Sociale* ('AMS').<sup>31</sup> Arguably the most important judgment for understanding the

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<sup>28</sup> Ibid, 1879; Opinion of Advocate General Trstenjak delivered on 8 September 2011 in Case C-282/10, *Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre*, EU:C:2011:559, para 128.

<sup>29</sup> Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135, para 8; Joined Cases C-397/01 to C-403/01, *Pfeiffer and Others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECR I-8835, para 115.

<sup>30</sup> *Dominguez* (n 13) para 42.

<sup>31</sup> *AMS* (n 4). For a more detailed assessment of this case, see E Frantziou, 'Case C-176/12 *Association de Médiation Sociale*: Some Reflections on the Horizontal Effect of the Charter and the Reach of Fundamental Employment Rights in the European Union' (2014) 10 *EuConst* 332; N Lazzarini, 'Case C-176/12, *Association de médiation sociale v Union locale des syndicats CGT and Others*, Judgment of the Court of Justice (Grand Chamber) of 15 January 2014' (2014) 51 *CMLRev* 907; C Murphy, 'Using the EU Charter of Fundamental Rights Against Private Parties after *Association De Médiation Sociale*' (2014) *EHRLR* 170; E Uría Gavilán, '¿Los principios de la Carta de Derechos Fundamentales de la Unión Europea pueden ser invocados en litigios entre particulares?: comentario a la Sentencia del Tribunal de Justicia (gran sala) de 15 de enero de 2014 en el Asunto C-176/12 *Association de médiation sociale*' (2014) 34 *Revista General de Derecho Europeo* (RI §415166).

Court's approach towards horizontal effect post-Charter, this case requires extensive discussion.

*AMS* concerned Article 27 EUCFR, which provides that 'workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices.' This right is further enshrined in Directive 2002/14, which establishes a general framework for informing and consulting employees within the EU.<sup>32</sup> In implementing this Directive, France had excluded employees working under accompanied-employment contracts<sup>33</sup> from the right in question. *AMS*, an association governed by private law mainly employing individuals through such contracts, brought a case challenging the creation of a works council by its employees. The questions referred by the French court to the CJEU concerned the horizontal applicability of Article 27, as expressed in Directive 2002/14 (and more specifically, its application in the legal dispute between, on the one hand, Mr Laboubi, the employees' representative and, on the other hand, *AMS*, the undertaking itself). It was therefore clear from the preliminary reference that in order to answer the questions put before it, the Court would need to discuss the horizontal effect of the Charter directly.<sup>34</sup> However, the judgment did not do so and its structure is instructive in this regard.

The Court's reasoning began with, and indeed focused on, a discussion of the provisions of Directive 2002/14. After reaffirming the well-known principle that directives lack horizontal direct effect, the Court went on to discuss the potential of applying Directive 2002/14 indirectly.<sup>35</sup> Thus, rather than discussing the purpose of Article 27, the scope of the protection it affords, and the reasons for its incorporation in the EU Charter, the Court restated its case law on the non-horizontality of directives and further noted that indirect effect was inapplicable in

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<sup>32</sup> Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation [2002] OJ L 80/29, Article 1(1).

<sup>33</sup> These contracts were intended primarily to facilitate employment and integration into the job market.

<sup>34</sup> *AMS* (n 4) para 33.

<sup>35</sup> *Ibid*, paras 28-40.

this case, as it would amount to a *contra legem* reading of national law.<sup>36</sup> It was only the absence of indirect horizontal effect of the directive that led the Court to the third part of its assessment, which concerned the horizontal application of Article 27 EUCFR.<sup>37</sup>

As such, whilst confirming its emphasis on the ability of directives to create indirect horizontal effects, in line with *Dominguez*,<sup>38</sup> the Court also appeared to emphatically reaffirm the salience of its pre-Lisbon case law, in which fundamental rights merely operate as exceptions to the lack of direct horizontal effect of directives, without considering their constitutional status under the Charter. It then confined its interpretation to a cursory reading of the Charter's text, finding that this provision did not create a right that was specific enough to be invoked 'as such' in a dispute between private parties.<sup>39</sup> The Court did not discuss other means of ensuring the application of the Charter provision, beyond direct effect. Yet, as Chapter 1 has already highlighted, fundamental rights can be enforced through several different avenues.<sup>40</sup> Indirect effect, namely the development of legal principles applied by the courts in their interpretation of private law, is a particularly valuable tool in fundamental rights adjudication.<sup>41</sup> Even where direct claims cannot be allowed, the peremptory nature of these rights means that they can have a 'radiating effect,' thus entering other legal fields.<sup>42</sup> This discussion was not pertinent only in respect of the relevant directive but also, crucially, in respect of the Charter provision itself.

This feature was recognised, once more, by Advocate General Cruz Villalón, who provided the Opinion in *AMS*. The Advocate General put the matter plainly:

The *Cour de cassation* is not asking the Court the usual question whether a directive can have horizontal effects in relations between individuals, since

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<sup>36</sup> Ibid, paras 39-40.

<sup>37</sup> Ibid, paras 41-49.

<sup>38</sup> Ibid, paras 36-38.

<sup>39</sup> Ibid, para 51.

<sup>40</sup> R Alexy, *A Theory of Constitutional Rights* (tr J Rivers, OUP 2002) 355-56; See also C O'Cinneide and M Stelzer, 'Horizontal effect / state action' in M Tushnet, T Fleiner and C Saunders, *Routledge Handbook of Constitutional Law* (Routledge 2013) 177.

<sup>41</sup> R Brinktrine, 'The Horizontal Effect of Human Rights in German Constitutional Law: The British Debate on Horizontality and the Possible Role of the German Doctrine of "Mittelbare Drittwirkung Der Grundrechte"' (2001) 6:1 *EHRLR* 421, 424.

<sup>42</sup> Ibid.

the *Cour de cassation*, in light of its order for reference, is sufficiently aware of the case-law of the Court in that regard. First, it is asking the Court something quite different, that is whether the Charter, where its content, on the one hand, requires implementation in an act giving specific expression to that content, and where, on the other hand, that specific expression has taken place through a directive, is an admissible criterion for review for a national court assessing the legality of a national rule.<sup>43</sup>

Unlike the Opinion, though, the Court's focus on the properties of the Directive and lack of discussion of the role and status of the Charter provision did not in fact offer a complete answer to the national court's question, as summarised in the passage above. In assuming that the analysis of the horizontal effect of the Directive was sufficient in accounting for the horizontal effect of the Charter provision, without recognising its constitutional specificities, *AMS* exemplifies in the clearest manner the problematic conceptualisation of horizontality in EU law. The Court assimilated a constitutionally protected fundamental right reflecting a commitment to representation within the undertaking as an organisational pillar of employment relations in the European Union (Article 27 EUCFR), with the application of the provisions of a directive that was merely intended to render the parameters of this commitment more concrete. However, one does not necessarily follow from the other. While consistent interpretation of the French Labour Code with Article 3(1) of Directive 2002/14 might have been impossible, as the thresholds set out in that provision were incompatible with those set out in national law,<sup>44</sup> it is not clear from the judgment whether national law could not be interpreted to some extent in light of the spirit and purport of the fundamental right to information and consultation within the undertaking, more broadly.

Firstly, while Article 27 may not be able to give rise to new legal obligations 'as such,' this did not necessarily prevent the provision from being used as a tool to interpret the *existing* obligations.<sup>45</sup> Presumably, even the French laws wrongly implementing the Directive were premised on a broader goal of securing information and consultation. If French law provided a window for interpretation in the light of the fundamental right, then indirect effect could have

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<sup>43</sup> *AMS* Opinion (n 1) para 27.

<sup>44</sup> See, by analogy, Case C-334/92, *Wagner Miret v Fondo de Garantía Salarial* [1993] ECR I-6911, para 20.

<sup>45</sup> See the discussion regarding the normative core of fundamental rights obligations *infra*.

made a material difference to the case. For example, the Court of Justice could have invited the national court to assess whether, read in the light of Article 27 EUCFR, which has a wider scope than Directive 2002/14, French law still offered some degree of information and consultation that could be relied upon by persons working under accompanied-employment contracts. Alternatively, the French court may have been in a position to invalidate those aspects of the labour code that were incompatible with Article 27. It is not suggested that this would *necessarily* have been the case here, as that determination would still depend on national law. Nevertheless, a complete assessment of the horizontality of Article 27 EUCFR by the Court of Justice required an assessment of its indirect horizontality, in addition to its direct horizontality.

Secondly, the Court's reasoning was overly restrictive in its discussion of the remedy of state liability for breach of Directive 2002/14, providing the claimant in this case with little more than false hope. The Court noted that, in the absence of a remedy operating within the private dispute in question, the claimant still had the opportunity of seeking compensation against the state for its failure to comply with the directive.<sup>46</sup> However, the nature of the doctrine of state liability under EU law effectively precludes Mr Laboubi from succeeding before national courts, as it would be difficult to assess the damage he has suffered under the *Francovich* conditions.<sup>47</sup> His claim was about the loss of his and his fellow employees' fundamental right to be informed and consulted in their workplace as prescribed in Article 27 EUCFR in a field of application of EU law (regulated through Directive 2002/14). Not only is the claimant unlikely to meet the requirements of material loss and causal link with France's false implementation of the Directive. Even if that were possible, that claim would merely concern France's breach of the Directive but would not encompass at the same time the breach of the fundamental right enshrined in Article 27, which symbolises a basic condition upon which the workplace in all EU Member States has been agreed to

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<sup>46</sup> *AMS* (n 4) para 50.

<sup>47</sup> See Case C-6/90, *Francovich and Bonifaci v Italy* [1991] ECR I-5375, paras 31-35, 40. To the extent that his employment contract was suspended during the time that he pursued the court action, then Mr Laboubi might be able to recover any lost salaries (the judgment is unclear about what the nature of his suspension was). Whether this is attributable to the French provisions in question remains to be assessed by the national court. See further, regarding the conditions of state liability, Chapter 3.



function. Thus, even if one could maintain the argument that this loss flowed causally from the French state's bad implementation of Directive 2002/14, and the breach was sufficiently serious, as prior case law requires,<sup>48</sup> it is still not easy to put a price tag on the loss of the opportunity to exercise a fundamental right.

The Court's ruling thus highlighted the inability of the doctrine of state liability to replace a thorough discourse on state-mediated effect/positive obligations. In a field falling within the scope of EU law,<sup>49</sup> it is necessary to assess not only the breach of a directive but also whether France has met its constitutional duty to protect Article 27 EUCFR. The Court was not just required to consider whether failing to fulfil this obligation gave rise to claims to compensation under the well-known conditions of state liability for failure to implement EU law set out in *Francovich* and *Brasserie du Pêcheur*. There was also an obligation to protect, or to compensate for failing to protect, the claimants' fundamental right to information and consultation within the undertaking, enshrined in Article 27 of the Charter (in other words, a claim against the French state's failure to meet its positive obligation to ensure the application of the Charter provision).<sup>50</sup>

Finally, the discussion of the horizontal effect of the Charter based on the question of whether a provision can be invoked 'as such' is very problematic.<sup>51</sup> In *AMS*, the Court states that Article 21, which was at stake in *Mangold* and *Kücükdeveci*, was capable of conferring individual rights and of being so invoked.<sup>52</sup> However, the Court goes on to find that Article 27 is not of a rights-conferring character, so that the '*Kücükdeveci* effect'<sup>53</sup> cannot be used in respect of this provision.<sup>54</sup> In his Opinion, Advocate General Cruz Villalón had engaged

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<sup>48</sup> This would be a particularly contentious point, as France had not entirely failed to implement the Directive but, rather, had implemented it wrongly: see *Francovich*, *ibid*, para 38; Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94, *Dillenkofer v Germany*, paras 25-27 [1996] ECR I-4845.

<sup>49</sup> S Peers, 'Supremacy, Equality and Human Rights: Comment on *Kücükdeveci* (C-555/07)' (2010) 35:6 *EL Rev* 849, 855-6.

<sup>50</sup> See, by analogy: M Rönnmar, '*Laval* Returns To Sweden: The Final Judgment Of The Swedish Labour Court And Swedish Legislative Reforms' (2010) 39 *ILJ* 280. The Swedish court had awarded punitive damages for breach of EU law in addition to a claim in compensation.

<sup>51</sup> *AMS* (n 4) para 47.

<sup>52</sup> *Ibid*.

<sup>53</sup> E Muir, 'Of Ages in – And Edges of – EU law' (2011) 48:1 *CML Rev* 39, 60.

<sup>54</sup> *AMS* (n 4) para 49.

in a thorough discussion of the issues raised both by the content and by the structure of Article 27. Whereas he did not put forward further examples, he noted that, even if some rights are primarily addressed to states, at the same time ‘there are rights whose relevance in relationships governed by private law it would be inconceivable to deny.’<sup>55</sup> He then went on to consider Article 27 more specifically. He argued:

The right recognised in that article is an excellent example of the second group of rights to which I have just referred, that is to say the rights which it would be more than imprudent to deny were relevant in relations governed by private law. As has been stated and in terms which there will be ample opportunity to consider, that article declares that ‘[w]orkers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices.’ The heading of the article in question is ‘Workers’ right to information and consultation *within the undertaking*,’ the last detail meaning that it must be accepted that ‘the undertaking’ is in some way involved in the effectiveness of that right. It is true that the public authorities (the European Union and the Member States) will be the first to be called upon to ‘guarantee’ workers the enjoyment of that right, through adopting and implementing the relevant provisions. However, in complying with the provisions of the public authority, undertakings themselves, and for such purposes the same is true whether they are public or private, must also ensure, on a day-to-day basis, that workers are guaranteed information and consultation at the appropriate levels.<sup>56</sup>

The Advocate General therefore concluded that Article 27 could, in principle, be relied upon in a private dispute such as the one in question, as a matter of content.<sup>57</sup> He subsequently considered extensively the meaning and consequences of the distinction between rights and principles made in the Charter,<sup>58</sup> in line with the aforementioned discussion of this issue in Chapter 2. He argued that, since Article 27 did not in itself stipulate the conditions of information and consultation within the undertaking, it should be considered a principle.<sup>59</sup> However, this feature was not sufficient to remove its potential for horizontality altogether. To the extent that Directive 2002/14 clearly explained the

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<sup>55</sup> *AMS Opinion* (n 1) paras 38-40.

<sup>56</sup> *Ibid*, paras 38-40, emphasis original.

<sup>57</sup> *Ibid*, para 41.

<sup>58</sup> *Ibid*, paras 44-80.

<sup>59</sup> *Ibid*, para 56.

conditions of its exercise, Article 27 had acquired specific parameters in EU law and could therefore produce direct horizontal effect.<sup>60</sup> The fact that the EU secondary law clarifying this right happened to be a directive (and the exception to direct horizontal effect thus applied to it) was immaterial, because it was not the Directive alone but Article 27 of the Charter in conjunction with the Directive that would meet the conditions for direct horizontality.<sup>61</sup>

The Advocate General's reasoning in this regard was powerful and constitutionally coherent.<sup>62</sup> However, it was not mentioned in the judgment, where the Court engaged in a very different analysis. The Court interpreted neither the nature and context of Article 27 EUCFR, nor the rights/principles distinction. Rather, the emphasis on rights that can be invoked as such in the judgment seemed to create a new distinction between 'rights-conferring' provisions, which are capable of direct effect and, therefore, potentially, of horizontal direct effect, and non-rights-conferring provisions, which are not.<sup>63</sup> In other words, the Court appeared to retain a practice-based assessment of the nature of the provisions in question based on a test of conferral of individual rights. It has been suggested that this approach is preferable to founding determinations of invocability upon the rights/principles distinction, which is, as discussed in Chapter 2, unclearly expressed within the Charter and its Explanations.<sup>64</sup> Whereas this point was not made in the judgment, the operation of the rights-conferring/non-rights-conferring test does indeed suggest that the Court intended to replace that distinction.<sup>65</sup> This was confirmed in *Glatzel*, which concerned Article 26 EUCFR on the integration of persons with disabilities.<sup>66</sup> In

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<sup>60</sup> Ibid, para 66.

<sup>61</sup> Ibid, paras 73-80.

<sup>62</sup> See further Chapter 7, in which a similar model for horizontality is proposed – one that does not, however, extend as far as the Advocate General's suggestion in respect of direct horizontality.

<sup>63</sup> *AMS* (n 4) para 47.

<sup>64</sup> S Peers and S Prechal, 'Article 52: Scope and Interpretation of Rights and Principles' in S Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Beck/Hart 2014) para 52.190. Regarding the distinctions between different Charter provisions for the purposes of horizontal effect, see further: D Leczykiewicz, 'Horizontal Application Of The Charter Of Fundamental Rights' (2013) 38 *EL Rev* 479, 488-489.

<sup>65</sup> See Murphy (n 31).

<sup>66</sup> Case C-356/12, *Glatzel v Freistaat Bayern*, EU:C:2014:350, para 78. It follows from this judgment that all principles should be considered non-rights-conferring. However, this does not necessarily mean that any provision which is not a principle should in turn be considered rights-conferring.

that case, the Court found that Article 26 EUCFR does not confer rights ‘as such’ and therefore refrained from engaging in judicial review altogether on the basis of that article.<sup>67</sup> By contrast, it affirmed that Article 21 could be so invoked.<sup>68</sup>

This position could have wide-ranging and not altogether positive implications. First, like the rights/principles distinction, the distinction between rights-conferring and non-rights-conferring provisions in itself says little about the kind of obligations these categories entail, other than the fact that they do not give rise to direct effect. In both *AMS* and *Glatzel*, it was necessary for the Court to explain whether non-rights-conferring provisions like Articles 26 and 27 retain any minimum, irreducible core that still needs to be protected and, if so, what that consists of.<sup>69</sup> For example, do provisions of a non-rights-conferring character require observance as opposed to respect, along the lines of the rights/principles distinction? Is their invocation in all circumstances conditional upon the existence of further legislation? In turn, does the distinction mean that provisions with a rights-conferring nature can be enforced against private parties regardless of the existence of secondary legislation? Despite their centrality to the application of horizontal effect, these questions are left unanswered in these judgments.

Furthermore, the Court’s approach has precluded a much-needed interpretation of the content of the rights in question, building on their social and legal context and the goals they serve in the European Union.<sup>70</sup> Returning to *AMS* in particular, the assessment of Article 27 is unconvincing in the absence of such a discussion, especially when compared to judgments in which horizontality has previously been granted, such as *Mangold* and *Küçükdeveci*.<sup>71</sup> As the Advocate General had pointed out, fundamental rights such as that to information and consultation within the undertaking are difficult to discuss without having regard to broader questions concerning the viability of a state-based approach in their effective protection.<sup>72</sup>

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<sup>67</sup> Ibid. See, for a detailed analysis, J Krommendijk, ‘Principled Silence or Mere Silence on Principles? The Role of the EU Charter’s Principles in the Case Law of the Court of Justice’ (2015) 11:2 *EuConst* 321, 351.

<sup>68</sup> *Glatzel*, *ibid*, paras 74ff. Krommendijk, *ibid*, 351-352.

<sup>69</sup> *AMS* Opinion (n 1) paras 48-49 and 68.

<sup>70</sup> *Frantziou*, Case C-176/12 (n 31) 346-7.

<sup>71</sup> See *AMS* (n 4) paras 39-49.

<sup>72</sup> *AMS* Opinion (n 1) paras 38-40.

By continuing to follow a textual approach in respect of horizontality, the Court seems to have excluded a series of relevant considerations from its assessment, such as equality of treatment, in this case between standard workers and non-standard workers.<sup>73</sup> Furthermore, the provision in question was detached from a rich legal background comprising national and international protections that the Union respects, which feeds into the decision to grant fundamental status to the right to information and consultation within the undertaking in the Charter. That background includes Article 21 of the European Social Charter,<sup>74</sup> Articles 17 and 18 of the 1989 Community Charter of the Fundamental Social Rights for Workers,<sup>75</sup> and the ILO's core labour standards.<sup>76</sup> Seen in that light, the distinctions drawn by the Court between Article 21 and Article 27 of the Charter and, consequently, between rights-conferring and non-rights-conferring provisions, appear over-simplified.

Indeed, it is not entirely clear how the determination of whether a provision confers rights or not should be made. The Court suggests that the crucial characteristic of rights-conferring provisions is that they do not require further legislative action – in other words, that they are purely ‘negative’ in character<sup>77</sup> – whereas provisions that refer to national laws and practices, such as Article 27, are to be considered as non-rights-conferring.<sup>78</sup> This approach creates a system of categorisation of the Charter's provisions, which is unhelpful both from the perspective of understanding the distinction between rights and principles made in the Charter itself and from a conceptual perspective.<sup>79</sup> The

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<sup>73</sup> Professor Silvana Sciarra persuasively made the latter point at a symposium concerning the *AMS* judgment, which was held at University College London on 11 February 2014.

<sup>74</sup> European Social Charter (revised), ETS No 163 (1996).

<sup>75</sup> Community Charter of the Fundamental Social Rights of Workers [1989] OJ C120/52.

<sup>76</sup> ILO Convention concerning Discrimination in Respect of Employment and Occupation, No 111 (1958); ILO Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, No 98 (1949); ILO Convention concerning Freedom of Association and Protection of the Right to Organise, No 87 (1948).

<sup>77</sup> By ‘negative’ obligations I refer to duties requiring inaction, as opposed to action on the part of Member States: e.g. the obligation *not* to discriminate, as opposed to an obligation *to ensure* equal treatment (or, by the same token, information and consultation within the undertaking).

<sup>78</sup> Murphy (n 31) 7-8. See also A Young, ‘Horizontality and the EU Charter,’ UK Constitutional Law Blog, 29 January 2014, <<http://ukconstitutionallaw.org/2014/01/29/alison-young-horizontality-and-the-eu-charter/>> accessed 20 February 2014.

<sup>79</sup> S Peers, ‘When does the EU Charter of Rights Apply to Private Parties?’, EU Law Analysis Blog, 15 January 2014, <<http://eulawanalysis.blogspot.co.uk/2014/01/when-does-eu-charter-of-rights-apply-to.html>> accessed 20 February 2014.

distinction automatically creates two tiers of fundamental rights not only in terms of the expectations they may create for further legislative action (as the rights/principles distinction seems to do) but also in terms of their invocability, more broadly.<sup>80</sup> First, the classification is unrepresentative of the non-hierarchical exposition of rights in the Charter itself, especially insofar as it could adversely affect specific chapters thereof more than others. Many of the provisions enshrined in the Charter's Solidarity Chapter are inextricably linked to secondary legislation and do not depend solely on the fulfilment of a 'negative' obligation, as the Court seems to require in *AMS*.<sup>81</sup> Reducing the question of the Charter's enforceability – vertical as well as horizontal – to the question of whether a particular obligation is rights-conferring or not, understood in the strict sense of whether one is able to rely on a particular right 'as such,' rather than in conjunction with other legislation, risks creating a *de facto* near-exclusion of enforceability for certain provisions, mainly to be found, but not necessarily confined to, the Solidarity Chapter.<sup>82</sup>

More broadly, rights that enshrine a negative obligation can become meaningless in the absence of positive action to protect them.<sup>83</sup> For instance, a traditional civil and political right, such as the right to marry and found a family enshrined in Article 9 of the Charter, does not merely cover state interference – the right cannot be exercised in the absence of measures taken on the part of the state to implement it. More starkly still, even the prohibition of torture, inhuman or degrading treatment or punishment enshrined in Article 4 of the Charter cannot be fulfilled unless a degree of state action is taken to properly train police and military forces in such a way that they will not abuse their position of power.<sup>84</sup> Establishing a test of enforceability based on a distinction between provisions which confer rights 'as such' and provisions which require some form of further

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<sup>80</sup> The Court has confirmed this in *Glatzel* (n 67) paras 74ff. Krommendijk (n 67) 352.

<sup>81</sup> See B Hepple, *Rights At Work: Global, European And British Perspectives* (Sweet & Maxwell 2005) 35.

<sup>82</sup> B De Witte, 'The Trajectory of Fundamental Social Rights in the European Union' in G De Búrca and B De Witte (eds), *Social Rights in Europe* (OUP 2005) 163.

<sup>83</sup> H Shue, *Basic rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press 1996) 52, 60.

<sup>84</sup> V Mantouvalou, 'In Support of Legalisation' in CA Gearty and V Mantouvalou, *Debating Social Rights* (Hart 2011) 119.

legislative action is conceptually problematic, as it does not appear to recognise that fundamental rights require protection in multiple forms.<sup>85</sup>

Indeed, overall, the case exemplifies the difficulties inherent in applying horizontality through technical rules in the fundamental rights domain: these rights do not operate in a contextual vacuum; they engage a web of commitments *within* a social setting, in this case that of employment, which is characterised by a plurality of bargaining positions and by significant power struggles. The Court's treatment of the Charter provision as if it were separate to these issues and the unquestioned application of technical distinctions drawn from prior case law to the Charter, without an assessment of how the incorporation of employment rights therein alters their overall status in the EU, are criticisable. Not only does the judgment raise questions about the treatment of social rights, but it also puzzlingly appears to conflate the idea of horizontality as a constitutional principle with multiple manifestations, as discussed in Chapter 1, with the direct horizontal effect of directives.

Of course, as the Advocate General had rightly noted, it is impossible to discuss the horizontal effect of the Charter as if horizontal effect did not already form part of the Court's case law to date.<sup>86</sup> It is equally unsatisfactory, though, when discussing the horizontality of a new and constitutionally important document, to extrapolate from past practice without offering an analysis of how previous rules apply to the new legal context, and, most importantly, what reasons can be adduced for maintaining them.<sup>87</sup> A case raising difficult constitutional issues of the kind at stake in *AMS* is likely to have an impact on the interpretation of the Charter more generally. As Peers notes, the judgment does more than exclude the horizontal effect of Article 27: by distinguishing that provision from Article 21 of the Charter, it can be read as affirming the potential for horizontality of some of the Charter's provisions, as a matter of principle.<sup>88</sup> Nonetheless, the cryptic and hurried manner in which this is done<sup>89</sup> creates significant difficulties

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<sup>85</sup> See Shue (n 83). See also J Ruggie, 'Protect, Respect and Remedy: A Framework for Business and Human Rights' (2008) 3 *Innov Technol Gov Glob* 189.

<sup>86</sup> *AMS* Opinion (n 1) para 34.

<sup>87</sup> See *Prigge* Opinion (n 1) para 26.

<sup>88</sup> Peers (n 79).

<sup>89</sup> See in particular *AMS* (n 4) para 47.

in the application of the ruling. Despite suggesting that Article 21 had a different status to Article 27, the Court did not actually go on to discuss the Charter's potential for horizontality in the future, so that its development remains a matter of academic speculation.<sup>90</sup>

#### ***4.2.3 Dansk Industri: confirming a fragmented view of horizontality for fundamental rights post-Lisbon***

In its recent ruling in *Dansk Industri* ('DI'), the Court had the opportunity to revisit the problems identified in the aforementioned cases. However, the judgment was underwhelming from this perspective. Despite adding some clarity regarding the horizontal applicability of Article 21 EUCFR, the judgment heightens the fragmented nature of the Court's case law and raises important questions of coherence in respect of the interpretation of the Charter.

The case built on the much-litigated issue of age discrimination and concerned the recovery of arrears of pay by the legal heirs of an individual who had been discriminatorily dismissed. The Danish Supreme Court referred to the Court of Justice, firstly, a question regarding the direct horizontal effect of the right not to be discriminated against. Secondly, the national court asked how it should reach the balance between that right and the general principles of legal certainty and legitimate expectations.

In line with his counterpart in *AMS* and *Prigge*, in *DI*, Advocate General Bot urged the Court to clarify the case law, albeit not so much in respect of direct effect but of indirect horizontality. The main tenet of his Opinion was that the duty of national courts 'to interpret national law in conformity with the content and objectives of directives means that directives may have an indirect effect in such disputes.'<sup>91</sup> The Advocate General's reading of the case law was that the exception to the non-horizontality of directives through a general principle of law only arises in cases where consistent interpretation *qua* duty of national courts to do all that is in their power to give effect to EU law would be impossible.<sup>92</sup>

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<sup>90</sup> Ibid.

<sup>91</sup> Opinion of Advocate General Bot, delivered on 25 November 2015, in Case C-441/14, *Dansk Industri (DI) v Estate of Karsten Eigil Rasmussen*, EU:C:2015:776, para 41.

<sup>92</sup> Ibid, para 50.



On the one hand, the Advocate General's reference to existing case law is not entirely convincing. Whereas the approach he put forward was consonant with *Dominguez* and, to a certain extent, *AMS*, it also suggested that a case like *Küçükdeveci* might have been decided without recourse to direct effect, if the national law had left a window of interpretation open to national courts (and, on the facts, this had not been the case).<sup>93</sup> While the unavailability of the mechanism of consistent interpretation may indeed have been an internal reason for the Court's ruling in *Küçükdeveci*, that is not clearly reflected in the judgment.

On the other hand, though, there is still significant force in the Advocate General's position as a means of interpreting the case law in a conceptually coherent manner from this point forward. Effectively, Advocate General Bot merely emphasised that the question of horizontality does not begin from direct effect but, rather, from the national court's duty to interpret all national law consistently with EU constitutional law, including the fundamental rights contained in the Charter.<sup>94</sup> In line with our discussion in the previous pages, he added that the question of whether consistent interpretation was possible depended solely on national law – and indeed, one might add, on the role and functions that a national constitutional order attributed to its judicial system.<sup>95</sup> He thus urged the Court of Justice to consider very carefully the state of national law before stipulating a remedy.<sup>96</sup> Finally, he pointed out that the duty of consistent interpretation was flexible enough to enable the national court to give effect to provisions enshrining the right to equal treatment as well as to the general principles of legal certainty and legitimate expectations.<sup>97</sup>

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<sup>93</sup> Ibid.

<sup>94</sup> The Advocate General indeed referred to academic commentary in which this argument has been advanced as a normative remedy to constitutional conflicts: *ibid*, para 47. See D Simon, 'La Panacée de l'Interprétation Conforme: Injection Homéopathique ou Thérapie Palliative?' in MT D'Alessio, V Kronenberger and V Placco (eds), *De Rome à Lisbonne: Les Juridictions de l'Union Européenne à la Croisée des Chemins — Mélanges en l'honneur de Paolo Mengozzi* (Bruylant 2013) 298.

<sup>95</sup> *DI* Opinion, *ibid*, para 52. See also Case C-212/04, *Adeneler and Others v Ellinikos Organismos Galaktos (ELOG)* [2006] ECR I-6057, para 103; Case C-506/04, *Wilson v Ordre des avocats du barreau de Luxembourg* [2006] ECR I-8613, para 34.

<sup>96</sup> *DI* Opinion, *ibid*, para 54.

<sup>97</sup> *Ibid*, paras 66ff. It is noteworthy that the Advocate General had envisaged the possibility of the Court of Justice also authorising a temporal limitation of the effects of the ruling in the interests of legal certainty, at para 82.

The Court did not altogether follow his reasoning. First, it discussed the case based on the general principle of non-discrimination, finding:

The source of the general principle prohibiting discrimination on grounds of age, as given concrete expression by Directive 2000/78, is to be found, as is clear from recitals 1 and 4 of the directive, in various international instruments and in the constitutional traditions common to the Member States. *It is also apparent from the Court's case-law that that principle, now enshrined in Article 21 of the Charter of Fundamental Rights of the European Union, must be regarded as a general principle of EU law.*<sup>98</sup>

It thus suggested that inclusion of a fundamental right in the Charter does not automatically guarantee the 'general principle' status, which remains the benchmark for a decision on horizontality. Secondly, even though the Court did confirm the point it had made in *Dominguez*, namely that consistent interpretation (indirect effect) was the starting point in the assessment of horizontality, it quickly went on to affirm the *Mangold/Kücükdeveci* rule on the facts.<sup>99</sup>

At a first stage, the Court confirmed that it was primarily the national court's duty to ensure that EU law remained 'fully effective'<sup>100</sup> and clarified that the question of direct effect would arise only to the extent that the body of national law could not be interpreted in conformity with the directive.<sup>101</sup> That is a positive reinterpretation of the general principles case law: it recognises that a national court will generally be in a better position to assess how the structures of national law can accommodate an EU fundamental right in private relations.<sup>102</sup> It thus rightly posits supranational remedies as the second step of the analysis (once national remedies are proven inadequate).<sup>103</sup>

Once it conceded that consistent interpretation with the directive was impossible, the Court quickly reached the conclusion that the supranational remedy of direct effect applied. This was so regardless of the principle of legitimate expectations, while legal certainty was not discussed at all in this part

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<sup>98</sup> *DI* (n 5) 22, emphasis added, references omitted.

<sup>99</sup> *Ibid*, paras 33-34.

<sup>100</sup> *Ibid*, para 29.

<sup>101</sup> *Ibid*, para 35.

<sup>102</sup> On the differentiated nature of this field see further Chapter 1. The need for a degree of deference to national courts within a supranational order is further discussed in Chapter 7.

<sup>103</sup> For a discussion of the differences between national and supranational remedies, see further Chapter 7.

of the judgment.<sup>104</sup> The Court simply concluded, referring to its settled case law in *Defrenne*:

The protection of legitimate expectations cannot, in any event, be relied on for the purpose of denying an individual who has brought proceedings culminating in the Court interpreting EU law as precluding the rule of national law at issue the benefit of that interpretation.<sup>105</sup>

It did not, however, discuss the integration of the principles of legal certainty and legitimate expectations *within* the remedy it offered. It simply referred to the principle of state liability as a remedy for any damage to legitimate expectations caused by the Member State's failure properly to transpose the directive.<sup>106</sup> It then concluded, without reasoning as to how this balance is reached, that the principles of legitimate expectations and legal certainty cannot be allowed to impede the effective exercise of individual rights.<sup>107</sup>

This approach remains inadequate conceptually for two main reasons: first, rather than assessing consistent interpretation in relation not only to the directive but also to the fundamental right, it confines the analysis to the former. This is unconvincing. As Advocate General Jacobs had rightly argued in his Opinion in *Unilever*, the assessment of conformity must be made by reference to the broader constitutional framework of the EU (which now includes the Treaties and general principles as well as the Charter) and not just a specific regulation or directive.<sup>108</sup> Secondly, the Court's current approach isolates the question of consistent interpretation with the directive enshrining the general principle/fundamental right from the question of what the meaning of that fundamental right is and, crucially, how its horizontal application should be balanced with the general principles of legal certainty and legitimate expectations. Insofar as they are all structural elements of the constitutional order of the European Union, though, is it legitimate for the Court to reach the conclusion that legitimate expectations and legal certainty cannot prevent the horizontal application of the principle of non-discrimination?

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<sup>104</sup> *DI* (n 5) 35-41.

<sup>105</sup> *Ibid*, para 41.

<sup>106</sup> *Ibid*, para 42.

<sup>107</sup> *Ibid*, para 43.

<sup>108</sup> Opinion of Advocate General Jacobs, delivered on 27 January 2000, in Case C-443/98, *Unilever Italia SpA v Central Food SpA* [2000] ECR I-7565, para 102.

The answer to this question could only have been found if the Court engaged in a substantive discussion of the hierarchy of norms and meaning of the fundamental right to equal treatment. It is indeed important to note that the undertone of the Danish Supreme Court's reference to the Court of Justice in *Dansk Industri* presented significant similarities to the reaction to *Mangold*.<sup>109</sup> In its order for reference, the Danish court stated that it did not just require guidance as to the direct horizontal effect of the general principle of non-discrimination on grounds of age but also on how that principle should be balanced against two other general principles of EU law: those of legal certainty and legitimate expectations. Even though there was no indication that the national court was prepared judicially to review the Court of Justice, it nonetheless made clear that it was impossible to apply the existing case law without at the same time affecting legal certainty and the legitimate expectations of the private parties on whom a horizontal obligation would be imposed.<sup>110</sup> As such, a clarification in respect of the relationship between consistent interpretation and indirect effect appears minor – if not entirely misplaced – to the extent that it is not accompanied by a rigorous assessment of the import and meaning of the Charter provisions themselves.

As Chapters 6 and 7 will discuss in further detail, in containing the use of direct effect in this context, the Court rightly seems to acknowledge the complementarity of national and supranational standards in the protection of EU fundamental rights. However, this point must be accompanied by two important qualifications: the first is methodological and the second conceptual. From a methodological perspective, even if it appears less problematic to start from the indirect effect mechanism than from the – at least in terms of national judicial perceptions – more intrusive mechanism of direct horizontal effect, it is still greatly unsatisfactory to employ a different methodology to the fundamental rights that find expression in a directive from those that come within the scope of EU law through other provisions. Insofar as fundamental rights are now enshrined in a single binding Charter that has the status of primary law, it is essential for the

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<sup>109</sup> On this issue, see the discussion in Chapters 3 and 7.

<sup>110</sup> See *DI* Opinion (n 91) para 23.

horizontality doctrine to apply to it coherently, both in order to achieve legal certainty for claimants and in order to ensure the overall clarity of this field of EU law. The second point that ought to be made concerns the content of the rulings themselves. Horizontality in this field involves not only the question of how a directive feeds into private relations but also, more importantly, the questions of principle that these cases concerned, namely the meaning of the right to paid annual leave, the right to be informed and consulted in the workplace, and the right not to be discriminated against. Regrettably, the case law has consistently failed to provide guidance on these issues.

It follows that, on the one hand, the Court's emphasis on consistent interpretation in recent case law should be welcomed as a matter of substance, insofar as it recognises the centrality of national courts in giving effect to fundamental rights in private disputes. On the other hand, though, the continued reliance on the rules concerning the non-horizontality of directives in discussing the horizontal effect of the Charter, as well as the overall lack of coherent reasoning about its goals and functions in the constitutional order of the European Union, remain a cause of concern.

### 4.3 *De facto* application of horizontality without 'horizontal' reasoning

The Court's conservative stance towards the Charter's horizontality in *AMS* is not underpinned by a coherent conceptual commitment to applying the Charter vertically, i.e. to Member States and Union institutions alone. Rather, despite the problematic manner in which it has dealt with the questions about direct horizontal effect that have been submitted to date, the Court remains open to the creation of horizontal obligations in practice. This is clear not only in virtue of the suggestion in the *AMS* ruling that some provisions of the Charter (such as Article 21 on non-discrimination) amount to general principles of law that can be applied horizontally. At the same time, the Court has attributed horizontal obligations substantively to (at least some) private parties, such as powerful search engine operators, in respect of some fundamental rights, such as privacy.<sup>111</sup> Indeed, the

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<sup>111</sup> *Google* (n 6). See also Joined Cases C-335/11 and C-337/11, *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening acting on behalf of Pro Display A/S*, EU:C:2013:222, paras 19-21.

reader may recall our discussion concerning the imposition of a horizontal obligation on Google to protect the right to privacy and to weigh it up against the freedom of expression, in Chapter 1. It is worth returning to Mr Costeja González's case against Google, which entailed the imposition of this wide-ranging horizontal obligation, in order to assess a rather different dimension of the Charter's horizontality.

Following a reference from the Spanish Constitutional Court, the Court of Justice affirmed that individuals like Mr Costeja González can request to have personal data removed from Internet search engines in the EU, in virtue of their fundamental rights to privacy and data protection (a right to have their data 'forgotten'), enshrined in Articles 7 and 8 of the Charter, in conjunction with Directive 95/46.<sup>112</sup> Unlike past judgments concerning the attribution of horizontal effect, discussed in the previous section, in *Google* the Court was keener to affirm horizontal obligations, proving unequivocally the relevance of horizontality in the Charter context.<sup>113</sup> The Court imposed on a private undertaking – Google – the obligation of weighing up the freedom of expression and the rights to privacy and private data. It did so through the mechanism of indirect horizontality, by reading the relevant directive in the light of Articles 7 and 8 of the Charter. At the same time, though, the judgment displayed important drawbacks in the application of horizontal effect in EU fundamental rights law. Most importantly, despite reaching a horizontal outcome, the Court did not mention horizontality at all in its reasoning.

Indeed, *Google* is not a case of mere indirect effect – so much is actually being read into the Directive that it almost seems to amount to direct horizontality of the Charter provisions. This is done without mentioning horizontality as a constitutional principle and its relationship to the well-known (albeit criticisable) doctrine that has characterised its direct and indirect manifestations to date within EU law. While the Court was clear about the fundamental rights basis of a claim

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<sup>112</sup> [1995] OJ L281/31. *Google*, *ibid*, para 97.

<sup>113</sup> One reason for this may be the nature of the right that was invoked in this case (privacy), as opposed to rights under the Solidarity Chapter which, as further discussed in Chapter 2, had been the subject of contestation during the Charter's drafting.

to have personal data deleted,<sup>114</sup> it failed to assess what the ‘institutionally-defined rights to privacy’ enshrined in Articles 7 and 8 of the Charter actually guarantee, which specific aspects of these rights the publication of personal data affects and what a violation of these rights by a private actor, Google, strikes at.<sup>115</sup> It discussed neither the concept of horizontal effect *qua* responsibility of private actors in the observance of fundamental rights, nor the fit of its ruling into the existing body of case law on the horizontal effect of EU law.

Thus, whereas in *Google* the Court rightly pointed to the reasons why horizontality may be beneficial (e.g. changes in society and the power held by undertakings like Google), it did not adequately articulate those reasons. In an information society dominated by private actors, the fundamental rights to privacy and the protection of private data require a degree of horizontality in order to retain their meaningfulness.<sup>116</sup> There are therefore good grounds for attributing some degree of responsibility for the safeguard of fundamental rights to certain private actors. In not explaining this exercise, though, the Court seemed to stall the possibility of transparent discussion about the merits of the ruling. Furthermore, the departure from its settled approach towards horizontality to date – a largely desirable turning point – is easy to overlook. The lack of reasoning in this regard, coupled with the absence of links to other horizontal effect cases and the setting out of overarching principles, seem to devalue what could have been a meaningful change of direction in respect of horizontal effect in the Charter era. Indeed, the effect of the ruling is that horizontal obligations flowing from the Charter are attributed to private entities in the case law, even though the horizontality question is not openly examined.

Moreover, the case confronts us plainly with the question of what limits should be placed on horizontality. The *Google* judgment can be starkly contrasted with the general principles case law in this regard. Whereas in the aforementioned cases and, particularly, *AMS*, the Court had been cautious in limiting its approach to the facts and right in question, the *Google* judgment does not do so. Rather, it appears to add to the legal uncertainty that characterises this field post-Lisbon and

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<sup>114</sup> *Google* (n 6) paras 62-99.

<sup>115</sup> T Scanlon, ‘Adjusting Rights and Balancing Values’ (2004) 74 *Fordham L Rev* 1477, 1478-81.

<sup>116</sup> See A Cavanagh, *Sociology in the Age of the Internet* (McGraw Hill 2007) 62-63.

raises important questions about the extent to which it can be generalised: Should the same standards apply, for instance, to search engines of a smaller scale; websites unrelated to the news business; amateur blogs; or an unfortunate post on Facebook from several years ago?<sup>117</sup>

These questions are not purely hypothetical. They in fact came before the Court of Justice in a rather unusual set of circumstances, in *Ryneš*.<sup>118</sup> The case concerned the installation of video surveillance equipment in a private property for the purposes of personal safety, which nonetheless also monitored a part of public space (the street on which the property was situated). When one of the windows of the house was broken by a shot from a catapult, the owner gave the footage to the police, which in turn used it to identify suspects. One of the suspects challenged the lawfulness of the footage, arguing that it amounted to processing of personal data within the meaning of Article 3(2) of Directive 95/46 and, as such, it should have been reported. The Czech court referred a question to that effect to the Court of Justice. Despite the eloquent discussion of the differences between a horizontal relationship with a company such as Google and a private camera installed in someone's home, which was carried out by the Advocate General,<sup>119</sup> the Court did not consider this point in any detail. In fact, the operative part of the ruling, which was only sixteen paragraphs long, contained no assessment of the distinction between different types of private relations or indeed the balance between the right to private life of those caught on camera on the one hand and right to property of Mr Ryneš on the other. The Court simply found:

To the extent that video surveillance such as that at issue in the main proceedings covers, even partially, a public space and is accordingly directed outwards from the private setting of the person processing the data in that manner, it cannot be regarded as an activity which is a purely

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<sup>117</sup> Cf Opinion of Advocate General Jääskinen, delivered on 25 June 2013, in Case C-131/12, *Google Spain SL, Google Inc v Agencia Española de Protección de Datos (AEPD) and Costeja González*, EU:C:2013:424, para 134. See also : House of Lords European Union Committee, 'EU Data Protection law : a 'right to be forgotten' ?', Second Report of Session 2014-15, HL Paper 40, London 30 July 2014, <<http://www.publications.parliament.uk/pa/ld201415/ldselect/lducom/40/40.pdf>> accessed 7 August 2014, paras 40-41.

<sup>118</sup> Case C-212/13, *Ryneš v Úřad pro ochranu osobních údajů*, EU:C:2014:2428.

<sup>119</sup> Opinion of Advocate General Jääskinen, delivered on 10 July 2014, in Case C-212/13, *Ryneš v Úřad pro ochranu osobních údajů*, EU:C:2014:2072, paras 48ff.



‘personal or household’ activity for the purposes of the second indent of Article 3(2) of Directive 95/46.<sup>120</sup>

However, the Court did not discuss any of the necessary implications of that decision or indeed the difficult notions of personal household, private and public space and private and public life in modernity.

While a thoughtful application of horizontality can have benefits in respect of inclusion and the effective protection of fundamental rights under modern living conditions, over-extending it can have the opposite effect. It risks de-constitutionalising and outsourcing to private actors important aspects of fundamental rights protection, a danger well illustrated in the *Google* judgment and the absence of constitutional discourse that characterised it. As Chapter 5 will highlight in more detail, the case in fact exemplifies a broader discomfort with questions pertaining to the public/private divide, which appears to tie together the multi-faceted case law we have so far seen in this field.

The ease with which the Court of Justice has *de facto* attributed obligations to private parties is indeed striking. The *Test-Achats* case provides another example. The case concerned the interpretation of Article 5(2) of Directive 2004/113. The Court found that the provision should be struck out, as it was incompatible with the right to equal treatment. As a result, both public and private insurance companies were no longer allowed to take into account statistics relating to gender in the calculation of insurance premiums.<sup>121</sup> The case can be considered as bringing into the fundamental rights context a form of ‘incidental horizontal effect’ whereby claimants attack the validity of legislation in order subsequently to invoke the ruling in a private dispute. The judgment did not, however, mention its relationship to the case law that exists regarding the incidental horizontal effect of directives and which has been criticised in depth for being unduly complex and a systemic cause of legal certainty.<sup>122</sup> Thus, while

<sup>120</sup> *Ryneš* (n 118) para 33.

<sup>121</sup> See S Sever, ‘Horizontal Effect and the Charter’ (2014) 10 *CYEL* 39, 50.

<sup>122</sup> Opinion of Advocate General Jacobs, delivered on 27 January 2000, in Case C-443/98, *Unilever Italia SpA v Central Food SpA* [2000] ECR I-7565, paras 74ff; See T Tridimas, *Black White and Shades of Grey: Horizontality of Directives Revisited* (2001) 21:1 *YEL* 327. See also, for a more recent critique, Opinion of Advocate General Bobek, delivered on 7 July 2016, in Case C-303/15, *Naczelnik Urzędu Celnego I w Ł. v G.M., M.S.*, EU:C:2016:53, especially paras 51ff.

cases like *Test-Achats* and *Google* made leaps in terms of ensuring that EU legislation intended to apply to private parties in fact incorporates the fundamental rights protected in the Charter, they suffer greatly from a lack of explicit and articulate reasoning as to why it was essential that private parties should be subject to the obligation to observe them.

#### **4.4 The problems with the Court's approach in the Charter context: a law of diminishing legitimacy?**

Overall, the reconstruction of the case law in the two preceding sections demonstrates that the horizontality doctrine has remained greatly affected by prior rules and, as such, largely deficient in terms of constitutional analysis. After the Charter's entry into force, in some instances, there has been a (selective) application of prior rules on horizontal effect. In others, as De Mol puts it, there is a 'deafening silence' about horizontality altogether.<sup>123</sup> And, while silence in this field is unsatisfactory, it is all the more problematic when it is carried forward to case law which sets out the imposition of entirely new obligations on private parties, as was the case in rulings like *Google*. Two specific points of revision of this case law are required. The first concerns the constitutionality of the Court's reliance on the general principles of EU law to justify the application of the Charter. The second point concerns the transparency and argumentative coherence of its reasoning in this field, more generally.

Firstly, and perhaps most importantly, the Court has not evaluated what the Charter's primary law status means for its horizontal applicability and has not attempted to assess what changes it has brought about in respect of prior case law, other than merely affirming its relevance in horizontal disputes.<sup>124</sup> The aforementioned judgments indeed suggest resistance to the idea that the Charter has changed much in the way fundamental rights are enforced in the Union on the part of the Court.<sup>125</sup> The latter appears, rather, to reassess the status of some of the provisions that have been designated as 'fundamental' in the Charter, by rendering

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<sup>123</sup> See De Mol (n 2).

<sup>124</sup> *AMS* (n 14) para 42.

<sup>125</sup> See, in respect of the divergent views held by the Court's judges regarding the Charter's effects: S Morano-Foadi and S Andreadakis, 'Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights' (2011) 17:5 *ELJ* 595, 599, 610.

horizontality dependent on the nature of the right and the question of whether it constitutes a general principle of EU law.

Empirical research regarding the sometimes-hesitant judicial attitudes towards the Charter, documented by Morano-Foadi and Andreadakis, explains some of the recent difficulties in its application, as well as the Court's lack of direction in relation to fundamental rights, more generally.<sup>126</sup> It shows that EU judges and Advocates General are split about the Charter's constitutional significance.<sup>127</sup> While for some members of the Court the Charter signifies a change of direction in EU law, with fundamental rights being 'at the core of the European agenda',<sup>128</sup> post-Lisbon, several Court members do not share this view. Rather, they are more sceptical about the drafters' intentions and consider the Charter a 'weird' instrument, more of a 'sound bite' than a bill of rights and, essentially, a document that changed nothing in terms of substance in the Court's fundamental rights jurisprudence.<sup>129</sup> Indeed, over the span of just over six years since its entry into binding force, the Charter has been used to different degrees in horizontal disputes, without consistency in respect of whether a Charter provision or a general principle applied. This seems to have coincided with different Court formations and reporting judges.

Crucially, the majority of the judges confirmed that they have not changed their methodology in discussing fundamental rights cases since the Charter's entry into force and that they do not recognise a need to distinguish the value of the sources listed in Article 6 TEU.<sup>130</sup> There appears to be an assumption that since Article 6 TEU lists both the Charter and the general principles as sources of fundamental rights protection, *it does not matter* whether it is the general principle or the Charter right that is actually applied.<sup>131</sup> According to Koen Lenaerts, writing extra-judicially, the EU Charter has a three-fold role:

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<sup>126</sup> Ibid.

<sup>127</sup> Ibid.

<sup>128</sup> Ibid, 599, citing interview 17.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid, 610, citing interview 16.

<sup>131</sup> See, to that effect, Opinion of Advocate General Kokott, delivered on 17 January 2013 in Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council*, EU:C:2012:775, paras 105-107.

First, just as general principles of EU law, the Charter also serves as an aid to interpretation, since both EU secondary law and national law falling within the scope of EU law must be interpreted in light of the Charter. Second, just as general principles, the Charter may also be relied upon as providing grounds for judicial review. EU legislation found to be in breach of an Article of the Charter is to be held void and national law falling within the scope of EU law that contravenes the Charter must be set aside. Finally, it continues to operate as a source of authority for the “discovery” of general principles of EU law.<sup>132</sup>

Even though it is clear from the article’s overall discussion that it was intended to strengthen, rather than to prejudice the Charter’s role, an assumption appears to be implicit in this account to the effect that the Charter should continue to be conceptualised by reference to the general principles jurisprudence. This is problematic. To describe the Charter as a *guide* to the Court in its fundamental rights case law seems not to recognise the Charter’s role in setting out the limits of legitimate action for EU institutions, including the Court of Justice. Retaining the general principles as the main point of reference for what a fundamental right will ultimately be seems not to reflect the Charter’s distinct value as a source of rights that stems from a democratic (rather than judicial) process of authorship.

Additionally, this approach misconstrues the role of both the Charter and the general principles. Firstly, it reads the potential of granting rights into the general principles of EU law, an interpretative mechanism<sup>133</sup> and, secondly, it ascribes an interpretative function to the Charter (which is, since the Lisbon Treaty, part of primary law and, hence, the object of constitutional interpretation). Whereas, as a constitutional rights list, the Charter sets out conditions based on which the law and institutions of the EU should operate, the general principles of EU law are tools that allow the constitutional order to develop organically and supplement the constitutional arrangement enshrined in the Charter and the Treaties.<sup>134</sup> Their function is nonetheless not to replace or radically reassess it.

The tensions that arise from this understanding of the Charter are particularly clear in the horizontal context, where the general-principles-based

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<sup>132</sup> K Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (2012) 8:3 *EuConst* 375, 376. See also *Dominguez* Opinion (n 28) paras 134-135.

<sup>133</sup> T Tridimas, *The General Principles of EU Law* (OUP 2006) 1-7. R Dworkin, *Taking Rights Seriously* (7<sup>th</sup> edn, Duckworth 1994) 24-26.

<sup>134</sup> See Tridimas, *ibid*.

exception to the lack of direct horizontal effect of directives is prevalent in the recent case law. Lenaerts does note that all of the Charter's provisions should be considered as having the status of general principles and generally resists the creation of two streams of protection.<sup>135</sup> The problems surrounding the discussion of the horizontal effect of fundamental rights based on general principles would indeed be greatly reduced if all of the Charter's provisions automatically had the status of general principles. Unfortunately, though, the implication of the rulings discussed in Section 4.2 above is that some provisions of the Charter (such as aspects of non-discrimination) may be found to meet the level of general principles either explicitly or implicitly, but others (such as information and consultation within the undertaking), may not. This is the case despite the fact that the Lisbon Treaty grants constitutional status to all of the Charter's provisions and, therefore, equal legal validity.<sup>136</sup>

Thus, the existence/absence of a general principle has been used as the relevant test that justifies the application or non-application of its provisions in horizontal cases.<sup>137</sup> That is a highly unsatisfactory way of conceptualising horizontality in the codified context of the Charter. In the absence of a written source that determined the content of fundamental rights, it was necessary for the Court to introduce them in order to take cognisance of the importance of these rights in the constitutional traditions across the EU and the values it sought to advance. Similarly, it might remain open to the Court to decide that a right that has not been enshrined in the Charter is nonetheless fundamental because it has the status of a general principle.<sup>138</sup> However, to the extent that the Charter is in place, is it still within the Court's mandate to determine whether the provisions that have been included therein have a higher constitutional status?

As noted in Chapter 2, the very reason for including a specific set of fundamental rights in the Charter was, at least in part, that these rights were already considered by the drafters to form part of a common EU fundamental

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<sup>135</sup> Lenaerts (n 132) 402. Allan Rosas has also resisted the creation of two streams of protection, albeit favouring references to the Charter standard rather than the general principles: A Rosas, 'When is the EU Charter of Fundamental Rights Applicable at National Level?' (2012) 19:4 *Jurisprudence* 1269, 1282.

<sup>136</sup> Article 6(1) TEU.

<sup>137</sup> *Römer* (n 8); *Dominguez* (n 5); *AMS* (n 14).

<sup>138</sup> Art 6(3) TEU.

rights heritage. Indeed, the institutionalisation of rights in a single document renders it easier to ascertain what basic rights the EU values than it would have been in the regime that pre-existed it, which was based on the fluid concept of general principles. As Advocate General Cruz Villalón persuasively put the matter in his Opinion in *Prigge*, which has been further discussed above, while fundamental rights remain general principles of EU law, the crucial point of call both for the judiciary and for applicants is whether a right has been entrenched in the ‘written constitution.’<sup>139</sup>

By contrast, rendering the Charter’s horizontal applicability dependent on the general principles of EU law creates important constitutional limitations for the Charter, as it undermines the usefulness of its binding status. It appears to consist in a type of meta-constitutional review, whose legitimacy is questionable. At present, the meaning of horizontality through the general principles of law remains almost entirely judicially defined. Not only does this raise concerns about juristocracy,<sup>140</sup> but also about the quality of the constitutional discourse surrounding the protection of fundamental rights in the EU more generally. Insofar as a particular provision has been enshrined in the Charter, does it fall within the Court’s jurisdiction to carry out its constitutional review outside of the Charter’s structure by deciding that some Charter rights are not fundamental enough to amount to general principles that apply horizontally between private parties? Such an approach appears to tread close to *ultra vires* action. As Paul Craig has put it:

The scope of *intra vires* action is an endemic problem for any polity that has limited power. The determination of those limits is often contestable, more especially in a polity such as the EU, where the range of powers accorded to it are broad and certain powers are couched in language that renders it difficult to impose tight constraints on its exercise.<sup>141</sup>

However, the ‘lightness of touch’ with which the Court is carrying out its judicial review, highlights a need for ‘reason and evidence for the challenged action.’<sup>142</sup>

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<sup>139</sup> *Prigge* Opinion (n 1) 26.

<sup>140</sup> See R Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2007) 218.

<sup>141</sup> PP Craig, ‘The ECJ and *Ultra Vires* Action: A Conceptual Analysis’ (2011) 48:2 *CML Rev* 395, 436-7.

<sup>142</sup> *Ibid*, 437.

The introduction of a politically agreed document that institutionally defined fundamental rights was particularly promising, in terms of legitimising the imposition of horizontal obligations across the EU. The maintenance of the general principles discourse has greatly minimised this possibility.

The second problem of the current case law is a lack of adequate constitutional reasoning more broadly. To some extent, the Court's reluctance to address questions about the Charter's horizontality is understandable. As European attitudes towards horizontal effect vary and different legal systems use horizontality in substantially different ways to apply the rights they consider 'fundamental' to private disputes, it is difficult for the Court to find a widely acceptable common ground regarding horizontality at the EU level. For example, while the protection of personal data does not trigger any specific obligation for private parties in the UK, it does in Germany and Spain, where it is inherently linked to legislation protecting human dignity and the sanctity of private life.<sup>143</sup> The shared meaning of fundamental rights is difficult to pin down in legal terms acceptable to all, especially in cases involving multiple right-holders in which competing rights may be at stake.<sup>144</sup> Nevertheless, the complicated nature of the issues at stake does not altogether justify the conceptual gaps in the assessment of EU law in these general-principles-affirming judgments, which are problematic both from the perspective of the effective protection of fundamental rights and from the perspective of legitimacy and legal certainty of EU constitutional law.

Indeed, uncertainty regarding the Charter's horizontality is already confronting national courts.<sup>145</sup> For example, the application of horizontality to the right to an effective remedy and to the right to private data by lower courts have formed the subject of separate appeals to the UK Supreme Court.<sup>146</sup> The latter will soon be called to decide what the effect of the Charter's horizontality is on UK law regulating sensitive political questions, including diplomatic immunities and the collection of data. In the absence of consistent guidance regarding the principles that dictate the Charter's horizontality on the part of the Court of

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<sup>143</sup> Article 18.4 Spanish Constitution.

<sup>144</sup> See R Alexy, *A Theory of Constitutional Rights* (OUP 2002) 355.

<sup>145</sup> See, for example, in the UK: *Vidal-Hall v Google, Inc* [2015] EWCA Civ 311; *Benkharbouche and Another v Embassy of the Republic of Sudan and Another* [2015] EWCA Civ 33.

<sup>146</sup> *Ibid.*

Justice, national courts are presently unable to make such determinations conclusively. Rather, these courts will need to make a reference to the Court of Justice on each occasion that touches upon an issue that has not yet been assessed at the supranational level. The delays and uncertainty likely to ensue from this obligation are discouraging for all claimants, but they are particularly problematic in the context of fundamental rights, where provisions such as those regarding trafficking, discrimination, and rights at work are likely to affect individuals in particularly vulnerable positions.<sup>147</sup>

A final issue that must be raised insofar as lack of reasoning is concerned relates to the application of the European Convention on Human Rights. When considering the horizontal effect of the Charter, it is necessary to recognise that many of its provisions are modelled on the ECHR and that, irrespective of whether the EU ultimately accedes to the Convention or not, it is already bound to observe it under Article 6 TEU and Articles 52(3) and 53 of the Charter. Indeed, the Convention is embedded in the EU's fundamental rights tradition, which always placed on it 'special significance' before the entry into force of the Charter.<sup>148</sup> Compliance with human rights generally and the Convention more specifically has in the past served the avoidance of conflicts between the Court of Justice and national constitutional courts and thereby guaranteed the primacy and effectiveness of EU law. Identifying with the regional, Convention standard, rather than (or in addition to) international standards for the protection of human rights, has been an identity-building exercise on the part of the Court of Justice, which has presented itself as a staunch defender of human rights, now seeking to be distinguished from the lower protections at times offered in international law.<sup>149</sup> Puzzlingly, though, in its judgment in *Kamberaj*, the Court suggested that

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<sup>147</sup> See L Peroni and A Timmer, 'Vulnerable Groups: The Promise Of An Emerging Concept In European Human Rights Convention Law' (2013) 11 *ICON* 1056.

<sup>148</sup> Case C-36/02, *Omega Spielhallen- Und Automatenaufstellungs v Oberbürgermeisterin Der Bundesstadt Bonn* [2004] ECR I-9609, para 13; Case 44/79, *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727, para 41; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakat* [2008] ECR I-06351, paras 283-4. See also *Bosphorus Hava Yollari Turizm*, App No 45036/98 (ECtHR 30.06.2005) para 165.

<sup>149</sup> G de Búrca, 'The European Court of Justice and the International Legal Order after *Kadi*' (2010) 51:1 *Harvard International Law Journal* 1, 3-5, 40ff.



the Convention standard is no longer the point of reference for fundamental rights in the EU, the Charter having replaced it in this regard.<sup>150</sup>

There is no specific limitation to national courts imposing horizontal effect – either directly or indirectly – in the interpretation of Convention rights<sup>151</sup> *in addition* to the positive obligations that the Strasbourg court sets out, in accordance with Article 52(3) EUCFR.<sup>152</sup> However, the EU horizontality doctrine can become problematic if it adversely affects the standard of any of the ECHR protected rights. Whereas in most cases horizontal effect may not be a cause of particular concern, tensions between EU and ECHR law can arise when *competing* human rights claims between private parties are at stake. This is especially worrying to the extent that the Court has not always used balancing techniques effectively, at times failing to identify that competing rights were at stake. This issue was particularly clear in the *Google* and *Ryneš* rulings. Let us take *Google* as an example. Horizontal balancing between the protections of privacy and other fundamental rights, such as the freedom of expression, can create divergences between EU and ECHR standards.<sup>153</sup> The Charter's Explanations clarify that Article 7 of the Charter ought to be read as corresponding to Article 8 ECHR.<sup>154</sup> Additionally, while there is no provision at the ECHR level that is designed specifically to protect against the processing of personal data, like Article 8 EUCFR, the latter provision is also premised on

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<sup>150</sup> Case C-501/10, *Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others*, EU:C:2012:233, paras 62-63, 80; Case C-617/10, *Åklagaren v Åkerberg Fransson*, EU:C:2013:105, para 44. It must be noted that the Court has nonetheless not departed expressly from the Convention standard and has, when needed, read Charter provisions in line with the Convention. See also Joined Cases C-92/09 and C-93/09, *Schecke and Eifert v Land Hessen* [2010] ECR I-11063; Case C-294/16 PPU, *JZ v Prokuratura Rejonowa Łódź – Śródmieście*, EU:C:2016:610. The main issues with the Convention standard arise primarily from the Court's lack of discussion of horizontality.

<sup>151</sup> S Besson, 'Comment Humaniser le Droit Privé Sans Commodifier les Droits de l'Homme' in F Werro (ed), *La Convention européenne des droits de l'homme et le droit privé* (Stämpfli 2006) 12-13.

<sup>152</sup> Article 52(3). This is further supported by the Charter's Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/17, 33-34.

<sup>153</sup> See E Frantziou, 'Further developments in the right to be forgotten: The European Court's judgment in Case C-131/12, *Google Spain, SL, Google Inc v Agencia Espanola de Proteccion de Datos*' (2014) 14:4 *HLRL* 761.

<sup>154</sup> Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/17 at 33. While the Explanations are not binding, they have a high interpretative value in respect of the Charter: Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *EuConst* 375, 402; See also Article 6(1) TEU.

Article 8 ECHR, i.e. on respect for private life more broadly, according to the Charter's Explanations.<sup>155</sup> Despite the fact that the ECHR only protects data under the right to respect for private and family life, the home and correspondence, and does not contain the specific provisions regarding the protection of personal data addressed in Article 8 of the Charter, the ECtHR's case law does in fact provide guidelines on this issue, and it is unclear whether the EU's horizontal application of this right currently meets it.<sup>156</sup>

The CJEU's failure to refer to the ECHR in *Google* suggests that its judgment is premised on the assumption that recognising horizontal effect for the right to privacy necessarily affords a higher level of protection for human rights than the ECHR minimum threshold requires. However, where competing rights are at stake, the matter is not always clear. While horizontal effect was a useful course of redress for Mr Costeja González – and those finding themselves in similar circumstances – the recognition of a horizontal right to be forgotten under the Charter's protection of privacy has vast implications: as we have already discussed, at the constitutional level, horizontal effect is not merely about individual right-holders but also about the kind of society that the rights they hold are intended to frame. In the absence of a discussion of its relationship to the freedom of expression in a democratic society, a horizontal right to privacy risks resulting in an abridgment of another right of the same order. A more careful analysis of such issues is required on the part of the Court.

Indeed, while the ECtHR has generally recognised that the rights of others, including the right to reputation,<sup>157</sup> can trump the freedom of expression, it has noted that 'particularly strong reasons must be provided for any measure limiting access to information which the public has the right to receive.'<sup>158</sup> Thus, unlike the Court's ruling in *Google*, the ECtHR's position in this field has been particularly mindful of the balance between privacy and freedom of expression (protected under Article 10 ECHR and Article 11 Charter). Protecting privacy is

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<sup>155</sup> Explanations, *ibid*, 20.

<sup>156</sup> See *Editorial Board of Pravoye Delo and Shtetel v Ukraine*, App No 33014/05 (ECtHR 5.05.2011) para 63. For a more detailed account of the ECHR position on this issue, see D McGoldrick, 'Developments In The Right To Be Forgotten' (2013) 13:4 *HRLR* 761.

<sup>157</sup> See *Tammer v Estonia*, App No 41205/98 (ECtHR 6.02.2001) para 62; *Dalban v Romania*, App No 28114/95 (ECtHR 28.09.1999) para 49.

<sup>158</sup> *Timpul Info-Magazin and Anghel v Moldova*, App No 42864/05 (ECtHR 27.11.2007) para 31.

coextensive, under the Convention framework, with a careful evaluation of the impact that such protection might have on the freedom of expression and information. However, more adequate reasoning in this regard would have been sufficient to demonstrate compliance with the Convention. The Strasbourg Court has made clear that it will generally not intervene where the domestic (in this case EU) courts have supplied adequate reasoning in respect of the balance struck. As the ECtHR's Grand Chamber put it in *Von Hannover (No 2)*:

Where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts.<sup>159</sup>

While the Court of Justice recognised that Google's activities may give rise to protected forms of expression,<sup>160</sup> it did not go on to define the reach of these two claims (free expression and privacy). In fact, the Court did not refer at all to the Convention system, to any of its specific provisions, or to the Strasbourg Court's case law. As such, the reasoning provided in the judgments does not allow for substantive review of how the EU application of fundamental rights to private relations actually meets the minimum threshold set by the Convention. In a horizontal case involving balancing between different Convention rights, the CJEU will need to be careful not to drop the bar excessively in respect of one right in order to afford horizontal protection to the other.

This approach is not limited to *Google*. The *Ryneš* ruling as well as other case law – such as *Delvigne* – fail to mention the relevance of the Convention.<sup>161</sup> There is therefore no opportunity of properly identifying and reviewing the standard set by the Court, either by the ECtHR upon accession or by the courts of the Member States. Indeed, any tensions in the relationship between the EU and the ECHR would adversely affect the relationship between the EU and its

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<sup>159</sup> *Von Hannover v Germany (no 2)*, App Nos 40660/08 and 60641/08 (ECtHR 7.02.2012) para 107.

<sup>160</sup> *Google* (n 6) paras 80-81.

<sup>161</sup> Case C-650/13 *Delvigne v Commune de Lesparre-Médoc* ECLI:EU:C:2015:648. A positive step in this regard was made in Case C-294/16 PPU, *JZ v Prokuratura Rejonowa Łódź – Śródmieście*, EU:C:2016:610, where the Court set out the Charter standard in the light of and after a clear discussion of the Convention. It remains to be seen whether this approach will be followed in the horizontal context and, particularly, in cases involving competing rights.

Member States and hence the Court's ability to set out deliverable supranational standards. A ruling of incompatibility of the EU standard by the Strasbourg court would add to the already charged relationship between national courts and the CJEU. In turn, confirmation in the Strasbourg court's case law of the compatibility of a horizontal application of rights in the EU could have an important symbolic impact, both for the EU and for national constitutional courts, easing some of the tensions arising from divergences between EU law and national constitutional traditions regarding horizontality.

It follows that Convention considerations are not questions that can be left to be regulated in the distant future, or indeed upon the EU's accession to the ECHR: they are already requirements under EU law, and not to take them into account would upset a sensitive and delicate equilibrium not only internationally, but also internally. While the Court's Advocates General have engaged with ECtHR reasoning, the latter lacks consistent articulation in final judgments. As such, horizontality could continue to develop as an autonomous concept, irrespective of the merits of the application of international human rights and the means offered to put these rights into effect in national constitutional traditions.

It is important to clarify the implications this failure has for the protection of fundamental rights overall. Indeed, the reader might wonder why the Court has been criticised from a fundamental rights perspective both for not granting horizontal effect *Dominguez* and *AMS* and for doing just that in cases like *Google*. However, both of the trends that can be identified in the case law, i.e. the formalistic focus on rigid conceptions of general principles on the one hand (e.g. in *AMS*) and, on the other hand, the willingness to refer to the Charter in horizontal cases without expressly confirming the parameters of its horizontality (e.g. in *Google*), are equally troubling. Effectively, both of these lines of case law converge conceptually: the application of fundamental rights to private relations has remained detached from context and has not *expressly* taken into account the idea of responsibilities within society, as highlighted in the Charter's Preamble. Rather, the Court's current case law, which has inherited substantive misconceptions about the nature of horizontality from the pre-Charter years,

seems to de-constitutionalise the application of Charter provisions to private relations.

Thus, irrespective of one's stance towards the question of whether horizontal obligations should be institutionalised or not, it is clear that, in the absence of a reasonably well promulgated framework for determining which fundamental rights obligations are in place, horizontality loses much of its inclusionary potential. It becomes, rather, an important legal hurdle for the private parties on whom obligations are imposed (as the obligation may not be reasonably foreseeable), while in turn it may offer little more than an uncertain prospect to parties seeking to have those obligations imposed on others (as they can only initiate proceedings speculatively). Last but not least, where horizontal obligations have *de facto* been imposed, there has been a lack of discussion of the important issues that a careless horizontal application of fundamental rights can indeed give rise to: how do we address the dangers associated with allowing private parties who are not necessarily interested in protecting rights to balance these rights for others? Despite their different outcomes, the strands of recent case law that this chapter identified are in fact symptoms of the same problem: that constitutional analysis is absent from this field, despite its potentially vast constitutional implications. Nonetheless, in the words of Advocate General Jacobs, such an analysis is 'inescapable, if indeed the Community is to be based, as its founders intended, on the rule of law.'<sup>162</sup>

#### **4.5 Conclusion: a horizontality doctrine that marginalises the idea of constitutional duties**

It follows from the issues discussed above that the application of horizontal effect after the Lisbon Treaty has not followed a clear direction in the field of fundamental rights. In this field, the Court seems to be going one step forward and two steps back, with seminal judgments not being reapplied in comparable situations and a tendency to provide thin reasoning. Between *Küçükdeveci* and *AMS*, cases that referred to the Court direct questions about horizontal effect have

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<sup>162</sup> F Jacobs, 'Is the Court of Justice of the European Communities a Constitutional Court?' in D Curtin and D O'Keeffe (eds), *Constitutional Adjudication in European Community and National Law* (Butterworths 1992) 32.

been met with very little explanatory discussion.<sup>163</sup> Indeed, as Besselink puts it, the Court more broadly ‘seems to take the line that when it deems it feasible to answer a preliminary question without touching on the Charter issue it will do so.’<sup>164</sup> This approach is problematic: it signals the development of an informal and unpredictable horizontality model in the European Union, containing elements of prior case law with only limited use of constitutional reasoning.

Furthermore, such reasoning is primarily identifiable in the Opinions of Advocates General, rather than the judgments themselves. In turn, the rulings fail to situate the idea of horizontality within the realm of the supranational adjudication of fundamental rights, rather than within the well-known doctrine of direct effect, and thus to envision horizontal duties as forming part of the polity-building discourse that surrounded the Charter’s creation. As this chapter has tried to illustrate, horizontality in this field cannot be adequately discussed by relying lock, stock and barrel on an overcomplicated and, at times, directly contradictory set of rules. To the extent that the case law remains premised on formalistic legal distinctions and on the specificities of particular Charter provisions, it is not capable of providing answers to directional questions about the horizontal effect of fundamental constitutional rights.

Indeed, the impression that these rules leave is that of temporary and only partial fixes to broader legal questions. Their focus remains on the private, individual relationship and its particularities, and has not provided consistent precedents for horizontality in a constitutional context concerned primarily with the common good.<sup>165</sup> It is clear that, by granting horizontal effect to the general principles of EU law, the Court sought precisely to redress an imbalance between

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<sup>163</sup> See L Pech (n 2); M De Mol, ‘Dominguez: A Deafening Silence’ (2012) 8 *EuConst* 280. Most illustratively in the case law, *Dominguez*, n (n 5); Case C-132/11 *Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH v Betriebsrat Bord der Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH*, EU:C:2012:329; Joined Cases C-335/11 and C-337/11 *K Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening acting on behalf of Pro Display A/S*, EU:C:2013:222; Case C-104/09 *Roca Álvarez v Sesa Start España ETT SA* [2010] ECR I-08661; Case C429/12 *Pohl v ÖBB-Infrastruktur- AG*, judgment of 16 January 2014, nyr.

<sup>164</sup> Besselink (n 12) 27.

<sup>165</sup> See for example the divergent assessment of the cases: *Küçükdeveci* (n 5); *Dominguez* (n 5); and *AMS* (n 14).

market considerations and fundamental rights.<sup>166</sup> However, as the *Dansk Industri* case has suggested, the Court is now confronted with significant problems of balancing different general principles, so that its current approach appears structurally problematic.

As the EU doctrine in this field is far from a blank canvas, painting the picture of the Charter's horizontality is an intricate exercise. It is important not to brush over the pre-existing case law in a way that creates further confusion but, at the same time, it is sometimes necessary to find space for the new instrument to develop. This can be difficult in what seems to be, currently, a picture overpopulated with different rules and no clear method. The Court's stance in this field may be explained primarily through its approach towards answering preliminary references by national courts, which consists in containing its rulings to a 'one case at a time' approach, confined to the questions that have been asked.<sup>167</sup> As I hope to show in the remaining chapters of this thesis, though, the Court's role in this field is in fact the opposite: it consists in guiding on broader matters pertaining to the interpretation of the substance and extent of the Charter's provisions and leaving to national courts the technicalities of their application. Thus, whereas in part horizontality involves a thorough engagement with the problems of the previous horizontality model, it is also a forward-looking exercise, which requires a reconceptualisation of horizontality at the EU level.

This leads into the final part of the assessment of horizontal effect carried out in this thesis, which advances the following main argument: in addition to placing the Charter's horizontality in its constitutional context, namely European, national and international rights protection, the EU horizontality narrative in this field must be supplemented by a more thorough engagement with concepts central to the horizontal application of fundamental rights in society, such as private power, individual autonomy, and human dignity. Indeed, the critique of horizontal effect I have advanced has been made with one point in mind: to serve as a first

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<sup>166</sup> D Leczykiewicz, 'Horizontal Effect of Fundamental Rights: In Search of Social Justice or Private Autonomy in EU Law?' in U Bernitz, X Groussot and F Schulyok (eds), *General Principles of EU Law and European Private Law* (Kluwer 2013) 174.

<sup>167</sup> See K Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (2007) 44:6 *CML Rev* 1625. Cf D Sarmiento, 'Half a Case at a Time: Dealing with Judicial Minimalism at the European Court of Justice' in M Claes and others (eds), *Constitutional Conversations in Europe: Actors, Topics and Procedures* (Intersentia 2012).

step in rethinking horizontality in a manner that is more attuned to the Charter context. In light of this objective, Chapter 5 argues that, ultimately, the application of fundamental rights to private relations depends on an exercise that both the pre-Lisbon and post-Lisbon case law failed to carry out: that of delineating the EU public sphere as a sphere not only of market forces and private interests but one of participation by and cooperation between peoples.<sup>168</sup> Chapters 6 and 7 assess the difficulties inherent in applying horizontality in such a context and put forward a framework for doing so, based on a concept of coordination of civic duties at the EU level, premised on political equality.

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<sup>168</sup> E Balibar, 'At the Borders of Europe' in *We, the People of Europe? Reflections on Transnational Citizenship* (Princeton University Press 2003) 9.



## 5 The Horizontal Effect of the Charter and the Public/Private Divide

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### 5.1 Introduction

I have so far tried to demonstrate that, to date, the horizontal effect doctrine has not reflected a clear stance regarding the attribution of responsibility to private actors for violations of fundamental rights. It has mostly been concerned with considerations pertaining to the primacy, effectiveness and uniformity of EU law, more generally. Indeed, as the two preceding chapters have highlighted, the idea of horizontality in EU law can be understood more as part of the Court's development of the doctrine of direct effect and less as part of a coherent theory for the application of fundamental rights in the constitutional order of the European Union. This chapter advances a more thorough conceptual critique of the Court's case law, with a view to understanding its shortcomings in the constitutional context and responding to them more adequately. It will be argued that the horizontality doctrine in EU law can be understood in light of a very particular conception of the EU public sphere, primarily associated with the market, which has been advanced over the years in the Court's case law. As Chapter 1 has already suggested, the distinction between public and private activity is of central significance in the application of constitutional law and foundational for the representation of horizontality. In turn, a more detailed discussion of the public sphere and the role of private actors therein is required in order for horizontality to acquire constitutional meaning.

This argument is supported by drawing together the way in which the Court has dealt with questions about public life in its horizontality case law over the years, most clearly in *Viking*<sup>1</sup> and *Laval*,<sup>2</sup> most recently in cases such as *Alemo-Herron*<sup>3</sup> and *Google*,<sup>4</sup> and indeed even in its early case law, such as

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<sup>1</sup> Case C-438/05, *The International Transport Workers' Federation & The Finnish Seamen's Union v Viking Line ABP & Oü Viking Line Eesti* [2007] ECR I-10779.

<sup>2</sup> Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-1767.

<sup>3</sup> Case C-426/11, *Alemo-Herron and Others v Parkwood Leisure Ltd*, ECLI:EU:C:2013:521.

*Defrenne*.<sup>5</sup> While, as the two previous chapters have shown, the Court's case law is populated by a variety of rules that lack conceptual coherence, it can be better understood when considered as part of a conception of EU law as a hybrid constitutional/private law structure geared towards determining the operation of the market and the policies pertaining thereto. This is not to say that EU law over the years has been concerned with issues related to the market only. Rather, its shape and constitutional dimensions have been substantively influenced by the centrality of the market in the Court's reasoning. The very idea of horizontality in the EU, namely that Treaty rules could apply to private and public actors alike, has been developed within a Treaty framework that was, for the most part, concerned with the regulation of market freedoms and reconstructed rights as interests of different market participants.<sup>6</sup>

Seen against this normative background, it is understandable that many of the social and political dimensions of fundamental rights and particularly questions of collective concern appear to be marginalised in the Court's case law, both before and after the entry into force of the Charter. However, this conceptualisation of horizontality is unsatisfactory in the field of fundamental rights today. Reviewing it does not require a reversion to statist conceptions of public action.<sup>7</sup> On the contrary, the horizontality discussion can be re-centred through constitutional reasoning that recognises more explicitly the organisational features of fundamental rights and the important impact that private activity can have on their exercise, within the highly marketised, private-centric public sphere that characterises the European Union.

These arguments will be developed in the following manner. Firstly, the chapter highlights how the EU case law on horizontality advances a conception of rights as *individual interests* in EU integration (Section 5.2). It then engages with and explains the distinctions between the private and public spheres in modernity, as well as the role of constitutional law therein (Section 5.3). Finally, it argues

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<sup>4</sup> Case C-131/12, *Google Spain SL, Google Inc v Agencia Española de Protección de Datos and Costeja González*, EU:C:2014:317.

<sup>5</sup> Case 43/75, *Defrenne v Sabena* [1976] ECR 455.

<sup>6</sup> *Ibid*, para 39. See also Case 26/62, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

<sup>7</sup> See, generally: J Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Polity Press 1989) 27ff.

that reconstructing a public/private divide in the EU, albeit one that recognises new forms of publicness, is essential in applying the Charter to private parties (Section 5.4). Rather than merely affecting private relations between individuals, the horizontal effect of fundamental rights concerns the very traversal between the two spheres of activity. It becomes relevant *only* when private action matters for public life and in turn infiltrates aspects of private life with public duties towards others. Understanding its public (constitutional) law significance is necessary in order for horizontality to provide coherent outcomes from the perspective of fundamental rights as organisational premises of the EU polity, rather than remaining a doctrine that advances them on an *ad hoc* basis only, by weighing them up as private interests largely stripped of political meaning.

## 5.2 The Court's private law focused approach to fundamental rights

As Chapters 3 and 4 demonstrated, both before and after the entry into force of the Charter, EU case law has failed to grapple with horizontality coherently in the fundamental rights context. Rather, it has continued to address legal technicalities mainly concerning the absence of direct horizontal effect of directives.<sup>8</sup> As a matter of principle, the EU horizontality doctrine is premised on the idea, enshrined in *Van Gend en Loos*, that EU law creates rights as well as duties for its subjects.<sup>9</sup> Yet, whereas this was a promising starting point for a horizontal conception of rights, which flourished in the Court's seminal ruling in *Defrenne*, its development in later case law has been underwhelming.

As the reader will recall, in *Defrenne*, the Court had held that, in addition to ensuring that undertakings operating in Member States which had implemented the right to equal pay do not suffer a 'competitive disadvantage' within the single market,<sup>10</sup> this right also:

Forms part of the social objectives of the community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of its peoples, as is emphasised by the Preamble to the

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<sup>8</sup> See, for example: Case C-176/12, *Association de Médiation Sociale v Union Locale des Syndicats CGT Hichem Laboubi, Union Départementale CGT Des Bouches-du-Rhône Confédération Générale Du Travail (CGT)*, EU:C:2014:2; Case C-282/10, *Dominguez v Centre Informatique Du Centre Ouest Atlantique*, EU:C:2012:33. See further Chapter 4.

<sup>9</sup> *Van Gend en Loos* (n 6).

<sup>10</sup> *Defrenne* (n 5) para 9.

Treaty [...]. This double aim, which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the Community.<sup>11</sup>

The Court thereby acknowledged that the single market had social dimensions, and that its purpose was not *just* to ensure economic integration, but also to ensure that such integration actually resulted in the improvement of living and working conditions in the EU. In order to justify its decision to apply the right to equal pay directly to both public and private action capable of prejudicing it, the Court engaged in substantive reasoning regarding the role of social issues in the European Union, despite the fact that the latter remained, at the time, confined to the market.

Nonetheless, the *Defrenne* ruling can be criticised precisely in the sense that it placed the economic aims of the EU on a par with its social aims. As Eric Stein has pointed out, in *Defrenne*, the Court avoided taking the step of actually classifying the right not to be discriminated against on grounds of gender as a ‘fundamental human right’ and hence to consider it applicable in all employment relations (and not just in disputes concerning equal pay).<sup>12</sup> In his Opinion in this case, Advocate General Trabucchi had indeed suggested that the Court should take this step.<sup>13</sup> Not to do so was an important limit of the ruling, which spoke only of the ‘interest’ of private parties in having Treaty rules observed.<sup>14</sup> Rather than discussing considerations pertaining to the public order of the European Union, such as the organisation of employment relations as well as the role of political rather than judicial institutions in delivering the aims put forward in the Treaty, the Court focused on a specific market distortion and used horizontality as the most effective way of resolving it.<sup>15</sup>

It must be emphasised that, at the time, the Court’s approach was understood as having a structural benefit. As Pierre Pescatore had put it, the

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<sup>11</sup> Ibid, paras 10-12.

<sup>12</sup> E Stein, ‘Lawyers, Judges, and the Making of a Transnational Constitution’ (1981) 75:1 *AJIL* 1, 20.

<sup>13</sup> Opinion of Advocate General Trabucchi, delivered on 10 March 1976, in Case 43/75, *Defrenne v Sabena* [1976] ECR 455, 490.

<sup>14</sup> *Defrenne* (n 5) para 31.

<sup>15</sup> See F De Witte, ‘The Architecture of a Social Market Economy’ (2015) LSE Law, Society and Economy Working Paper 13/2015, <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2613907](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2613907)> accessed 28 March 2016, 8.

development of a ‘law of integration’ was leading ‘to the creation of stable structures capable of standing up to the assault of crisis and the erosion of time.’<sup>16</sup> From the 1960s through the early 90s, the method of legal integration, premised on the private enforcement of EU law within the single market, indeed had this effect.<sup>17</sup> In the 1976 context, when *Defrenne* was decided, the effect of the ruling was not just to include women in a marketplace in which they were disadvantaged. At the same time, in recognising their right to be paid equally with men for their work, it enabled them meaningfully to participate in the market as an institution with substantial political influence, and thus more fully to take part in public life. In other words, in allowing Ms Defrenne’s claim to equal pay against her employer in virtue of the ‘absolute nature’ of Article 119 of the (then) EEC Treaty,<sup>18</sup> the Court played a key role in affirming not just the private autonomy of women to pursue their conception of the good life but also their public autonomy, manifested in a claim to have the right to equal pay enforced as a matter of collective commitment to gender equality in the workplace.<sup>19</sup>

However, the same cannot be said of the reaffirmation of this position over the years. In referring to *Defrenne* in *Viking* three decades later, the Court used the ruling in a manner that marginalised its dynamic construction of rights in a greatly changed European constitutional framework and most clearly showed the limits of its methodology in the fundamental rights context. Rather than drawing upon the substantive import of the judgment in light of its background, the Court referred to *Defrenne* in a formalistic way, as a justification of the restriction of a fundamental social right, in order to affirm market freedoms enshrined in the Treaty.<sup>20</sup> The Court did not consider how *Defrenne* could be translated into the post-Maastricht Treaty framework. Rather, the Union’s ‘double aim,’ ‘at once economic and social,’ to which the Court had referred in justifying the imposition

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<sup>16</sup> P Pescatore, *The Law of Integration* (Sijthoff 1974) 3.

<sup>17</sup> J Baquero Cruz, ‘What’s Left of the Charter? Reflections on Law and Political Mythology’ (2008) 15:1 *MJ* 65, 75.

<sup>18</sup> *Defrenne* (n 5) para 39.

<sup>19</sup> See J Habermas, ‘On the Internal Relation between the Rule of Law and Democracy’ in J Habermas (ed), *The Inclusion of the Other: Studies in Political Theory* (Polity Press 1999) 264. See also, on the role of actions in court in the public sphere, Habermas, *Structural Transformation* (n 7) 5.

<sup>20</sup> *Viking* (n 1) paras 58-59.

of a horizontal obligation to observe a fundamental right in *Defrenne*,<sup>21</sup> was relied upon in order to justify a horizontal duty to observe a market freedom. This was done without considering how such a finding would practically affect the public life of EU citizens in a constitutional context that had, by then, purported to place them at the centre through concepts such as EU citizenship and a more coherent social policy.<sup>22</sup> In other words, the Court did not assess how the judgment tied into the Union's aim 'to ensure social progress and seek the constant improvement of the living and working conditions' of its peoples, as its reference to *Defrenne* might have suggested,<sup>23</sup> rather than simply to serve the private interests of market participants.

Let us turn to the Court's rulings in *Viking* and *Laval* in more detail. The cases concerned the reflagging of a vessel from Finland to Estonia and the employment of Latvian workers for the construction of a school in Sweden, respectively. In both cases, Finnish and Swedish trade unions called a general strike, thus physically preventing the operations of the two companies from continuing. The Court of Justice had to decide whether the market freedoms of private parties (the freedom of establishment and the freedom to provide services) could be relied upon horizontally, in order to restrict the fundamental right to strike of other private parties (the members of trade unions).<sup>24</sup> Whereas the Court highlighted that the right to take collective action including strike action was a fundamental right, it noted that the market freedoms were equally important features of a free and fair EU market.<sup>25</sup> As such, trade unions were required to respect the market freedoms of private undertakings within the EU by only resorting to strike action if all other means of collective bargaining and protest had failed.<sup>26</sup> In the cases in question, they had not, so that the horizontal obligation to respect the market freedoms prevailed.<sup>27</sup>

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<sup>21</sup> *Defrenne* (n 5) paras 10-12.

<sup>22</sup> Most notably, see Article 8 of the Maastricht Treaty on European Union [1992] OJ C191/01.

<sup>23</sup> *Defrenne* (n 5) para 10. Cf *Viking* (n 1) para 79; *Laval* (n 2) para 105.

<sup>24</sup> This right had already been labelled 'fundamental' under Article 28 of the Charter, although the latter was not, at the time, binding. See *Viking* (n 1) para 24; *Laval* (n 2) para 90.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Viking* (n 1) para 90; *Laval* (n 2) paras 110-111.

The motives of the shipping and construction companies had been far from noble. Both companies had exercised their market freedoms in order to circumvent Finnish and Swedish labour law by working with cheaper labour from Latvia and Estonia. The purpose of the strike action was not to replace Estonian and Latvian workers with Finnish or Swedish workers (although this could have been the effect of the trade unions' position). The strike was intended to protect the legal position of all workers in these countries, including posted workers, by ensuring that the local collective agreements were applied. It thus formed part of an organised expression of objection to the changes effectuated to a politically agreed<sup>28</sup> arrangement regarding minimum working conditions because of the exercise of economic freedoms by certain market actors (*Viking* and *Laval*). The cases therefore did not just concern the single market. In order to determine to what extent the freedom of services and establishment had to be observed if they led to lower standards of employment in certain Member States, the Court had to consider difficult constitutional questions about the direction and future of welfare in the EU, such as social security entitlements and adequate wages. These concerns were particularly acute for Scandinavian states, in which constitutional identity (now protected under Article 4 TEU) is linked to a high standard of social protection.<sup>29</sup>

In its judgments, the Court acknowledged that restrictions on the freedom of establishment brought about by collective action could be justified based on an 'overriding reason of public interest,' such as the protection of workers.<sup>30</sup> However, its reasoning in respect of this issue was highly problematic. The rulings are premised on the assumption, which was made especially clear in *Viking*, that fundamental rights such as the right to strike might be 'legitimate grounds for restricting a market freedom,' but that they nonetheless in principle

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<sup>28</sup> On the inherent link between a democratic society and collective bargaining including the right to take collective action, see the judgment of the ECtHR in *Demir and Baykara v Turkey*, App No 34503/97 (ECtHR 12.11.2008). For a thorough assessment, see also KD Ewing and J Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39:1 *ILJ* 2.

<sup>29</sup> R Cox, 'The Path-Dependency of an Idea: Why Scandinavian Welfare States Remain Distinct' (2004) 38:2 *Soc Pol and Admin* 204, 206-207. See also M Rönnmar, 'Sweden' in M Freedland and J Prassl (eds), *EU Law in the Member States: Viking, Laval and Beyond* (Hart 2014) 256.

<sup>30</sup> *Viking* (n 1) para 90; *Laval* (n 2) paras 110-111.

constitute market restrictions.<sup>31</sup> Rather than evaluating the constitutional functions of fundamental rights on the one hand and market freedoms on the other, the Court started from the premise that fundamental rights could merely be legitimate reasons for *restricting* the default state of constitutional law in the single market, that of free movement. The latter required observance by non-state actors including trade unions. The Court did not integrate in its reasoning a discussion of how fundamental rights could be effectively protected constitutionally in the EU legal order and whether they also gave rise to horizontal obligations therein.

The Court's attempt to reach a balance between the economic freedom of private companies to seek profitable business in another Member State and the right to strike translated into an attempt to regulate through private law reasoning (the resolution of competing individual interests of private parties) a conflict between two by no means apolitical questions, which required in-depth constitutional analysis. In these cases, it was not possible to reach a meaningful decision by reasoning on that basis. EU public law questions concerning the way in which the EU reached into national legal orders and the value it placed on politically agreed fundamental rights when these came into conflict with market freedoms were at stake. As such, the judgments required an evaluation of the institutional role of trade unions in the protection of fundamental rights; the effect of a dissolution of a strike on the effective exercise of this mandate; the degree of power held by the undertakings in question; and, finally, the effect of lowering certain labour standards on the overall protection of fundamental rights (including not only the right to strike, but also rights to work<sup>32</sup> and to move freely<sup>33</sup>) within the EU constitutional order. Regrettably, the Court did not engage with these issues.

By failing to evaluate the constitutional differences between fundamental rights and market freedoms, the Court appeared to conflate the EU public sphere with the market, despite the fact that the EU had by then developed significantly

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<sup>31</sup> *Viking*, *ibid*, para 74.

<sup>32</sup> Art 15 EUCFR.

<sup>33</sup> Art 45 EUCFR.



from its initial economic origins.<sup>34</sup> The borrowing of proportionality reasoning<sup>35</sup> to balance the economic freedoms and fundamental rights – without an assessment of their respective role in the EU constitutional order – prevents the latter from becoming pillars of a community that now clearly goes beyond economic regulation. The cases demonstrate that the nature of the questions raised by a horizontal application of fundamental rights in the EU context is directional: it concerns the way in which the EU is run and the extent to which it should regulate national social choices, rather than simply concerning the affirmation of particular, individual interests in private property and in the enjoyment of market freedoms. Issues such as the conditions of engaging in strike action relate to the underpinnings of a constitutional order *within* which the common market is situated.

A wide-ranging constitutional critique of the line of reasoning evidenced in these rulings can be advanced. As Dieter Grimm has noted, the EU suffers from a problem of over-constitutionalisation, to the extent that the qualification of constitutionality concerns not the public law character of certain commitments, but merely their designation as Treaty law. Much of EU law therefore has formally constitutional status even though in reality it concerns policies that could well be advanced through ‘ordinary’ legislation not giving rise to higher constitutional protection (as is indeed the case in the constitutions of many of the Member States).<sup>36</sup> This problem can be traced back to the *Les Verts* judgment, in which the Court had ascribed constitutional status to the EU Treaties at large.<sup>37</sup> The designation of all aspects of the Treaty as constitutional law in turn results in a misuse of the idea of balancing. The Court appears to weigh up entitlements that offer themselves better to a private law analysis (the exercise of market freedoms by undertakings hoping to make an added profit through choice of law) with

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<sup>34</sup> Most notably, the Charter had been proclaimed (although in non-binding form) and EU citizenship had been established.

<sup>35</sup> See in particular *Viking* (n 1) para 87, which confined the exercise of the right to strike to less-restrictive-alternatives-based proportionality.

<sup>36</sup> D Grimm, ‘The Democratic Costs of Constitutionalisation: The European Case’ (2015) 21:4 *ELJ* 460, 469-471. Fundamental rights have both structural and substantive characteristics. See R Alexy, *A Theory of Constitutional Rights* (tr J Rivers, OUP 2002) 350. As Grimm rightly notes, it is debatable whether this is the case for many of the provisions of the TFEU.

<sup>37</sup> Case 294/83, *Parti Ecologiste “Les Verts” v Parliament* [1986] ECR 1339, para 23.

entitlements such as the right to strike, which require, as I have highlighted above, constitutional analysis within a particular social and political context.

As Besson usefully notes, the proportionality tests used in private law must be transformed in order to accommodate fundamental rights without ‘commodifying’ them.<sup>38</sup> It is one thing to say that policy considerations such as free trade may in some cases be taken into account in setting out the limits of fundamental rights in a democratic society. It is another thing to assume that the formally equal constitutional status of these provisions means that they also have the same constitutional functions, as the Court’s case law suggests. It is indeed questionable whether it is ever possible to ‘balance’ fundamental rights and market freedoms, not because the former are *morally* superior, but because the legal structure of these two categories is different. As Scanlon explains, in the context of constitutional rights, the adjudicator seeks to determine which reasons justify the restriction or *adjustment* of rights, rather than balancing them against those reasons.<sup>39</sup> It is telling, in this regard, that the Charter does not include all four original market freedoms within its provisions, but mentions only the free movement and residence of persons.<sup>40</sup> By contrast, rights associated with the free movement of persons and expressly protected in the Charter, including the rights of Latvian and Estonian workers to work and to move freely and the freedom of the employers to conduct a business,<sup>41</sup> could have perhaps been balanced against the right to strike. The Court did not, however, mention them in its rulings.

In turn, by recognising horizontal effect for the economic freedoms of particular market actors but not assessing the impact these can have on the operation of a broader EU public sphere defined, among other things, by the fundamental right to strike, the Court failed to recognise that public deliberation requires protection from distortion by corporate interests.<sup>42</sup> Rather, it seemed to be

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<sup>38</sup> S Besson, ‘Comment Humaniser le Droit Privé sans Commodifier les Droits de l’Homme’ in F Werro (ed), *Convention Européenne des Droits de l’Homme et le Droit Privé* (Stämpfli 2006) 30.

<sup>39</sup> T Scanlon, ‘Adjusting Rights and Balancing Values’ (2004) 72:5 *Fordham L Rev* 1477, 1481; See also R Alexy, ‘Constitutional Rights, Balancing, and Rationality’ (2003) 16:2 *Ratio Juris* 131, 135-139.

<sup>40</sup> Article 45 EUCFR.

<sup>41</sup> Article 16 EUCFR.

<sup>42</sup> See J Rawls, ‘The Idea of Public Reason Revisited’ (1997) 64:3 *University of Chicago Law Review* 765, 772-3. See also J Habermas, *The Theory of Communicative Action, Vol 2 – Lifeworld*

building such interests into the EU public sphere by postulating them as considerations to be taken into account in the exercise of political activity, such as a strike, by trade unions and their members. However, fundamental rights operating within a political community (in line with which the Treaties must be interpreted) enable public deliberation,<sup>43</sup> which is also, as the Court has itself previously found, carried out through collective action.<sup>44</sup> Thus, through the use of horizontality, these judgments effectively condoned the corrosive impact of the market on fundamental rights, rather than guarding against it.<sup>45</sup>

It is, of course, essential to read the judgments with a supranational order in mind in order fully to comprehend the constitutional implications of the vision of horizontality offered therein in the EU. Indeed, it would be simplistic merely to observe that subordinating national labour standards to market freedoms would necessarily result in an abridgment of the living and working conditions of workers in the EU overall. Drawing such a conclusion would entail an assessment not only of the interests of workers in Finland and Sweden but, also, those of workers in Latvia and Estonia (issues that cannot be addressed in detail in this project). In a supranational order in which there are substantial wealth inequalities amongst Member States, whether welfare and social progress are overall best achieved through the observance of particular national labour standards or through greater economic liberalisation are questions to which there may not be a single correct answer. Still, even though the EU may give rise to multiple national narratives about the nature of ‘social progress’ that the Court had spoken of in *Defrenne*,<sup>46</sup> the judicial choice to apply a market freedom horizontally but not to engage in that reasoning in respect of the fundamental right indicates a structural preference for one aspect of the EU public sphere (the free market) over another (a national policy regarding welfare).<sup>47</sup> The Court’s findings were not accompanied by an assessment of the meaning of social progress in a multifaceted

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and System: *A Critique of Functional Reason* (T McCarthy tr, Polity Press 1987) 318, 356-67, 374-5.

<sup>43</sup> See further Chapter 1.

<sup>44</sup> Case T-135/96, *UEAPME v Council of the European Union* [1998] ECR II-02335, para 89.

<sup>45</sup> See A Bogg, ‘*Viking and Laval: The International Labour Law Perspective*’ in Freedland and Prassl (n 29) 71.

<sup>46</sup> See *Defrenne* (n 5) para 10.

<sup>47</sup> W Streeck, ‘Small-state Nostalgia? The Currency Union, Germany and Europe: a Reply to Jürgen Habermas’ (2014) 21:2 *Constellations* 213, 218.

constitutional polity and the necessity of this choice from the perspective of supranational public law (e.g. by showing that its findings served the common good across the Union). Rather, the idea that the European Union constituted not only an economic union but also a union with social dimensions,<sup>48</sup> seems to have been used in an evasive way, which on its face affirmed the *Defrenne* ruling but, in reality, substantially departed from the way in which it had operated, and marginalised the important changes that have taken place in the EU constitutional landscape between 1976 and 2007. It follows that, despite referring to *Defrenne* to affirm the ‘at the same time economic and social’ dimensions of the market, the latter dimension appeared to be readily submerged to the individual economic interest of private undertakings in *Viking* and *Laval*.<sup>49</sup>

These cases are particularly illustrative of the deep constitutional tensions surrounding horizontality in the EU context. They are not, however, isolated instances. An acceptance of balancing based on the economic burden placed on private companies has emerged in EU law since the 1980s.<sup>50</sup> For example, in *Bilka Kaufhaus*, the Court accepted that a private company could advance justifications for a policy indirectly discriminating against women (in that case a refusal to pay pension entitlements to part-time workers) based on its real economic needs. The policy would be considered objectively justified, even if it was not necessary under a strict means/ends analysis.<sup>51</sup> More recently, and perhaps most strikingly, in *Alemo-Herron*, the Court sought to reach a fair balance between the economic interests of an undertaking and the interests of employees in the context of the transfer of the undertaking in question from the public sector to the private sector.<sup>52</sup> The Court found that the incorporation of collective agreements in which the new private owner of the undertaking had not participated (despite the fact that these were already in existence when the undertaking was purchased), would be an undue abridgment of the owner’s fundamental right to freely conduct a business, protected in Article 16 of the

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<sup>48</sup> *Viking* (n 1) para 79; *Laval* (n 2) para 105.

<sup>49</sup> *Ibid.* See also Streeck, *Small-state Nostalgia* (n 47) 218.

<sup>50</sup> It is interesting, from a historical perspective, that this tendency appears to coincide with the emergence of the exception to the direct horizontal effect of directives (see further Chapter 3), thus demonstrating a broader reticence of affirming the enabling aspects of *Defrenne* at this time.

<sup>51</sup> Case C-170/84, *Bilka Kaufhaus v von Hartz* [1986] ECR I-1607, para 36.

<sup>52</sup> *Alemo-Herron* (n 3) para 25.

Charter.<sup>53</sup> However, the Court did not discuss how this finding influenced the nature and effectiveness of the fundamental right to collective bargaining (Article 28 of the Charter), or the extent to which a private employer needed to comply with it.

Furthermore, it is important to highlight that cases which advanced reasoning that *prima facie* valued the substance of fundamental rights, such as *Mangold* and *Kücükdeveci*,<sup>54</sup> have also not offered a broader discussion of the limits of the Court's jurisdiction in these fields or of the role that fundamental rights played in the development of the EU as a constitutional order with economic *and* social dimensions. Rather, they have been confined to specific provisions the Court considered 'general principles' of law, in a line of case law that still favoured individualised assessments of specific rights (such as age discrimination, but not annual leave), without an overall view of the role of fundamental rights in a supranational context.<sup>55</sup> As Chapter 4 has already discussed, this line of case law has not changed, but rather appears to have been affirmed after the entry into force of the Charter, as demonstrated in rulings such as *Dominguez*, *AMS* and *Dansk Industri*.<sup>56</sup>

Similarly, despite the fact that the *Google* ruling, which was also discussed in further detail in Chapter 4, remains very different from cases such as *Dominguez*, *AMS* or indeed *Viking* and *Laval* in terms of outcome, it confirms in the clearest terms the lack of an adequate conception of the public sphere in the Court's case law after the Charter was granted binding status. Importantly, it does so outside of the social rights and discrimination context, which has dominated the horizontal effect case law to date. In *Google*, questions inherent in the distinction between private and public were at issue, namely the tension between, on the one hand, an individual's right to the protection of his private data<sup>57</sup> and, on the other hand, Google's right to publish information and the public's right to access that information.<sup>58</sup> The judgment rightly emphasised the importance of the

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<sup>53</sup> Ibid, para 31.

<sup>54</sup> Case C-555/07, *Kücükdeveci v Swedex GmbH* [2010] ECR I-365.

<sup>55</sup> See further Chapters 3 and 4.

<sup>56</sup> Case C-441/14, *Dansk Industri (DI) v Estate of Karsten Eigil Rasmussen*, EU:C:2015:77.

<sup>57</sup> Articles 7 and 8 EUCFR.

<sup>58</sup> Article 11 EUCFR.

individual rights to privacy and data protection, manifested in the ability to have data about oneself deleted on request.<sup>59</sup> However, the Court failed to assess at the same time the impact of its interpretation of the fundamental rights in question on the EU public sphere. It juxtaposed rights that it considered as having an individual character (in this case the right to privacy and data protection), which it called ‘fundamental rights,’<sup>60</sup> to the rights of economic operators within the market, as well as to fundamental rights with clearer collective dimensions, such as the freedom of the press and the public’s right to access information.<sup>61</sup> In the judgment, the latter set of rights, despite also being included in the Charter, were relegated to ‘interests’ which, whilst remaining ‘particularly important,’ were nonetheless not to be weighed up against *individual* rights, properly-so-called.<sup>62</sup> Thus, despite engaging with the concept of private life and indeed recognising its significance without referring, strictly speaking, to the market, the judgment failed to carry out what was, in this case, a necessary assessment of the role of different fundamental rights (privacy and freedom of expression) therein.<sup>63</sup> It did not situate private life *vis-à-vis* its unavoidable companion, public life, thus confirming the continuing prevalence of a particularistic, individual-oriented approach towards the horizontal application of rights, the satisfaction of which is not the product of an assessment of their operation in the public sphere but rather a determination of their relative value by the Court of Justice.

This approach towards the horizontal effect of fundamental rights is puzzling. Lack of clarity regarding the balancing of rights and their operation in the public sphere, especially when addressed to private undertakings primarily intended to generate profit, risks being met not with more careful balancing of competing rights but, rather, with the option that best serves the primary goals of these undertakings, i.e. the method that is most cost-effective.<sup>64</sup> For example, the Court’s approach in *Google* risks incentivising undertakings to simply remove the

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<sup>59</sup> *Google* (n 4) paras 97-99.

<sup>60</sup> *Ibid*, para 97.

<sup>61</sup> *Ibid*, para 81.

<sup>62</sup> *Ibid*, paras 81, 99.

<sup>63</sup> E Frantziou, ‘Further Developments in the Right to be Forgotten: The European Court of Justice’s Judgment in Case C-131/12, *Google Spain, SL, Google Inc v Agencia Espanola de Proteccion de Datos*’ (2014) 14:4 *HRLR* 761, 768-770.

<sup>64</sup> Habermas, *Communicative Action* (n 42) 318, 356–67, 374–5.

information that a particular individual wants to have deleted, without necessarily assessing their actual impact on the freedom of expression of other private parties. As Advocate General Jääskinen had persuasively explained in his Opinion in that case, through a careless application of horizontality in the fundamental rights context, the affected Internet operators may end up actually deciding based on their private interest the balance between fundamental rights concerning the public good, thus taking these questions out of the public sphere altogether.<sup>65</sup> The distinction between private and public life was also aptly recognised by Advocate General Jääskinen in his Opinion in *Ryneš*. In that case, he noted that the Data Protection Directive must be interpreted in the light not only of the rights to privacy and the protection of private data of one party but also in the light of the fundamental rights of others, including the rights to family life and property.<sup>66</sup> In a horizontal context, a fair balance that takes into account all of these rights must be reached.<sup>67</sup> As discussed in Chapter 4, such an assessment was lacking from both judgments.

This state of affairs persists. In his Opinion in *AKT*, which concerned the right to take collective action to oppose the use of temporary workers, Advocate General Szpunar proposed an approach that would reconcile market freedoms and the right to collective bargaining more adequately. Firstly, he highlighted the double purpose of the EU, which includes social objectives, and noted that a Directive concerning temporary work should be read in a manner that afforded adequate protection to full-time workers.<sup>68</sup> Subsequently, he found that the provisions of a collective bargaining agreement had to comply with EU law, as the Court had done in *Viking*.<sup>69</sup> However, the Advocate General made clear that this finding was reached *after* concluding that, on the facts, free movement rules did not interfere with the main tenets of the fundamental right. He in fact

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<sup>65</sup> Opinion of Advocate General Jääskinen, delivered on 25 June 2013 in Case C-131/12 *Google Spain SL, Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, EU:C:2013:424, paras 133-134.

<sup>66</sup> Opinion of Advocate General Jääskinen, delivered on 10 July 2014, in Case C-212/13, *Ryneš v Úřad pro ochranu osobních údajů*, EU:C:2014:2072, paras 27 and 65-66.

<sup>67</sup> *Ibid.*

<sup>68</sup> Opinion of Advocate General Szpunar, delivered on 20 November 2014, in Case C-533/13, *Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Öljytuote ry, Shell Aviation Finland Oy*, EU:C:2014:2392, paras 26-66 and particularly 61-66.

<sup>69</sup> *Ibid.*, paras 68-69.

emphasised that that this could ‘in no way imply that the freedom to provide services takes precedence over the right to collective bargaining.’<sup>70</sup> Thus, even if one were to disagree with his conclusions, the Advocate General’s reasoning differed markedly from the Court’s earlier approach in this field.

It is important to note that, in the market building process (the completion of which was a pre-requisite of further integration), the constitutionalisation by the Court of Justice of the economic freedoms transformed private law into constitutional law.<sup>71</sup> As such, seeking to draw a strict ‘dichotomy between an unpolitical European private law society and its “political” counterpart is in one sense highly artificial and may be argued to be a misleading construct.’<sup>72</sup> Furthermore, it must be emphasised that recourse to other institutions was not always possible. In the 1960s and 70s, as manifested in a range of cases in the discrimination context in particular, such as *Reyners* and *Van Duyn*, as well as *Defrenne*, the Court’s approach was required to enable decision-making, to the extent that other institutions and the Member States were moving slowly in terms of implementing the Treaty.<sup>73</sup> It is well documented in the literature that, through the method of legal integration, the Court developed a form of ‘normative supranationalism’ that complemented the weak ‘decisional supranationalism’ displayed by political institutions.<sup>74</sup> The application of the law by and to non-state actors – not only private individuals but also, if not primarily, private companies – has been tightly embedded in the reinforcement of EU law through judicial means.<sup>75</sup> As Thornhill has pointed out, EU law ‘subjects private agents (singular and corporate) to rights norms, and so creates a matrix in which these agents can be regularly incorporated in decision-making procedures.’<sup>76</sup>

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<sup>70</sup> Ibid, para 74.

<sup>71</sup> C Joerges, ‘The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective’ (1997) 3:4 *ELJ* 378, 383.

<sup>72</sup> Ibid.

<sup>73</sup> PP Craig, ‘*Once Upon a Time in the West: Direct Effect and the Federalization of EEC Law*’ (1992) 12:4 *OJLS* 453, 456.

<sup>74</sup> Ibid, 465-6; JHH Weiler, ‘The Community System: The Dual Character of Supranationalism’ (1981) 1:1 *YEL* 267, 271.

<sup>75</sup> A Stone Sweet, *The Judicial Construction of Europe* (OUP 2004) 53.

<sup>76</sup> C Thornhill, ‘The Formation of a European Constitution: an Approach from Historical-political Sociology’ (2012) 8:3 *Int J L in Context* 354, 379.



In rendering a measured account of the Court's methodology in the adjudication of fundamental rights to date, it is important, on the one hand, to recognise that the application of both fundamental rights and market freedoms had an enabling effect on private actors who, through rights, influenced political processes and took part in EU governance.<sup>77</sup> These actors have not always been powerful corporations or interest groups. Rather, as the case law discussed above has shown, the Court's rights-based constitutionalism has not failed individual right-holders in a number of important fundamental rights issues, such as equality or privacy. It has thus at times had an inclusionary impact on individuals and groups not otherwise concerned with cross-border trade, most clearly manifested in the affirmation of the rights of women generally,<sup>78</sup> pregnant workers more specifically,<sup>79</sup> and carers.<sup>80</sup> Indeed, through the methodology of integration through law:

Different actors in the periphery of the political system are able effectively to borrow legislative power, so that the polity as a whole can operate as a multifocal legislative body, in which many actors, situated in both national and transnational settings and often placed between the strictly public and the strictly private domain, derive and justify their authority to legislate from the rights instilled in the constitutional structure.<sup>81</sup>

On the other hand, though, reconstructing the way in which some of the core horizontality case law portrays the public/private divide has also shown its limits in acquiring constitutional form. The horizontality doctrine in EU law has not merely resulted in a novel, hybrid public/private structure of law simply resulting from the fluidity of the public/private divide in modernity. On the contrary, rather than seeking to address changed social conditions that affect the equal enjoyment of fundamental rights, the EU case law on horizontal effect *is built upon* and has

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<sup>77</sup> Thornhill (n 76) 380; Stone Sweet (n 75) 53.

<sup>78</sup> *Defrenne* (n 5).

<sup>79</sup> Case C-177/88, *Dekker v Stichting Vormingscentrum Voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941; Case C-32/93, *Webb v EMO Air Cargo (UK) Ltd* [1994] ECR I-03567; Case C-394/96, *Brown v Rentokil Ltd* [1998] ECR I-04185; Case C-438/99, *Jiménez Melgar v Ayuntamiento De Los Barrios* [2001] ECR I-06915; Case C-109/00, *Busch v Klinikum Neustadt* [2003] ECR I-020341; Case C-109/00, *Tele Danmark A/S v Handels-Og Kontorfunktionaerernes Forbund I Danmark (HK) Acting on Behalf of Brandt-Nielsen* [2001] ECR I-06693.

<sup>80</sup> Case C-303/06, *Coleman v Attridge* [2008] ECR I-05603.

<sup>81</sup> Thornhill (n 76) 380; See also Stone Sweet (n 75) 53.

at times utilised the erosion between the public and private spheres as a means of advancing the project of integration.

It follows that, when understood in the context of a constitutional order that attributes an equal status to fundamental rights and market freedoms, the horizontality doctrine is not problematic only because of the lack of argumentative clarity and consistency that characterises it, as highlighted already in Chapters 3 and 4. It is also problematic from the perspective of constitutional theory: it has allowed fundamental rights to be infiltrated by private law reasoning and therefore to become, to a great extent, commoditised. As such, the existing doctrine has limited value for the ability of EU law to deliver fundamental rights equally to EU citizens/members rather than to market actors, as its primary focus. A more detailed discussion of the public/private divide in modernity and its relationship with constitutional law indeed highlights why this approach requires revision in order to establish adequate horizontal obligations through the Charter.

### **5.3 Horizontal effect and the public/private divide in modernity**

The distinction between the public and private spheres is central to politics premised on democratic participation<sup>82</sup> because it defines the conditions of living together and in turn creates the conditions and possibilities for individual self-expression.<sup>83</sup> As Benhabib explains, without a conception of the common world it is impossible to have a meaningful conception of one's private world and, in turn, without nurturing freedom and difference in the development of individual, private worlds, it is impossible to build a representative and inclusive world in common.<sup>84</sup> In the words of Hannah Arendt:

Public signifies the world in itself, in so far as it is common to all of us and distinguished from our privately owned place in it [...]. To live together in the world means essentially that a world of things is between those who have it in common, as a table is located between, relates and separates men at the same time [...]. The public realm, as the common world, gathers us together and yet prevents our falling over each other.<sup>85</sup>

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<sup>82</sup> As the EU aspires to be through its commitment to 'democracy' and the 'rule of law' in Article 2 TEU and the Charter's Preamble.

<sup>83</sup> S Benhabib, *The Reluctant Modernism of Hannah Arendt* (Rowman & Littlefield 2003) 198-200.

<sup>84</sup> Ibid, 214.

<sup>85</sup> H Arendt, *The Human Condition* (2<sup>nd</sup> edn, University of Chicago Press 1998) 52.

The dichotomy between public and private is necessary in order for both of these spheres of activity to become visible to us, and for their functions to be understood.<sup>86</sup> Of course, insisting upon a traditionalist distinction between public and private life whereby the former can be regulated through constitutional law and the latter through private law would be uncharacteristic of the way in which contemporary societies operate.<sup>87</sup> In modernity, the public/private divide has been displaced from the sphere of the historical public square on the one hand (the *agora*) and private life on the other (the sphere of the *oikos*).<sup>88</sup> In the post-industrialised world, it is impossible to situate political discourse with as much precision as traditional conceptions of the public square require.

Arendt herself was pessimistic about the future of public life under modern living conditions. With the expansion of the market, activities relating to the satisfaction of our material needs took over the public sphere.<sup>89</sup> She argued that the constant publicness (over-exposure to others) that characterised modernity tainted the living experience and produced the deepest forms of alienation, as individuals started to withdraw in order to seek refuge in the intimate private sphere only.<sup>90</sup> Pure political life therefore became impossible.<sup>91</sup>

However, building on these concerns, Jürgen Habermas has offered a more optimistic account of the modern public sphere. As he has poignantly observed, the changes in the fabric of modern societies have given rise to new forms of public deliberation.<sup>92</sup> Indeed, a displacement or shift in the boundaries between private and public does not mean that these spheres have disappeared altogether but, rather, that they have been ‘structurally transformed’: the divide between them has loosened and the public realm has come to occupy different forums and activities.<sup>93</sup> Under conditions of private commodity and news

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<sup>86</sup> Ibid, 50-52.

<sup>87</sup> For some of the most persuasive accounts to this effect, see H Woolf, ‘Public/Private: Why the Divide? –A Personal View’ (1986) *PL* 220; D Oliver, ‘The Common Values of Public and Private Law and the Public/Private Divide’ (1997) *PL* 630; D Oliver, *Common Values and the Public-Private Divide* (CUP 1999); PP Craig, ‘Theory, “Pure Theory” and Values in Public Law’ (2005) *PL* 440.

<sup>88</sup> Habermas, *Structural Transformation* (n 7) 3-11.

<sup>89</sup> Arendt (n 85) 47-48.

<sup>90</sup> Ibid, 71-72.

<sup>91</sup> Ibid.

<sup>92</sup> Habermas, *Structural Transformation* (n 7) 28ff.

<sup>93</sup> Ibid.

exchange, there has been a steady decline of the traditional public sphere and *civil society forms of publicness* have emerged in its place.<sup>94</sup> For example, it is clear today that public deliberation largely takes place within private platforms and, particularly, through social media, with politicians and citizens alike using them as means of disseminating public opinion. Albeit formally private (as privately owned), these forums engage public scrutiny. Furthermore, the workplace has acquired particular prominence as a space of interaction and organised political activity.<sup>95</sup>

As such, the modern public sphere can be defined, above all, as the ‘sphere of private people come together as a public.’<sup>96</sup> This does not mean that the personal necessarily *is* political but, rather, that the personal can have public relevance, when one’s private identity is under attack in society or indeed when private interests influence larger political choices.<sup>97</sup> Indeed, modern civil society comprises different layers: a privately oriented sphere of activity accommodating modern forms of survival and personal interest, but also a publicly oriented sphere of private activity concerned with social issues and the common good.<sup>98</sup> These two dimensions are engaged in a struggle. The influence of the former on the latter can corrupt egalitarian forms of deliberative democracy.<sup>99</sup> Where issues of public concern (e.g. the expression of opinion in the workplace) operate within structures primarily intended to serve particularistic interests (e.g. private wealth), the resolution of conflicts between the common good of all and the private interest of some becomes central in the maintenance of democratic institutions.<sup>100</sup>

It follows that the privatisation of the public sphere is not a process free of political repercussions but, rather, one that entails significant dangers for the exercise and quality of public discourse. Understanding the transformation of the

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<sup>94</sup> Ibid, 18-20.

<sup>95</sup> C Estlund, ‘Working Together: The Workplace, Civil Society and the Law’ (2000) 89 *Georgetown LJ* 1; See also T Parsons, ‘On the Concept of Political Power’ (1963) 107:3 *Proc Amer Phil Soc* 232, 241.

<sup>96</sup> Habermas, *Structural Transformation* (n 7) 27.

<sup>97</sup> S Benhabib, ‘The Personal Is Not the Political,’ *Boston Review*, 1 October 1999, available at <https://www.bostonreview.net/books-ideas/seyla-benhabib-personal-not-political>, accessed 10 May 2016.

<sup>98</sup> Habermas, *Structural Transformation* (n 7) 28-30.

<sup>99</sup> Ibid.

<sup>100</sup> Habermas, *Communicative Action* (n 42) 318, 356-67, 374-5. See also W Streeck, ‘Citizens as Customers: Considerations on the New Politics of Consumption’ (2012) 76 *New Left Rev* 27, 43.

public sphere into a more fluid realm within which private and public institutions mix is necessary in order to assess the role of law therein. As Chapter 1 has discussed in further detail, the weakening of modern states means that private actors are often involved in the provision of public functions (e.g. healthcare) and hence play an important role in the organisation of public life.<sup>101</sup> As such, in order to preserve the public sphere in modern societies, it is necessary to ensure that legal safeguards exist to prevent its colonisation.<sup>102</sup> Under these conditions, constitutional law can no longer be concerned with checks on government only.<sup>103</sup>

Nonetheless, as part of a sociological account of modern law, Habermas has, interestingly, observed tendencies towards a formalistic, instrumental juridification of public affairs rather than a use of constitutional law in structuring democratic public discourse.<sup>104</sup> As such, the legal structures that are in place in most post-industrialised societies tend not to cater to the changes to the public sphere but rather contribute to its erosion. As he puts it:

The liberal legal paradigm reckons with an economic society that is institutionalised through private law – above all through property rights and contractual freedom – and left to the spontaneous workings of the market. This “private law society” is tailored for the autonomy of legal subjects who as market participants more or less rationally pursue their personal life-plans. This model of society is associated with the normative expectation that social justice can be realized by guaranteeing such a negative legal status, and thus solely by delimiting spheres of individual freedom.<sup>105</sup>

In turn, this normative expectation fails, to the extent that growing social inequalities factually prevent the preconditions for an equal opportunity to make ‘effective use of equally distributed legal powers.’<sup>106</sup> In other words, a legal paradigm of this kind does not recognise that there is an inextricable link between private autonomy (the ability to pursue one’s conception of the good life) and

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<sup>101</sup> Streeck, *ibid.*, 43.

<sup>102</sup> Habermas, *Communicative Action* (n 42) 318, 356-67, 374-5. See also Streeck, *ibid.*, 43.

<sup>103</sup> Streeck, *ibid.*, 43.

<sup>104</sup> Habermas, *Communicative Action* (n 42) 356-373.

<sup>105</sup> Habermas, *Internal Relation* (n 19) 260-261.

<sup>106</sup> *Ibid.*

public autonomy (participation in political will formation as an enfranchised citizen).<sup>107</sup> The two are nonetheless mutually presupposed:

On the one hand, citizens can make appropriate use of their public autonomy only if, on the basis of their equally protected private autonomy, they are sufficiently independent; on the other hand, they can realize equality in their enjoyment of private autonomy only if they make appropriate use of their political autonomy as citizens.<sup>108</sup>

Thus, Habermas writes, in order to avoid the false ‘liberal fixation’ with state power, it is necessary to recognise the new dynamics of public life and to start conceptualising the public sphere through ‘the horizontal relationships that citizens have with one another.’<sup>109</sup> It is in this sense that horizontality is valuable as a constitutional doctrine.

The parallels between the liberal legal paradigm Habermas discusses and the shape of EU constitutional law are evident. Especially to the extent that the European Union is a political project that stems from the completion of a single market, it is not surprising that EU law displays tensions between market and polity. The Court has, essentially, been tasked with determining how the transactional forms of corrective justice underlying an initially private law focused model of integration can now be used to advance a constitutional order premised on values not only of an economic nature but, also, based on a conception of social justice.<sup>110</sup> However, the absence of a conceptualisation of the EU as a political community today and, particularly, the lack of an ideal public realm therein, reveal in the clearest terms the impossibility of meaningfully discussing the application of fundamental rights under the current horizontality framework. This law has developed based on the exercise of individual rights and

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<sup>107</sup> This idea should not be construed formalistically to mean that only those with an existing right to vote exercise public autonomy. In ‘The Rights of Others,’ Seyla Benhabib rightly notes that there are many different kinds of members: S Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (CUP 2004) 56. As further discussed in Chapter 6, in the EU context, this is extremely important. See also Habermas, *Internal Relation* (n 19) 259-261; Rawls, *Public Reason* (n 42) 800.

<sup>108</sup> J Habermas, ‘Remarks on the Legitimation through Human Rights’ in J Habermas, *The Postnational Constellation* (Polity Press 2001) 113, 118.

<sup>109</sup> Ibid, 122.

<sup>110</sup> See L Azoulai, ‘Sur un Sens de la Distinction Public/Privé dans le Droit de l’Union Européenne’ in S Robin-Olivier, O Odudu and L Azoulai (eds), ‘The Public/Private Divide in European Union Law’ (2012) CEJEC-WP 2010/7, <<http://cejec.u-paris10.fr/wp-content/uploads/2010/07/loic-oke3.pdf>> accessed 26 March 2015, 34.

freedoms, but marginalised duties or, differently put, the relatedness of individual rights to the rights of others in society. It has in turn failed more explicitly to make qualitative distinctions between those private actors who have a legitimate expectation of being included in processes of political will formation (EU citizens/members) and market actors (all private parties engaged in cross-border exchange), who do not. It is this aspect of modern public life, namely the delineation between private activity that has public relevance from private activity that does not, that the Court's conception of the horizontality doctrine seems to obviate most clearly in its horizontality case law.<sup>111</sup>

Indeed, cases like *Viking*, *Laval* and *AMS* on the one hand, and *Google*, *Mangold* and *Kücükdeveci* on the other, may have led to starkly different fundamental rights outcomes, but they have all been cornerstones of the same narrative: in none does the Court refer to the public dimensions of European Union law and the nature of horizontal fundamental rights obligations as *authored* by those to whom they apply.<sup>112</sup> Rather than building on the *Van Gend en Loos* binary of 'rights and duties' as a starting point for living together in a political community, the case law seems to have focused instead on the 'vigilance' of private parties to enforce their rights against others.<sup>113</sup> Existing EU law, as Joseph Weiler has put it,

Always posits an individual vindicating a personal, private interest against the [...] public good. That is why it works, that is part of its genius, but that is also why this wonderful value also constitutes another building block in that construct which places the individual in the centre but turns him into a self-centred individual.<sup>114</sup>

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<sup>111</sup> Especially in *Viking* (n 1); *Laval* (n 2); *AMS* (n 8).

<sup>112</sup> C Joerges, 'What is Left of the Integration through Law Project? A Reconstruction in Conflicts-law Perspectives,' in E Chiti, AJ Menéndez and PG Teixeira (eds), *The European Rescue of the European Union? The Existential Crisis of the European Political Project* (2012) RECON Report No 19, ARENA Report No 3/2012, <<http://www.reconproject.eu/main.php/RECONreport1912.pdf?fileitem=50487366>> accessed 25 July 2016, 37-67; How Will Constitutionalism and the Idea of Law-mediated Legitimacy Survive in Postnational Constellations? Comment on Stefan Kadelbach' in R Forst and R Schmalz-Bruns (eds), *Political Legitimacy and Democracy in Transnational Perspective* (2011) RECON Report No 13, Arena Report No 2/11, <[https://www.sv.uio.no/arena/english/research/publications/arena-publications/reports/2011/Report\\_02\\_11.pdf](https://www.sv.uio.no/arena/english/research/publications/arena-publications/reports/2011/Report_02_11.pdf)> accessed 25 July 2016, 135-144.

<sup>113</sup> *Van Gend en Loos* (n 9) 12. See also JHH Weiler, 'The Individual as Subject and Object and the Dilemma of European Legitimacy' (2014) 12:1 *ICON* 94.

<sup>114</sup> Weiler, *ibid*, 103.

As such, the existing EU legal framework is not capable of representing the essence of horizontality in a constitutional order. It sees ‘individuals vigilant of their rights,’ but not a shared political community premised on rights.<sup>115</sup>

#### **5.4 The need for supranational constitutional discourse in respect of horizontality**

It follows from the foregoing discussion that the private-interest-oriented model of incremental integration through law, which can be traced back to the Court’s earliest case law on horizontal effect, must be overcome in order for a constitutionally coherent analysis of the obligations of private parties under the Charter framework to become possible. The latter requires more adequate articulation and assessment of the meaning and functions of fundamental rights in the EU public sphere. In this regard, a clearer statement of the role that fundamental rights play within the European Union in the text of the Treaties themselves would be beneficial. At the same time, though, as the reconstruction of the case law above has sought to show, an insufficiently political conception of fundamental rights is deeply embedded in the Court’s reasoning and methodology and would require thorough revision. As De Witte rightly notes:

The role of law, in the integration process, is very particular. It is used to depoliticise political questions, create *de facto* convergence of national rules, and to push forward a messianistic idea of Europe [...]. The problem with this understanding of law, however, is evident: it presumes consensus on the ‘good’ to be achieved. As such, EU law runs against the problem of legitimacy whenever it engages in redistributive practices (as opposed to regulatory questions).<sup>116</sup>

This understanding of law is not normatively innocent. It is based on an understanding of the free market as a positive development that can deliver social justice, if allowed to flourish, and that can do so even ‘without the involvement of politics.’<sup>117</sup> In turn, EU case law<sup>118</sup> appears to present the law as something to be shielded from political choices, in spite of a process of constitutionalisation that has included EU citizenship and the introduction of the Charter, which add clear

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<sup>115</sup> *Van Gend en Loos* (n 9) 12; See also Streeck, *Citizens as Customers* (n 100) 46.

<sup>116</sup> De Witte (n 15) 22.

<sup>117</sup> *Ibid*, 19.

<sup>118</sup> In this project, this claim must be limited to the case law concerning the horizontal effect of fundamental rights, even if it likely applies to a wider range of subjects.



political dimensions to EU constitutionalism.<sup>119</sup> It thus advances the application of EU law but does so within a marketised public sphere in which economic considerations are privileged.<sup>120</sup> By contrast, it largely fails to capture questions such as redistribution and social justice, which are central to horizontal effect in a representative polity of the kind that the EU aspires to be, in line with Article 2 TEU.

It follows that if safeguards for its proper constitutional operation are not set out, horizontality in EU fundamental rights law can be counter-intuitive: it can impede the primary function of fundamental rights in organising reasonable political will formation and containing inequalities in power relations in the public sphere,<sup>121</sup> rather than protecting it. This problem is especially clear in the case law we have already discussed, which concerns rights that raise questions not of individual but of collective concern and, particularly, where the exercise of fundamental rights comes into potential conflicts with the exercise of the – also individually exercisable – market freedoms.<sup>122</sup>

In turn, rather than facilitating rational discussion on the merits of fundamental rights issues, the entry into force of the Charter seems to have heightened these problems. As the Court put it in *Melloni*:

Where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.<sup>123</sup>

Indeed, the EU Charter of Fundamental Rights is not a minimum standard but a binding standard that requires observance across the Union.<sup>124</sup> As Torrez Pérez puts it, unlike international human rights law and the ECHR, ‘EU rights claim to

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<sup>119</sup> De Witte (n 15) 19. This is most clearly exemplified by the rulings in *Viking* (n 1) and *Laval* (n 2).

<sup>120</sup> See JHH Weiler, ‘The Transformation of Europe’ (1991) 100:8 *Yale LJ* 2403, 2477.

<sup>121</sup> J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press 1996) 321.

<sup>122</sup> *Ibid.*

<sup>123</sup> Case C-399/11, *Melloni v Ministerio Fiscal*, EU:C:2013:107, para 60.

<sup>124</sup> *Ibid.*, paras 57-61.

be both a floor and a ceiling that states are required to respect.<sup>125</sup> Combined with the Court's ruling in *Fransson*, this assessment will have to be carried out in a range of cases not necessarily *implementing* EU law strictly speaking but, rather, falling within its material scope of application more broadly.<sup>126</sup> Thus, the relationship between national constitutional laws and the EU still seems to be driven by a somewhat one-sided and unaccommodating notion of primacy of the supranational standard.<sup>127</sup>

For Weiler and Lockhart, the primacy of EU fundamental rights could be justified. They had argued:

Part of the Community ethos [...] lies in the important civilizing effect resulting from the manner in which the Community forces individuals and states to confront and become tolerant of the other. Part of that civilizing confrontation is achieved through the intended inability of Member States, practical and legal, to screen off different social choices, legally sanctioned, in other Member States.<sup>128</sup>

In light of the foregoing discussion, though, it is necessary to consider whether this view of the relationship between EU and national fundamental rights remains justifiable. In many of the horizontal fundamental rights cases that have come before it, the Court has followed a minimalist route in terms of reasoning, which is premised on an integration-little-by-little, 'half-a-case-at-a-time' method that failed to explicate the grounds for the rulings ultimately rendered.<sup>129</sup> Rather than offering transparent constitutional discourse, the latter is lacking particularly in cases of public concern, such as welfare and social rights.<sup>130</sup> As such, the case law has substantively revealed very little about the nature of different social choices

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<sup>125</sup> A Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (OUP 2009) 36.

<sup>126</sup> Case C-617/10, *Åklagaren v Åkerberg Fransson*, EU:C:2013:105, para 19.

<sup>127</sup> See LFM Besselink, 'The Parameters of Constitutional Conflict after Melloni' (2014) 39:4 *EL Rev* 531, 545: this trend can be contrasted with more nuanced utterances of primacy in the fundamental rights context previously, in cases like *Omega* and *Sayn Wittgenstein*, which had been more mindful of national constitutional differences. See Case C-36/02, *Omega Spielhallen- Und Automatenaufstellungs v Oberbürgermeisterin Der Bundesstadt Bonn* [2004] ECR I-9609; Case C-208/09, *Sayn-Wittgenstein v Landeshauptmann von Wien* [2010] ECR I-13693.

<sup>128</sup> JHH Weiler and NJS Lockhart, "Taking Rights Seriously" Seriously: the European Court and its Fundamental Rights Jurisprudence – Part II' (1995) 32:2 *CML Rev*, 579, 604.

<sup>129</sup> See D Sarmiento, 'Half a Case at a Time: Dealing with Judicial Minimalism at the European Court of Justice' in M Claes and others, *Constitutional Conversations in Europe: Actors, Topics and Procedures* (Intersentia 2012) 13.

<sup>130</sup> See, most illustratively: *Viking* (n 1); *Laval* (n 2); *Dominguez* (n 8); *AMS* (n 8). See also, more generally, Case C-333/13, *Dano v Jobcenter Leipzig*, EU:C:2014:2358.

and how the Court assesses their salience beyond the criteria of primacy and effectiveness. Rather than taking centre-stage in the establishment of supranational fundamental rights, the discussion of the content of these rights as constitutional commitments and the values that underpin them seems to have ‘dwindled into the background.’<sup>131</sup>

It is indeed possible to challenge altogether the narrative of unity as a positive development in this context. As Anneli Albi notes, the idea that the EU is a ‘civilising’ force seems to be marked almost uncritically with the undertone that ‘European integration is inherently more progressive than national rules.’<sup>132</sup> There appears to be ‘a perceived opposition between a realm of European “law” as a rational force towards the inevitable and a realm of national “politics” as the articulation of the illogical, irrational and ideological.’<sup>133</sup> Rather than seeing expressions of national legislative autonomy in respect of social issues as the product of public deliberation that requires, as a matter of principle, constitutional respect also at the supranational level (and thus, constitutional justification when altered), the significance of national constitutional choices is largely marginalised in the case law, even when it comes to questions of public welfare. This approach has been most starkly exposed in cases concerning social rights that came into conflict with market freedoms throughout the history of the horizontality doctrine, such as *Dominguez*, *AMS*, *Viking* and *Laval*. Rather than mindfully discussing and seeking to resolve tensions among different constitutional choices of the Member States, the Court’s horizontal fundamental rights case law has painted a picture ‘in which national autonomy is structurally suspect.’<sup>134</sup> Yet, as De Witte observes:

Policy autonomy and diversity in retirement ages, social protection, or the scope of the right to strike, however, reflect not only different substantive preferences throughout the EU, but also a structural commitment to politics as a process for the articulation of values that ‘matter’ to a specific group of people, in a specific place and at a specific time. Protecting the role of national political actors in socially embedding the market is, in

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<sup>131</sup> A Albi, ‘An Essay on How the Discourse on Sovereignty and the Co-Operativeness of National Courts Has Diverted Attention From the Erosion of Classic Constitutional Rights in the EU’ in Claes (n 129) 41, 43.

<sup>132</sup> Ibid, 63.

<sup>133</sup> H Schepel and R Wesseling, ‘The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe’ (1997) 3 *ELJ* 165, 186.

<sup>134</sup> De Witte (n 15) 20.

other words, important to preserve the capacity of citizens and their Member States to express the ‘type of life’ they want to lead.<sup>135</sup>

Viewed in this light, it is not surprising that the Court’s approach has not been appealing to national courts entrusted with the constitutional safeguard of particular constitutional choices. The supremacy principle has been the subject of strong contestation on the part of national courts when it comes to fundamental constitutional questions.<sup>136</sup> Mechanisms have been developed within national law to place counter-limits on the Court’s jurisdiction, without always making a reference to the Court of Justice.<sup>137</sup> For this reason, as Baquero Cruz has put it, the interventions of the Court in national constitutional law have been ‘haphazard’ and ‘not systematic.’<sup>138</sup> In fact,

National courts often ignore Community law altogether and do not always look at the Court’s case law for authoritative guidance on its interpretation. Community law is not always applied when and as it should be applied. To that extent, the rule of law fails in the Union [...] and constitutionalisation, with direct effect and supremacy, is only theoretical, partial and imperfect.<sup>139</sup>

Managing the horizontal effect of a supranational rights catalogue that does not merely set a minimum standard is difficult: as with other fundamental rights questions, some EU constitutional orders may need to witness important changes to their horizontality regimes in respect of fundamental rights.<sup>140</sup> Without a doubt, this would be received hesitantly by national courts whose primary responsibility is to safeguard national constitutional protections addressed to citizens, and not to market actors. This is an especially relevant concern if we look

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<sup>135</sup> Ibid. See also A Somek, ‘What is a Political Union?’ (2013) 14 *GLJ* 561.

<sup>136</sup> *Solange II* – BverfGE 73, 339 (Az: 2 BvR 197/83); A Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (OUP 2009) 35ff.

<sup>137</sup> See, for example, the Italian ‘controlimiti’ doctrine. Also, in Germany: *Solange II*, *ibid*; and in the UK: *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin) para 62, per Laws LJ. See also, on the need to limit the possibility of preliminary references to last instance courts, J Komárek, ‘In the Court(s) We Trust?’ *On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure* (2007) 32:4 *EL Rev* 467.

<sup>138</sup> J Baquero Cruz, ‘The Changing Constitutional Role of the European Court of Justice,’ (2006) 34:2 *Int J of Legal Information* 232, 245.

<sup>139</sup> Ibid.

<sup>140</sup> At first glance, this may not appear problematic, particularly insofar as it is only relevant in cases that fall within the scope of EU law. However, as Chapter 7 will highlight, horizontality has in fact been a cause of constitutional conflicts that could be avoided through more prudent use of constitutional reasoning.

more closely at the type of things the Charter protects and, particularly, the cases where horizontality has most often been invoked: cases about social provision, discrimination and, indeed, most problematically, questions of welfare relating to social solidarity (such as pension levels, adequate wages and employment conditions.)<sup>141</sup> The development of EU law in this field shows that, based on the existing horizontality doctrine, even if on some occasions changes through EU law may lead to a race to the top (this has been the case in respect of gender discrimination), in others they may well lead to a race to the bottom (most clearly, in respect of collective bargaining and the right to strike).<sup>142</sup>

Indeed, despite the fact that the Charter's provisions are derived from the common constitutional traditions of the Member States, this does not necessarily mean that each of them enjoys the same degree of protection in all Member States or, crucially, that the balance between different rights (e.g. property and the right to strike or privacy and the freedom of expression) is reached in the same way.<sup>143</sup> This can cause substantive difficulties at the supranational level, particularly to the extent that, more often than not, the Court only states that it draws inspiration from the 'common constitutional traditions of the Member States' in its fundamental rights case law, but does not offer a precise analysis of these traditions or refer to the judgments of its national counterparts.<sup>144</sup> For instance, *Viking* and *Laval* made clear that the constitutional traditions of some EU Member States pointed at a higher level of protection for the right to strike than the Court was prepared to offer.<sup>145</sup> Whereas a strike could be restricted if it did not abide by the good faith principle, there was no constitutional provision for the market freedoms of the employer to be taken into account. Similarly, just as the restrictive application of the right to strike was received particularly hesitantly by national courts in the Scandinavian context,<sup>146</sup> an overly eager application of the

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<sup>141</sup> *Alemo-Herron* (n 3).

<sup>142</sup> *Viking* (n 1); *Laval* (n 2).

<sup>143</sup> All have to meet the minimum standards set by the Convention but, in virtue of the margin of appreciation doctrine, Member States are free to reach a different balance.

<sup>144</sup> FC Mayer, 'Constitutional Comparativism in Action. The Example of General Principles of EU Law and How They Are Made – A German Perspective' (2013) 11:4 *ICON* 1003, 1008.

<sup>145</sup> See *Rönnmar* (n 29).

<sup>146</sup> *Ibid.*

Charter's Solidarity provisions could be perceived as an open conflict with Member States that have signed Protocol 30.<sup>147</sup>

In order to grapple with the horizontal effect of the Charter, therefore, it is necessary to delve into a discussion of the role of horizontal effect within a supranational context that accommodates complex questions of a public character, such as rights in the workplace, as well as multiple constitutional renderings of these rights within national law. In other words, applying horizontal effect to the provisions of the Charter requires an assessment of the broader structures and purposes of EU fundamental rights. It is only by reasoning in respect of these issues, and seeking rational agreement on their merits across the different layers of the EU legal order, that horizontality can become a constructive feature of EU fundamental rights law, rather than being a cause of dissonance between different constitutional actors therein. In its binding dimension, the Charter is a prompt for constitutional review by the Court of Justice, urging it to discuss rights not merely as the necessary side-effects of a fair single market that recognises them as general principles of law, but as elements of political legitimation of EU action that have acquired their fundamental status through the deliberative process.<sup>148</sup> In this field, horizontality is inherently linked not to the exercise of individual rights as interests, but to the ability to govern (and to be governed) in a democratic fashion. This, politically attuned type of horizontality, though, is almost antithetical to the horizontality doctrine that has developed in the Court's case law to date.

If the very function of fundamental rights is to define the basic preconditions of a public sphere committed to democratic discourse, their horizontal effect needs to be discussed in light of this function.<sup>149</sup> To the extent

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<sup>147</sup> Regulating the application of the Charter's Solidarity chapter. See PP Craig, 'Oral evidence: The Application of the EU Charter of Fundamental Rights in the UK' (2014), House of Commons European Scrutiny Committee, HC 979, 22 January 2014, <<http://data.parliament.uk/writtenevidence/WrittenEvidence.svc/EvidenceHtml/5574>> accessed 30 January 2015.

<sup>148</sup> See Thornhill (n 76) 382. As was further discussed in Chapter 2, the Charter was envisaged as part of a European Constitution with clear federal aspirations: see further P Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 *CML Rev* 945, 946. Of course, it is debatable whether the drafting of the Charter was indeed sufficiently inclusive: see J Shaw, 'Process, Responsibility and Inclusion in EU Constitutionalism' (2003) 9:1 *ELJ* 45, 58ff. See further Chapter 2.

<sup>149</sup> See further Chapter 1.

that the Court's current approach favours a particularistic conception of rights as vehicles for market integration, it *structurally* excludes such an assessment.<sup>150</sup> The Charter's institutionalisation of a wide range of fundamental rights including social rights, which have in the past come into conflict with market freedoms, necessitates a revision of the Court's position. To list only a few, the Charter provides for rights: to education;<sup>151</sup> to work;<sup>152</sup> to be consulted and represented in the workplace;<sup>153</sup> to work under fair conditions and not to be unfairly dismissed;<sup>154</sup> to social security and social assistance;<sup>155</sup> to healthcare;<sup>156</sup> and, furthermore, rights to equality<sup>157</sup> and human dignity.<sup>158</sup> These rights cannot exist as isolated, individual entitlements. They presuppose the existence of a community that puts them in place. Ultimately, they raise the question of how the Preamble's references to duties and responsibilities towards 'other persons,' the 'human community' and 'future generations' can be realised. The application of the Charter, in vertical and horizontal relations, therefore involves a more thorough conceptualisation of the EU public sphere, in Etienne Balibar's words, because 'in reality, what is at stake here is the definition of the modes of inclusion and exclusion in the European sphere, as a "public sphere" of bureaucracy and of relations of force but also of *communication and cooperation between peoples*.'<sup>159</sup> One could add: of a sphere of communication and cooperation between *people*, not as national unities but as a postnational public, even if such a form of organisation is still in the making.<sup>160</sup>

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<sup>150</sup> Ibid.

<sup>151</sup> Article 14 EUCFR.

<sup>152</sup> Article 15 EUCFR.

<sup>153</sup> Articles 27 and 28 EUCFR, respectively.

<sup>154</sup> Articles 31 and 30 EUCFR, respectively.

<sup>155</sup> Article 34 EUCFR.

<sup>156</sup> Article 35 EUCFR.

<sup>157</sup> In a range of provisions, gathered under Chapter III, 'Equality': Articles 20-26 EUCFR.

<sup>158</sup> Article 1 EUCFR.

<sup>159</sup> E Balibar, 'At the Borders of Europe' in *We, The People of Europe? Reflections on Transnational Citizenship* (Princeton University Press 2003) 9.

<sup>160</sup> See C Douzinas, 'The Europe to come,' Critical Legal Thinking Blog, 15 December 2010, <<http://criticallegalthinking.com/2010/12/15/the-europe-to-come/#fnref-1136-6>>accessed 25 March 2015.

### **5.5 Conclusion: towards horizontality in a constitutional polity**

This chapter has argued that the narratives of development and social change through market integration, which were dominant in the 1960s and 70s, can be traced as the root of the EU horizontality doctrine. However, these narratives have not in fact allowed the EU to build a non-statist constitutional identity that favours the effective protection of fundamental rights under changed social conditions. Whereas the Court attached rights to individual right-holders, it did not examine their operation within a social context comprising, in addition to market freedoms, claims about redistribution and welfare at the supranational level.<sup>161</sup> Rather, the EU horizontality doctrine lacks a conception of deeper forms of ‘publicness,’ in the sense of collectiveness and community. It fails, in other words, to acknowledge our condition of living-together-in-the-world, outside of market parameters.<sup>162</sup>

The chapter has shown that the lack of a conceptualisation of the things that raise questions of public law (as questions about how a constitutional polity should be run) and the things that can remain regulated by non-constitutional law, is clear in some of the most debated judgments regarding the application of EU fundamental rights to disputes between private parties. It is indeed the narrative that ties together conceptions of horizontal effect put forward before and after the Charter’s entry into force and can be traced even in those of the Court’s judgments that can be applauded in terms of outcome for their effect on vulnerable claimants, such as *Defrenne* or *Küçükdeveci*.

The Court’s approach is understandable when seen in light of the idea of legal integration: in the early stages of EU law, there was an expectation that free trade itself would foster democracy and fundamental rights and contribute to the increase of living standards.<sup>163</sup> Nevertheless, the lack of a discussion of how and when private relationships impinge on the application of fundamental rights in EU law to date has developed into a critical deficiency in the Court’s conceptualisation of horizontal effect. As Baquero Cruz has put it:

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<sup>161</sup> Azoulai (n 110) 34-36.

<sup>162</sup> Arendt (n 85) 52.

<sup>163</sup> De Witte (n 15) 5-6.



If we put integration in an historical perspective, we have a feeling of exhaustion: the exhaustion of a model. [...] The law of integration and integration through law have given as much as they could to the European project. Now they seem to bear too much political weight and are beginning to break. The political, in view of the deficient design of European political institutions and processes, is conspicuously absent or hidden beneath the law.<sup>164</sup>

The starting point of market integration through legal means as well as the functional incrementalism that characterises the Court's methodology pose a structural problem for the Charter, as a constitutional instrument not primarily concerned with trade. They do not offer the constitutional reasoning required in order to address the directional and highly politicised questions that confront the Court of Justice in this field. Instead of acknowledging the increasing importance of private actors within institutions *central* to modern societies, such as the market, and thus attempting to redress the problems created by marketisation through horizontal obligations amongst consociates, much of the EU case law has in fact isolated social questions from the market. As EU law lacks a concept of 'publicness' for seemingly private activities<sup>165</sup> demonstrable in a clear conception of the constitutional role and duties of public institutions and of publicly oriented forms of private organisation/activity, it in turn lacks a filter for when the actions of private parties matter from the perspective of EU constitutional law.

This approach appears out of sync with what horizontal fundamental rights claims can mean for people's ability to enjoy fulfilling lives: seeing one's child; being able to work free from discrimination for women, non-nationals, the young and the old; fair wages irrespective of nationality; receiving a pension, to mention but a few. A meaningful answer as to when and why horizontality is required in this field must take account of these things and how much a given society values them. It thus involves a thorough assessment – and a continuous process of reassessing – of the circumstances under which human beings interact with each other in their private relations and the ways in which the law reaches out to them in their different conditions.

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<sup>164</sup> Baquero Cruz (n 17) 75.

<sup>165</sup> A looser concept of *öffentlichkeit* ('openness/publicness') that replaces the public square.

Of course, a conception of fundamental rights as features of a constitutional polity is, in one sense, less appealing than a private law centric approach that merely weighs them up as competing individual interests. As Streeck rightly notes, polities, ‘rather than simply serving the idiosyncratic wants of individuals [...] must subject them to public examination with the objective of aggregating them into a general will, which bundles and supersedes the many individual wills.’<sup>166</sup> This is an intricate constitutional exercise and can be politically unappealing in the short term, particularly in a supranational polity in which identifying a single general will is difficult. It is, however, essential in order for EU fundamental rights, vertical as well as horizontal, to acquire proper constitutional meaning. Indeed, in not offering public reasoning, the Court lacks the most basic tool for assessing the constitutional questions surrounding the Charter’s horizontal applicability: its operation in common life, within but also beyond, the market. A discussion of the horizontal effect of fundamental rights involves a deeper inquiry into the kind of society the EU is setting itself out to be and the values that lie in its core: if the EU remains a market economy concerned primarily with advancing the private interests of its participants, then a constitutional doctrine of horizontality is perhaps unwarranted. But if, as the Charter suggests, EU values truly reflect a commitment to equality and social justice within and outside the market, then there are important incentives to rethink the normative underpinnings of horizontality in the fundamental rights context and to enhance the Court’s reasoning with a careful and more transparent discussion of the role of fundamental rights in supranational constitutional adjudication.

The two final chapters of this thesis seek to demonstrate how a constitutional doctrine of horizontality can operate in the EU. It will be argued that it is only through public reasoning that acknowledges constitutional plurality and the role of the Charter itself, that the horizontal effect doctrine can acquire a workable constitutional form at the EU level.

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<sup>166</sup> Streeck, *Citizens as Customers* (n 100) 42.

## 6 Rediscovering Constitutional Reasoning Regarding the Horizontal Effect of the Charter

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### 6.1 Introduction

Chapter 5 argued that at the heart of the constitutional deficiencies of the horizontality doctrine there is a lack of understanding for the nature of fundamental rights in the EU public sphere and for the impact that private activity can have on their exercise. The adjudication of horizontal disputes in the fundamental rights context requires constitutional reasoning, which is capable of distinguishing questions concerning the public good from those concerning private interest. This chapter argues that such reasoning requires ‘public justification.’<sup>1</sup> As John Rawls imagined it:

Public justification is not simply valid reasoning, but argument addressed to others: it proceeds correctly from premises we accept and think others could reasonably accept to conclusions we think they could also reasonably accept.<sup>2</sup>

Indeed, the duty to provide reasons is correlative with legitimacy.<sup>3</sup> Reasoning is proof of the judges’ impartiality and enhances a sense of due process.<sup>4</sup> As Torres Pérez notes, ‘an explicit and articulate writing of the reasons why certain arguments are adopted or rejected works as a self-check. This might be a corrective measure for preconceptions or misunderstandings.’<sup>5</sup> In order to understand the nature of adequate ‘public justification’ in this field, it is necessary to consider two questions: firstly, what are the premises that we might accept as valid in the adjudication of the EU Charter? Secondly, to what conclusions do these premises lead in relation to the development of horizontal fundamental rights obligations? These questions will be considered in turn.

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<sup>1</sup> J Rawls, ‘The Idea of Public Reason Revisited’ (1997) 64:3 *Chicago L Rev* 765, 786.

<sup>2</sup> *Ibid.*

<sup>3</sup> M Shapiro and A Stone Sweet, *On Law, Politics and Judicialization* (OUP 2002) 232.

<sup>4</sup> A Torres Pérez, *Conflicts of Rights in the European Union: A Theory of Supranational Adjudication* (OUP 2009) 133.

<sup>5</sup> *Ibid.*, 178; See also JHH Weiler, ‘Epilogue: The Judicial Après Nice’ in G De Búrca and JHH Weiler (eds), *The European Court of Justice* (OUP 2002) 222.

Drawing upon the discussion of the Charter's background in Chapter 2, it will be argued that the Charter's main function, which distinguishes it from other sources of rights protection listed in Article 6 TEU, was its role in including citizens as active members of the EU project. As such, a political conception of fundamental rights and, more precisely, the concept of substantive political equality, can justify the interpretation of the Charter's provisions at the EU level, both vertically and horizontally (Section 6.2). It will then be argued that, insofar as horizontal effect is concerned, the Court needs to show both that a dispute between private parties in fact raises a public-order problem, and to provide detailed guidance as to how the latter should be resolved, in light of the constitutional nature of Charter provisions in the EU. Indeed, horizontality is not a niche area in the law of a single market, but rather a highly effective means of substantive inclusion within a public sphere characterised by vast inequalities and competing interests (Section 6.3).

By returning to the conceptual foundations of horizontality put forward in Chapter 1 and further reflecting upon questions with horizontal dimensions that the European Union is called on to address, such as irregular migration, unemployment and social inequalities, I hope to demonstrate that fundamental rights necessitate not only vertical but also horizontal protection at the supranational level. The use of horizontal effect in EU constitutional adjudication represents a possibility for reimagining fundamental rights in the European Union as a multi-layered constitutional polity of citizens/members – a membership that comes with individual and collective rights, but also duties. It is in virtue of its emancipatory, political-equality-enhancing character, rather than its role in furthering EU integration, that the horizontality doctrine can remain constitutionally salient in the EU today.

## **6.2 Public justification and supranational constitutional reasoning: the Charter as a vehicle towards political equality**

How can a supranational interpretation of fundamental rights be justified in a manner that can be both reasonably accepted by national courts and at the same time provide a coherent fit for the goals and role of the Charter within the EU? Valid public justification can take several forms. It must, however, correspond to

the conception of politics to which a constitutional arrangement seeks to give effect.<sup>6</sup> In the EU, that arrangement is defined in the Treaties themselves: Article 2 TEU and the Charter's Preamble refer to a form of EU democracy premised on common values. The Charter's substantive chapters also codify 'the indivisible, universal values of human dignity, freedom, equality and solidarity.'<sup>7</sup> In turn, these values could be seen as the first point of reference for guiding the interpretation of the Charter's provisions at the EU level.<sup>8</sup>

As Weiler has noted, 'there is no European *Volk*' *qua* demos rooted in a singular, shared social and historical experience.<sup>9</sup> The existence of a set of common values, such as the ones mentioned above, confirms that a basic agreement regarding the normative bases of the Union as a project broader than the market is in place.<sup>10</sup> This outlook can also be gleaned from Advocate General Maduro's Opinion in *Kadi*. He envisioned the European Union as a 'municipal' constitutional order premised on foundational treaties and values that the Court of Justice was required to uphold.<sup>11</sup> He argued that, in making determinations about the operation of fundamental rights within the EU, 'the Court cannot [...] turn its back on the fundamental values that lie at the basis of the Community legal order and which it has the duty to protect.'<sup>12</sup> This is an important point. It is necessary to unpack it further in order to emphasise the two elements of which it is comprised.

Reasoning based on common values would indeed appear to address the idea, most famously advanced by the German Constitutional Court, that obligations derived from EU law could only be considered legitimate insofar as they did not encroach upon the ability of each of the Union's constituent peoples

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<sup>6</sup> J Rawls, *Political Liberalism* (Columbia University Press 2005) 212-247 ('Lecture 6: The Idea of Public Reason'); See also Rawls, *Public Reason Revisited* (n 1) 775-6.

<sup>7</sup> Preamble to the EU Charter of Fundamental Rights [2010] OJ C 83/389.

<sup>8</sup> See, for a similar argument, A Von Bogdandy and others, 'Reverse *Solange* – Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49:2 *CML Rev* 489.

<sup>9</sup> JHH Weiler, UR Haltern, FC Mayer, 'European Democracy and its Critique' (1995) 18:3 *West Eur Pol* 4, 10.

<sup>10</sup> *Ibid.*

<sup>11</sup> Opinion of Advocate General Poiares Maduro, delivered on 16 January 2008, in Joined Cases C-402/05P and C-415/05P, *Kadi and Al Barakat v Council of the European Union and Commission of the European Communities* [2008] ECR I- 6351, para 21.

<sup>12</sup> *Ibid.*, para 44.

to self-govern within national structures.<sup>13</sup> As a justificatory premise, common values suggest that the ‘pre-legal conditions’ that define, for example, the German demos (or, by the same token, the Greek, Italian or French *demoi*) are shared EU-wide.<sup>14</sup> To the extent that the Charter is derived from a set of values to which all Member States *and their peoples* commit, the question of legitimacy does not arise. Thus, interpretations of the Charter should, as a minimum, not undermine – and be shown not to undermine – the very values from which the Charter’s provisions are derived.

However, even though values speak to the question of legitimacy of the instrument, they do not at the same time address the question of legitimacy of particular interpretations thereof by the Court of Justice. Constitutional courts across the EU make authoritative interpretations of these values within the legal order they oversee. An adequate justification on the part of the Court would consist more constructively in showing that an interpretation of the Charter (of which it is the authoritative arbiter) is plausible in light of its content, history, and role in the EU legal order. A careful distinction should therefore be made between justifying the Charter’s legitimacy as a source of the protection of fundamental rights in the EU through common values, and an assumption that these dictate a specific constitutional stance regarding the parameters of the protection of the provisions enshrined therein. While the former follows from Articles 2 TEU and the Charter’s Preamble, the latter requires further justification.

A coherent interpretation of the Charter’s provisions – both vertical and horizontal – must accommodate the specific arrangement by making explicit reference to its main characteristics as well as the institutional balance to which it

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<sup>13</sup> *Maastricht* – BVerfGE 89, 155 (Az: 2 BvR 2134, 2159/92) paras 41-44, footnotes omitted (the judgment is also known as *Brunner v European Union Treaty*). In discussing this matter, the German Constitutional Court makes reference to Hermann Heller’s famous thesis that a truly representative democracy can only be premised on social homogeneity: H Heller, ‘Politische Demokratie und Soziale Homogenität’ in H Heller, *Gesammelte Schriften, Vol 2* (Sijthoff 1971) 427ff. Arguably, though, this misrepresents one of his main arguments. Heller was averse to the idea of a demos defined by nationality and an exclusionary we/they dichotomy. He argued instead for a demos that discursively decided on the common good and not based on a predefined value system such as the one imagined by the German Constitutional Court. See, for a more thorough discussion, MA Wilkinson, ‘Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?’ (2015) 21:3 *ELJ* 313, 318-19.

<sup>14</sup> *Ibid.*

gives rise.<sup>15</sup> Indeed, in a modern constitutional order characterised by a plurality of norms, the judicial duty of justification is heightened.<sup>16</sup> As Chapter 2 has already highlighted, the Charter's functions were primarily symbolic. The Charter was not intended to harmonise fundamental rights or create new claims but, rather, to collect the rights that were considered common and to concretise the meaning of membership of the EU public sphere. It was seen as an explicit commitment by 'the peoples of Europe' to conditions upon which they were building a 'common future,' as proclaimed in its Preamble.<sup>17</sup> In turn, it was thought to enhance legitimacy and to reduce the Union's democracy deficit.<sup>18</sup> In validly justifying an interpretation of the Charter, therefore, it is important to distinguish the common values rooted in moral convention, popular wisdom or a common intellectual and philosophical tradition, which may *characterise* the public sphere, as Weiler has suggested,<sup>19</sup> from the commitment to a defined set of constitutional rights as a *premise* of the public sphere itself.<sup>20</sup> As Benhabib puts it, such a commitment stems from a 'political' rather than 'metaphysical' conception of rights.<sup>21</sup>

Indeed, there may well exist a 'supranational, civic, value-driven demos' in the EU.<sup>22</sup> Insofar as the application of constitutionally protected fundamental rights is concerned, though, the former two adjectives are of the essence, and not the latter. Even if value-driven,<sup>23</sup> it is the *civic* character of a constitutional process and not its attachment, as Craig puts it, to 'some rigid set of common values' that makes it sufficiently democratic.<sup>24</sup> As noted in Chapter 1, reasoning

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<sup>15</sup> See MW Dowdle and MA Wilkinson, 'On the Limits of Constitutional Liberalism: In Search of a Constitutional Reflexivity' (2015) NUS Law Working Paper 2015/009, <<http://ssrn.com/abstract=2686013>> accessed 10 May 2016.

<sup>16</sup> J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press 1996) 440.

<sup>17</sup> See Chapter 2.

<sup>18</sup> See J Baquero Cruz, 'What's Left of the Charter? Reflections on Law and Political Mythology' (2008) 15:1 *MJ* 65.

<sup>19</sup> Weiler, *European Democracy* (n 9) 19.

<sup>20</sup> Habermas, *Between Facts and Norms* (n 16) 89; J Habermas, 'Remarks on the Legitimation through Human Rights' in J Habermas, *The Postnational Constellation* (Polity Press 2001) 113, 117. See further Chapter 1.

<sup>21</sup> S Benhabib, *Dignity in Adversity: Human Rights in Troubled Times* (Polity Press 2011) 89.

<sup>22</sup> Weiler (n 9) 23.

<sup>23</sup> *Ibid.*

<sup>24</sup> PP Craig, 'Democracy and Rule-making within the EC: An Empirical and Normative Assessment' (1997) 3:2 *ELJ* 105, 130.

about constitutional issues has a predominantly procedural dimension: it is concerned with ensuring the civic character of decision-making, and gives effect to particular values within the limits of the adjudicator's institutional mandate.<sup>25</sup> Thus, while common values remain the bedrock of the fundamental rights regime, the reassessment of these values takes place within the public sphere itself. The role of constitutionally protected fundamental rights (and, by extension, of the arbiter entrusted with their safeguard) is to make that process possible.<sup>26</sup>

Hannah Arendt's discussion of rights is particularly useful in understanding their value as bases of a democratic political process. Drawing on Edmund Burke's writings on the French Revolution, Arendt developed the view that fundamental rights ultimately take effect within a specific political community only.<sup>27</sup> However, she thought that there was one right that does not 'spring from within the nation' and requires more than national guarantees: our right to be recognised as a holder of rights within the political community in which we live.<sup>28</sup> 'We are not born equal,' she wrote, but 'we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights.'<sup>29</sup> More specifically, 'our political life rests on the assumption that we can produce equality through organisation, because man can act in and change and build a common world, together with his equals and only with his equals.'<sup>30</sup> By contrast:

The human being who has lost his place in a community, his political status in the struggle of his time, and the legal personality which makes his actions and part of his destiny a consistent whole, is left with those

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<sup>25</sup> See *Du Plessis and Others v De Klerk and Another* (CCT8/95) [1996] ZACC 10, para 190, per Sachs J.

<sup>26</sup> See further Chapter 1.

<sup>27</sup> H Arendt, *The Origins of Totalitarianism* (2<sup>nd</sup> edn, Harcourt 1958) 299-301; See also E Burke, *Reflections on the Revolution in France* (first published 1790, ed EJ Payne, SMK Books 2012).

<sup>28</sup> This idea can be described as a 'right to have rights': Arendt, *ibid*, 296. Arendt broadly based this view on Kant's notion of a right to hospitality: I Kant, 'Perpetual Peace: A Philosophical Essay' (tr M Campbell Smith, Garland Publishing 1972) 137-138. Nonetheless, is the Arendtian reinterpretation of the right to have rights, positing it as a *precondition* for political organisation, which is particularly interesting from the perspective of postnational constitutional law. For a more thorough discussion see E Frantziou, 'A "Right to Have Rights" in the EU Public Sphere? An Arendtian Justification for the Application of the EU Charter of Fundamental Rights' (2016) IEL Working Paper 09/2016, <[http://epapers.bham.ac.uk/2192/1/IEL\\_Working\\_Paper\\_9-2016\\_-\\_A\\_%E2%80%98right\\_to\\_have\\_rights%E2%80%99\\_in\\_the\\_EU\\_public\\_sphere.pdf](http://epapers.bham.ac.uk/2192/1/IEL_Working_Paper_9-2016_-_A_%E2%80%98right_to_have_rights%E2%80%99_in_the_EU_public_sphere.pdf)> accessed 1 September 2016.

<sup>29</sup> Arendt (n 27) 301.

<sup>30</sup> *Ibid*.



qualities which usually can become articulate only in the sphere of private life and must remain unqualified, mere existence in all matters of public concern.<sup>31</sup>

Enjoying rights within the institutional framework to which we are subject is an indispensable part of any well-functioning, inclusive deliberative process, nationally and supranationally.<sup>32</sup> We enter the public sphere through an existing rights paradigm – it is through communication in the public sphere that we re-evaluate it.<sup>33</sup>

Understanding the application of the Charter through a political conception of fundamental rights is beneficial because it recognises its overall function not *merely* as a commitment to specific provisions – these may have been, to a greater or lesser extent, enshrined in EU and Member State laws already – but also as a procedural commitment to their overall enjoyment in the public sphere of the European Union. The novel institutional dimension that the provisions in question acquire through the Charter is significant, especially if their content is not new. Their fundamentality consists in their role of organising public life<sup>34</sup> and enabling individuals to participate therein.<sup>35</sup> In turn, if the Charter's enjoyment is prejudiced, whether in a localised or EU-wide context, and its provisions form the basis of the EU deliberative process, that process is also corrupted.

This understanding of the Charter is consonant with its role in structuring the EU public sphere in the post-Maastricht context and spells out the inherent link of the fundamental rights it protects with political membership – a debate that

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<sup>31</sup> Ibid.

<sup>32</sup> S Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (CUP 2004) 140. See also Habermas, *Legitimation* (n 20) 117.

<sup>33</sup> J Habermas, 'On the Internal Relation Between the Rule of Law and Democracy' in J Habermas (ed), *The Inclusion of the Other: Studies in Political Theory* (Polity Press 1999) 263.

<sup>34</sup> It is important to note that a procedural conception of law of the kind advanced by Jürgen Habermas is capable of accommodating values but remains, at the same time, open to reinterpretation: Habermas, *Between Facts and Norms* (n 16) 384. For this reason, a discourse-enhancing proceduralist account of constitutional law is capable of accommodating procedural fairness *as well as* issues of substantive political morality – indeed, it requires both guarantees regarding procedure (such as legal certainty) as well as legitimacy (which it ascribes to the concept of authorship): *ibid*, 198. Cf LL Fuller, *The Morality of Law* (Yale University Press 1969) 74ff.

<sup>35</sup> It follows that this conception of rights facilitates the involvement of individuals in EU governance as a political, and not merely instrumental or economic, process.

was in fact at the heart of its creation.<sup>36</sup> Indeed, commentators have emphasised the relationship between the effective enjoyment of EU citizenship and Article 51 of the Charter.<sup>37</sup> As Advocate General Sharpston had put it in her Opinion in *Zambrano*, in the Charter context, it is important to ask whether citizenship of the Union can ‘mean something more radical’ than what it has meant so far, namely citizenship attached to cross-border movement.<sup>38</sup> Can it mean ‘true citizenship, carrying with it *a uniform set of rights and obligations*, in a Union under the rule of law in which respect for fundamental rights must necessarily play an integral part?’<sup>39</sup>

It must be emphasised that such an account of the Charter does not mean that its provisions should apply to those who have full political rights only, thus denying their universality.<sup>40</sup> The Charter’s appeals to a public order premised on universal values – one that owes, furthermore, responsibilities to the ‘human community’<sup>41</sup> – would risk sounding like empty rhetoric if we associated participation in the EU public sphere with EU citizenship in a technical sense.<sup>42</sup> If the collective ‘we’ to which the EU political process aims referred to citizens of the Union only, this would deepen significant patterns of exclusion.<sup>43</sup> It would entail a very restrictive notion of authorship, which would marginalise the actual role of non-citizens in public life. Solace for such exclusions could not be found in the fact that drawing rights from the idea of citizenship might be a first step

<sup>36</sup> P Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’ (2002) 39:5 *CML Rev* 945, 971-2.

<sup>37</sup> S Iglesias Sánchez, ‘The Court and the Charter : The Impact of the Entry Into Force of the Lisbon Treaty on the ECJ’s Approach to Fundamental Rights’ (2012) 49:5 *CML Rev* 1565, 1596. See also F Fontanelli, ‘Some Reflections on the General Principles of the EU and on Solidarity in the Aftermath of *Mangold* and *Kücükdeveci*’ (2011) 17:2 *EPL* 225.

<sup>38</sup> Opinion of Advocate General Sharpston, delivered on 30 September 2010, in Case C-34/09, *Ruiz Zambrano v Office national de l’emploi* [2011] I-01177, para 3.

<sup>39</sup> *Ibid* (emphasis added).

<sup>40</sup> That would be the case, for example, if the Court decided that rights such as the freedom of association, the right to human dignity or the right to private life applied just to EU citizens, as only they have a claim to full participation in the deliberative process and, hence, in the observance of the fundamental rights that enable it.

<sup>41</sup> Charter Preamble (n 7).

<sup>42</sup> Article 20 (1) TEU.

<sup>43</sup> See for a critical analysis: E Balibar, ‘At the Borders of Europe’ in *We, the People of Europe? Reflections on Transnational Citizenship* (Princeton University Press 2003) 9; E Balibar, “‘Europe as Borderland’: The Alexander Von Humboldt Lecture in Human Geography,” University of Nijmegen, November 10, 2004, <<http://gpm.ruhosting.nl/avh/Europe%20as%20Borderland.pdf>> accessed 25 March 2015. See also J Shaw, ‘Sovereignty at the Boundaries of the Polity’ in N Walker (ed) *Sovereignty in Transformation* (Hart Publishing 2003) 461.

towards reimagining citizenship in a cosmopolitan manner, nor indeed in the fact that, occasionally, EU citizens' rights can indirectly also protect the rights of non-citizens.<sup>44</sup> Privileging citizens alone in respect of fundamental rights – vertically and horizontally – would be greatly problematic both in terms of social philosophy<sup>45</sup> and in terms of political accountability. In order to form a people, it is not only necessary to have a legally protected community of equal citizens but also to ensure that no one is excluded 'who is affected by the possible coercive measures of the legal community.'<sup>46</sup>

Indeed, to read the Charter as an instrument addressed to citizens would be at odds with its text. While some rights are reserved to specific groups<sup>47</sup> under the Charter, this is true only of the Chapter V provisions, which concern voting rights and free movement.<sup>48</sup> It is therefore necessary to render the meaning of a political justification of the Charter's provisions focusing on the enablement of public discourse more precise. A political conception of rights does not relate to the status of citizen in a formal sense but, rather, to the politicising role of *equally applicable* fundamental rights in the public life of a community. Particularly in a polity characterised by a plurality of cultures, identities and living standards, a basic set of fundamental rights as minimal equalising conditions that are in fact accessible to all is required.<sup>49</sup> Thus, interpreting the Charter based on political equality as a guiding principle challenges distinctions between citizen and non-citizen in the EU context. It attaches to 'citizenship' in a philosophical sense *qua* participation and public exchange in a constitutional polity and recognises the

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<sup>44</sup> Cf A Von Bogdandy and others, 'Reverse *Solange* – Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49:2 *CML Rev* 489, 517.

<sup>45</sup> See S Besson and A Utzinger, 'Towards European Citizenship' (2008) 39:2 *J of Soc Phil* 185, 193ff.

<sup>46</sup> H Brunkhorst, *Solidarity: From Civic Friendship to a Global Legal Community* (tr J Flynn, MIT Press 2005) 170.

<sup>47</sup> Citizens and residents.

<sup>48</sup> These apply only to citizens and, in some cases their relatives and to long-term residents. See Article 45 EUCFR on the freedom of movement and of residence; Case C-200/02, *Zhu and Chen v Secretary of State for the Home Department* [2004] ECR I-09925. Of course, the law regarding the free movement of persons is particularly complicated and entails many contradictions. See Case C-148/02, *Garcia Avello v Belgian State* [2003] ECR I-11613; Case C-34/09, *Ruiz Zambrano v Office national de l'emploi* [2011] ECR I-01177. In both cases the claimants were granted EU citizenship rights of movement despite the fact that they had never exercised a Union freedom. It is, therefore, disputable whether further personal limitations to citizens are indeed applicable, even in respect of free movement and residence rights.

<sup>49</sup> Habermas, *Between Facts and Norms* (n 16) 89.

ability to have rights acknowledged and re-interpreted in the public sphere *as a type of political activity*.<sup>50</sup> The very practice and claiming of rights in the public sphere, even by those who do not possess full political rights, is a jurisgenerative process.<sup>51</sup> It includes a broad range of platforms of public engagement, such as local politics, the free public expression and manifestation of opinion and belief and, of course, asserting rights in court. As Ingram puts it:

Far from being the apolitical basis of politics, rights are vehicles of politicisation: political movements arise to expand old rights or claim new ones. Rights are not established in principle and then protected by power, be it by that of one's own state or another; they are invented and reinvented by particular actors through the very practice of claiming them.<sup>52</sup>

This understanding of rights has two main implications: first, it recognises the potential for membership of non-members<sup>53</sup> and, more broadly, the multiple forms of membership to which a political community can give rise.<sup>54</sup> It highlights the centrality of fundamental rights in public discourse and requires that every individual affected by EU action be granted 'the entitlement to all civil rights—including rights to association, property, and contract—and eventually to political rights.'<sup>55</sup> Secondly, an understanding of equal rights as preconditions of reasonable discourse in the public sphere is sensitive to the requirement of applying rights in a multitude of institutional relations. Participation in public life does not simply depend on the exercise of political right in the sense of voting or imparting political speech. It denotes participation through a variety of means, e.g. through the exercise of rights in the workplace.<sup>56</sup> If the Charter's provisions are understood as the bases of a supranational constitutional arrangement whose

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<sup>50</sup> See MP D'Entrèves, 'Public and Private in Hannah Arendt's Conception of Citizenship' in MP D'Entrèves and U Vogel (eds) *Public and Private: Legal, Political and Philosophical Perspectives* (Routledge 2000) 68, 80.

<sup>51</sup> See R Cover, 'The Supreme Court, 1982 Term – Foreword: Nomos and Narrative' (1983) 97 *Harvard L Rev* 4, 33.

<sup>52</sup> JD Ingram, 'What Is a "Right to Have Rights"? Three Images of the Politics of Human Rights' (2008) 102:4 *Am Poli Sci Rev* 401, 411. See also C Lefort, *The Political Forms of Modern Society: Bureaucracy, Democracy, Totalitarianism* (MIT Press 1986) 258.

<sup>53</sup> E Balibar, *Masses, Classes, Ideas* (Routledge 1994) 212.

<sup>54</sup> See Benhabib, *Rights of Others* (n 32) 56, 88. Benhabib rightly observes that, while the entitlement to political rights may not be immediately granted to all, it must be in possible to acquire them eventually, through continued membership of a community.

<sup>55</sup> *Ibid*, 140.

<sup>56</sup> See PP Craig, 'Theory, "Pure Theory" and Values in Public Law' (2005) *PL* 440, 444-445.

members meaningfully identify as its authors,<sup>57</sup> they require observance in all those relations that are capable of reducing this function.<sup>58</sup> It follows that justifying the application of the Charter on the basis of political equality both factually necessitates and normatively justifies a horizontal conception of rights.

### **6.3 Political equality and the horizontal effect of the Charter: recognising constitutional rights *and duties***

When understood as means of politicisation,<sup>59</sup> fundamental rights require protection against actors that possess institutional power (be it the state, corporations, or individuals),<sup>60</sup> in order to render that politicisation meaningful. Horizontality acts as a vehicle towards the effective and substantively equal application of fundamental rights in the modern public sphere for those whose ability to take part therein is impeded by the actions of private parties. As Chapter 1 has shown, under modern conditions, fundamental rights cannot be equally accessed for all if offered against the state only. Public life is made up of a range of social exchanges, comprising state and non-state actors alike.<sup>61</sup> A doctrine of horizontal effect that focuses on political equality can enhance collective deliberation by re-conceptualising the public/private divide and acknowledging the changing role of certain private actors therein.<sup>62</sup> It thus becomes valuable in effectively delivering the public guarantees enshrined in a fundamental rights framework. In other words, a justification of horizontality based on political equality supplies an answer to the pivotal issue at stake in this field, namely when a particular claim falls within the domain of constitutional, public law entitlements. That is the case when private actors *de facto* obstruct the equal application of fundamental rights in the public sphere. As Benhabib has put it:

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<sup>57</sup> J Habermas, 'Citizenship and National Identity: Some Reflections on the Future of Europe' in B van Steenberg (ed), *The Condition of Citizenship* (Sage 1994) 264. See also J Habermas, 'Historical Consciousness and Post-Traditional Identity' in J Habermas, *The New Conservatism: Cultural Criticism and the Historian's Debate* (Polity Press 1995) 257; Habermas, 'Struggles for Recognition in the Democratic Constitutional State' in Habermas (n 33) 225.

<sup>58</sup> See J Flynn, 'Communicative Power in Habermas's Theory of Democracy' (2004) 3:4 *EJPT* 433, 442-443, 449-451.

<sup>59</sup> Ingram (n 52) 411.

<sup>60</sup> P Morriss, *Power: A Philosophical Analysis* (2<sup>nd</sup> edn, Manchester University Press 2002) 107.

<sup>61</sup> See further Chapter 1.

<sup>62</sup> J Schmidt and K Wiethölter, 'Zur Regelbildung in der Dogmatik des Zivilrechts' in M Herberger, U Neumann and H Rüßmann (eds), *Generalisierung und Individualisierung im Rechtsdenken* (Franz Steiner Verlag 1992) 238.

Politics is the space we create in common by virtue of what we can share with each other in the public sphere. The personal becomes the political when one's identity as a Jew, as a woman, as a refugee, etc. – an identity one shares with others – is attacked by the larger society.<sup>63</sup>

In turn, the idea of horizontality in constitutional adjudication enshrines the requirement of respect and accommodation for a plurality of private life choices, when these form part of public exchange, even if they are at times unappealing to others. To safeguard the ability of every individual to pursue and develop their personal life-plan so that they can indeed enter the public sphere on equal terms as their consociates requires constitutional guarantees against a variety of institutional relations within civil society, including the exchange of commodities or services.<sup>64</sup>

This point was highlighted in the reasoning of Lady Hale in *Bull v Hall*,<sup>65</sup> a case concerning discrimination on grounds of sexual orientation in the private provision of services, which came before the UK Supreme Court. In that case, an hotelier and his wife, Mr and Mrs Bull, had refused to let a double room in their family-run establishment to Mr Preddy and Mr Hall, a homosexual couple in a civil partnership. At the time, civil partnership was the only institutional arrangement akin to marriage available to same sex couples in the UK. When Mr Preddy and Mr Hall arrived at Mr and Mrs Bull's hotel, the latter informed them that they could only give *married* couples a double room, as to do otherwise would be incompatible with their religious beliefs. The claimants left the hotel and sought more suitable accommodation elsewhere. They subsequently brought a case claiming damages against the hotel owners for the additional cost they had incurred, as well as, crucially, compensation for a breach of their right not to be discriminated against on grounds of sexual orientation.<sup>66</sup>

In delivering the Supreme Court's judgment in the claimants' favour, Lady Hale noted that a civil partnership arrangement was equivalent to marriage: 'Like

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<sup>63</sup> S Benhabib, *The Reluctant Modernism of Hannah Arendt* (Rowman and Littlefield 2003) 232-233.

<sup>64</sup> *Ibid.*

<sup>65</sup> [2013] UKSC 73.

<sup>66</sup> Sexual orientation is a protected characteristic under the Equality Act 2010, which codifies in UK law rights enshrined in ECHR and EU law (including the Charter) and which have been protected by convention in the UK common law.

marriage, [civil partnership] is a *status*, in which some of the terms are prescribed by law, and which has consequences for people other than the couple themselves and for the State.’<sup>67</sup> For this reason, she noted that the case concerned a question of ‘public interest,’ namely the recognition that same sex couples can enter into a mutual commitment which was for a long time legally unavailable to them, on an equal footing as heterosexual couples.<sup>68</sup> To allow a provider of facilities to refuse to trade with a civilly partnered couple in a manner akin to the way they would trade with a married couple would preserve a systematic exclusion of homosexual couples from the institution of marriage/civil partnership in day-to-day life.<sup>69</sup> It would therefore be tantamount to condoning the stigmatisation of an important part of their identity in respect of certain kinds of association with others.<sup>70</sup> This type of constitutional reasoning demonstrates in clear terms the value of horizontality as a means of effectively safeguarding equality in a modern public sphere characterised by multiple forms of public interaction, within which the commitment to fundamental rights remains meaningful.

Such reasoning is desirable in an EU-wide context. To the extent that the EU polity is defined, as Chapter 5 demonstrated, by a fluid public sphere closely linked to the free market, horizontality becomes crucial in maintaining the Charter’s organisational character. As Wolfgang Streeck has observed, privatisation affects particularly those who need the state for social provision:

The attrition of the public sphere deprives them of their only effective means for making themselves heard, devaluing the political currency by which they might otherwise compensate for their lack of commercial currency. [...] Moreover, improving their lives might figure importantly in collective political visions of a good society, whereas markets can always do without them.<sup>71</sup>

As a constitutional doctrine geared towards achieving political equality, horizontality can play a crucial role in reinstating political capacity to groups which have historically depended on the European model of the welfare-providing

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<sup>67</sup> *Bull v Hall* (n 65) para 26, emphasis added.

<sup>68</sup> *Ibid*, para 36.

<sup>69</sup> *Ibid*.

<sup>70</sup> *Ibid*.

<sup>71</sup> W Streeck, ‘Citizens as Customers: Considerations on the New Politics of Consumption’ (2012) 76 *New Left Rev* 27, 46.

state (such as the poor or the elderly) and, as such, suffer the most from the erosion of its traditional functions.<sup>72</sup>

Indeed, socio-economic inequalities have altogether increased in the EU since the 1970s,<sup>73</sup> with high unemployment rates and a lack of social mobility affecting large parts of the European Union.<sup>74</sup> Furthermore, perhaps most strikingly, discrimination and xenophobia still require an adequate response on the part of the EU,<sup>75</sup> while human trafficking and modern forms of slavery are increasing in many of the Member States.<sup>76</sup> These issues cannot be placed solely within the realm of state control, nor can they be regulated through private law: the effect that private parties have on their development and, at the same time, the exclusions from the public sphere that they create, exemplify the displacement of the boundary between private and public.<sup>77</sup> More than just state action is required to protect them.

How might the conceptualisation of horizontality advanced above work in practice in the Court's own case law? Throughout this thesis, I have referred to a case brought by a Spanish citizen against Google, which concerned the protection of his private data.<sup>78</sup> It is worth returning to this example one last time in order to illustrate the role of the horizontal effect of constitutional rights as a tool in the affirmation of political equality within a changed public sphere. As the reader will recall, Mr Costeja González sought to have Google delete data that concerned him – or, as the referring court had poetically put it – to have that data ‘consigned to oblivion,’ in line with Articles 7 and 8 of the EU Charter.<sup>79</sup> The Court granted this

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<sup>72</sup> Ibid.

<sup>73</sup> European Commission, ‘Why Socio-economic Inequalities Increase? Facts and Policy Responses in Europe’ (2010) EUR 24471 EN, <[http://ec.europa.eu/research/social-sciences/pdf/policy\\_reviews/policy-review-inequalities\\_en.pdf](http://ec.europa.eu/research/social-sciences/pdf/policy_reviews/policy-review-inequalities_en.pdf)> accessed 15 March 2015.

<sup>74</sup> Ibid. See also Eurostat, ‘Euro Area Unemployment Rate at 11.4%; EU28 at 9.9%’ (2015) Euro Indicators News Release 20/2015, <<http://ec.europa.eu/eurostat/documents/2995521/6581668/3-30012015-AP-EN.pdf/9d4fbadd-d7ae-48f8-b071-672f3c4767dd>> accessed 15 March 2015.

<sup>75</sup> See G Ford, ‘In the Wake of Xenophobia: The New Racism in Europe’ (2007) 44:3 UN Chronicle, <<http://unchronicle.un.org/article/wake-xenophobia-new-racism-europe/>> accessed 26 March 2015.

<sup>76</sup> United Nations Office on Drugs and Crime, ‘Global Report on Trafficking in Persons’ (2009), <[http://www.unodc.org/documents/Global\\_Report\\_on\\_TIP.pdf](http://www.unodc.org/documents/Global_Report_on_TIP.pdf)> accessed 10 May 2015, 6.

<sup>77</sup> See Chapter 5 for a more thorough discussion of the public/private divide.

<sup>78</sup> Case C-131/12, *Google Spain SL and Google Inc v Agencia Española de Protección de Datos (AEPD) and Costeja González*, EU:C:2014:317.

<sup>79</sup> Ibid, para 20. Articles 7 and 8 of the Charter protect, respectively, the right to private life and personal data.



claim. However, as preceding chapters have argued, the judgment left much to be desired in terms of reasoning, as it did not tackle horizontal effect as a question that concerns the way in which private parties interact with each other in the public sphere.

*Google* is precisely the type of case where a conscious horizontal application of rights to privacy and private data could have a profound structural impact on public life in the internet era: it concerns a new form of public interaction and can shift how the public/private divide. As McGoldrick has noted, ‘control of and access to data generates *public* and private power.’<sup>80</sup> It is only if understood as an affirmation of a public commitment prejudiced by private action that the Court’s decision in *Google* can be justified constitutionally, and not as the weighing up of private interests of a specific individual on the one hand and a private undertaking on the other. The fact that Google now has a constitutional obligation to take into account the privacy rights of individuals in its EU activities under Articles 7 and 8 of the EU Charter can be seen as reflecting not only a substantive commitment to the content of these provisions as individual protections for Mr Costeja González; or at least this is not why it should matter from the perspective of the Charter. It is the institutional dimension of the harm caused by Google, i.e. its ability *de facto* to control the rights to private life and data protection as fundamental public guarantees within the EU applicable to Mr Costeja González and to all those finding themselves in similar circumstances that is relevant from the perspective of horizontality in this context. The personal and the political remain, albeit linked, separate: in order to affect public life and hence create constitutional obligations for others, it is necessary to transcend questions that pertain to the individual case and to assess how and if they translate to a common cause.<sup>81</sup>

My continued use of the *Google* example in this thesis, though, might suggest that horizontality in the EU is only relevant in strongly imbalanced

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<sup>80</sup> D McGoldrick, ‘Developments In The Right To Be Forgotten’ (2013) 13:4 *HRLR* 761, 762 (emphasis added).

<sup>81</sup> See S Benhabib, ‘The Personal Is Not the Political,’ *Boston Review*, 1 October 1999, available at <https://www.bostonreview.net/books-ideas/seyla-benhabib-personal-not-political>, accessed 10 May 2016. See also H Arendt, *The Human Condition* (2<sup>nd</sup> edn, University of Chicago Press 1998) 55.

private relations, such as claims against particularly powerful corporations, or in fields where privatisation can most starkly distort fundamental rights, such as the domain of privacy. However, as noted earlier, horizontal obligations as claims to the effective recognition of membership need not be lodged against visibly powerful market actors only. Indeed, in addition to cases where horizontal effect is needed because of the unusual, state-like dominance of certain private actors, horizontality is also central to a much wider range of power relations, pertaining to the protection of several seemingly private life choices and identities. Determining the question of whether a private action has public impact does not only concern the authority or market influence held by that actor. At the same time, it requires the recognition of the fact that the exercise of public autonomy in the public sphere is highly dependent on the effective exercise of rights that protect private autonomy.<sup>82</sup>

Perhaps most famously, Advocate General Poiares Maduro argued this point in his Opinion in *Coleman v Attridge*, a case concerning discrimination by association.<sup>83</sup> The Advocate General noted that, rather than conceiving of autonomy in an individualistic, isolated manner *qua* freedom from state interference, it is intrinsic to autonomy that every individual should be capable of building their lives based on a variety of valuable options.<sup>84</sup>

Similarly, a commitment to autonomy means that people must not be deprived of valuable options in areas of fundamental importance for their lives by reference to suspect classifications. Access to employment and professional development are of fundamental significance for every individual, not merely as a means of earning one's living but also as an important way of self-fulfilment and realisation of one's potential. The discriminator who discriminates against an individual belonging to a suspect classification unjustly deprives her of valuable options. As a consequence, that person's ability to lead an autonomous life is seriously compromised since an important aspect of her life is shaped not by her own choices but by the prejudice of someone else. By treating people belonging to these groups less well because of their characteristic, the discriminator prevents them from exercising their autonomy. At this point, it is fair and reasonable for anti-discrimination law to intervene. In essence, by valuing equality and

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<sup>82</sup> Habermas, *Internal Relation* (n 33) 259-264; Habermas, *Legitimation* (n 20) 118. This thesis is also one of the main tenets in Habermas, *Between Facts and Norms* (n 16).

<sup>83</sup> Opinion of Advocate General Poiares Maduro, delivered on 31 January 2008, in Case C-303/06, *Coleman v Attridge Law and Steve Law* [2008] ECR I-5603. The claimant in this case was a carer for a person with a disability.

<sup>84</sup> *Ibid*, paras 8-10.

committing ourselves to realising equality through the law, *we aim at sustaining for every person the conditions for an autonomous life*.<sup>85</sup>

The fact that the discriminator may be a private company and not the state (as was indeed the case in *Coleman*) does not alter that reasoning.<sup>86</sup> To the extent that the effect of a private party's actions is such as to block options essential in order for a person to take part in public life *qua* equal, autonomous being, constitutional protections are engaged.

In her recent Opinion in *Bougnaoui*, Advocate General Sharpston raised a similar argument. The case, which is pending before the Court at the time of writing, concerns the dismissal of an employee who refused to remove her headscarf whilst working as a design engineer for Micropole SA, a private undertaking, when one of the company's clients requested that she should do so. Ms Bougnaoui argued that her dismissal constituted discrimination on grounds of religion or belief contrary to Article 2 of Directive 2000/78 and Articles 10 and 21 of the Charter (which protect the rights to freely exercise and manifest religion or belief and not to be discriminated against, respectively).

The Advocate General agreed. She found that the dismissal constituted direct discrimination, as it targeted the Islamic headscarf and did not constitute a genuine occupational requirement.<sup>87</sup> Her reasoning is particularly noteworthy. Even if the Court ends up finding that the question concerns indirect discrimination only and can therefore be objectively justified, Advocate General Sharpston has recommended, albeit only implicitly, a departure from the *Bilka* test, which allows economically sound decisions not related to discrimination to justify indirectly discriminatory policies.<sup>88</sup> Rather, she argued that *any* justification of indirect discrimination, even in a private relationship, would need to take into account the specific nature of religious belief and that it could not result in its erosion:

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<sup>85</sup> Ibid, para 11, emphasis added.

<sup>86</sup> Irrespective of whether the decision is taken by a public authority or private employer, the decision amounts to a *policy*, which has an impact on public life: T Parsons, 'On the Concept of Political Power' (1963) 107:3 *Proc Amer Phil Soc* 232, 245-246.

<sup>87</sup> Opinion of Advocate General Sharpston, delivered on 13 July 2016, in Case C-188/15, *Bougnaoui and ADDH v Micropole SA*, EU:C:2016:553, para 108.

<sup>88</sup> Case C-170/84, *Bilka Kaufhaus v Von Hartz* [1986] ECR I-1607, para 36. See further Chapters 3 and 5.

To someone who is an observant member of a faith, religious identity is an integral part of that person's very being. The requirements of one's faith – its discipline and the rules that it lays down for conducting one's life – are not elements that are to be applied when outside work (say, in the evenings and during weekends for those who are in an office job) but that can politely be discarded during working hours.<sup>89</sup>

Furthermore, Advocate General Sharpston highlighted that the requirement to observe the rights of others does not negate the employer's autonomy. She rightly noted that, in this case, a balance between competing fundamental rights enshrined in the Charter was involved: on the one hand, the right of the employee to believe in and manifest her religion freely (Article 10) and, on the other hand, the employer's freedom to conduct a business (Article 16), neither of which is unqualified.<sup>90</sup> Whereas it was clear that the employer's choice to ask an employee to remove her headscarf concerned an economically sound decision of running a business by catering to clients' requests regarding the employees' attire, this choice was disproportionate. It merely concerned the employer's maximisation of profit and therefore did not prejudice the essence of their freedom to conduct a business altogether. By contrast, the employer's choice rendered nugatory Ms Bougnaoui's ability to manifest her religion, as it shunned a core part of her identity from a substantial part of her public life (the workplace).<sup>91</sup>

This approach is particularly welcome. It recognises that reaching a balance between different rights in the public sphere in horizontal relations cannot result in the abridgment of one of these rights but, rather, must cater to the accommodation of both. Thus, the constitutional adjudicator cannot – and should not – choose whether a right enshrined in the Charter is superior to others, whether by appeal to its moral significance or indeed by reference to a general principle of law.<sup>92</sup> In the Charter context, the Court must, rather, determine

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<sup>89</sup> *Bougnaoui* Opinion (n 87) para 118.

<sup>90</sup> *Ibid.*, para 119.

<sup>91</sup> *Ibid.*, paras 120-134 and especially 131-133.

<sup>92</sup> This line of reasoning has been advanced most convincingly, as noted in Chapter 4, by Advocate General Cruz Villalón in a series of Opinions in this field. See, most illustratively, Opinion of Advocate General Cruz Villalón, delivered on 19 May 2011, in Case C-447/09 *Prigge and Others v Deutsche Lufthansa*, EU:C:2011:321, para 26.

whether a particular policy takes both of the protected rights into account.<sup>93</sup> One could add that, in determining whether such a choice in fact deprives a person of options essential to the realisation of their autonomy, the Court must take into account the control that can be exercised by employers in these circumstances and the extent to which their decision amounts to or can amount to a consistent exclusionary practice.<sup>94</sup> It is indeed important to note that a client who wishes to deal only with non-veil-wearing designers is in a different institutional position vis-à-vis the veil-wearing employee to the employer him/herself.<sup>95</sup> The client in this case makes a request – and therefore exercises some influence over – the employer’s decision.<sup>96</sup> The employer remains, nonetheless, in a position to handle that request differently, for example by stating the company’s non-discriminatory policies or sending a different employee. In turn, the employer’s decision to dismiss does not only relate to a specific interaction with a client – it also constitutes a statement about the desirability of certain characteristics in the workplace.

In other words, it is essential to clarify that a conception of horizontality based on political equality is not unlimited. For example, if I wish to host an all-female dinner in my flat, that does not necessarily engage my duty to comply with the right to non-discrimination in Article 21 EUCFR.<sup>97</sup> In abstract terms, such a scenario would, of course, have some relevance from the perspective of equality (I would in fact be privileging my female friends over my male friends simply because of their gender). However, my choice appears to be structurally immaterial to my friends’ ability to enter the public sphere and to engage with

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<sup>93</sup> See T Scanlon, ‘Adjusting Rights and Balancing Values’ (2004) 74 *Fordham L Rev* 1477, 1478-81; R Alexy, ‘Constitutional Rights, Balancing, and Rationality’ (2003) 16 *Ratio Juris* 131, 135-139.

<sup>94</sup> See by analogy, Opinion of Advocate General Poiares Maduro, delivered on 23 May 2007, in Case C-438/05, *The International Transport Workers’ Federation and The Finnish Seamen’s Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779, para 47.

<sup>95</sup> Of course, there are questions about whether such a request should enjoy constitutional protection if it is the product of or can result in the stigmatisation a particular group. For a thoughtful discussion of this issue, see B Parekh, ‘Is There a Case for Banning Hate Speech?’ in M Herz and P Molnar (eds), *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (CUP 2012) 37ff.

<sup>96</sup> On the distinction between power (the ability to develop a policy/practice with public sphere implications) and mere influence, which does not amount to the ability to coerce or develop a specific policy outcome, see Parsons (n 86) 234.

<sup>97</sup> Presuming such scenarios came within the scope of EU law.

issues of collective concern. By contrast, it would substantively impede my own ability to develop the type of private life I may want to lead and to choose my private associations (even if these choices are unappealing to many).<sup>98</sup>

Thus, an adequate constitutional justification of horizontality would need to recognise, firstly, that the modern public sphere can comprise private forums of deliberation, such as the workplace; and secondly, that we enter the public sphere *together with*, rather than shielded behind, our plural private life choices. In other words, conceptualising horizontality as a constitutional doctrine involves recognising a) that the divide between the private and public spheres is a permeable one; *and* b) that both private autonomy and public autonomy require constitutional guarantees. These guarantees need to be adjusted not in order to advance a particular conception of a good life, but the ability of each individual to choose that life and to express it in interaction with others.<sup>99</sup> To use, once more, the words of Albie Sachs:

While recognising the unique worth of each person, the Constitution does not presuppose that a holder of rights is an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times.<sup>100</sup>

A properly conceptualised horizontal effect doctrine in the Charter context is about questioning whether the institutions traditionally understood as ‘public,’ namely Member States and the institutions of the EU, can deliver fundamental rights equally within a political project arising from a market, the effective operation of which has always rested, at least in part, on the vindication of rights as private, individual interests of more or less active market participants.<sup>101</sup> In turn, it is necessary to overcome an understanding of horizontal effect as a means for the instrumental application of EU law derived from absolute notions of primacy and to build it into a discussion of constitutional law as a safeguard of the

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<sup>98</sup> For a thorough discussion of the extent to which horizontality limits private autonomy see *Du Plessis v De Klerk and another* (CCT8/95) [1996] ZACC 10, paras 120ff, per Kriegler J.

<sup>99</sup> Within the parameters of reasonable discourse: Habermas, *Between Facts and Norms* (n 16) 198.

<sup>100</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* (CCT11/98) [1998] ZACC 15, para 117, per Sachs J.

<sup>101</sup> JHH Weiler, ‘The Individual as Subject and Object and the Dilemma of European Legitimacy’ (2014) 12:1 *ICON* 94, 103.

political process, which benefits the members of the EU supranational order both in respect of their private autonomy but also their public autonomy, as political actors and indeed, in a broad sense, as citizens.<sup>102</sup>

Violations of fundamental rights matter when they affect the possibility of equal political status within the EU, thus depriving the notion of equal EU citizenship of practical meaning.<sup>103</sup> When is this the case? In *AMS*, for example, the fact that France had not, in some way, given effect to Article 27 for a particular group of employees, and had at the same time failed otherwise to provide them with representation, put those employees in a disadvantageous position in exercising political activity *on equal terms*, both compared to employees on other types of contracts in France and compared to workers in Member States where the relevant protections had been implemented. Similarly, cases like *Defrenne* and *Küçükdeveci* redress institutional exclusions from rights guaranteed within the European Union in one of its most important forums for public exchange: the market.

In *FOA*, a recent case concerning disability discrimination, the Court seemed to acknowledge this point. It stated that the main criterion for determining whether the fundamental right not to be discriminated against on grounds of disability in the workplace had been breached was that of the ‘full and effective participation of the person concerned in professional life on an equal basis with other workers.’<sup>104</sup> It then emphasised specifically the necessity of *equal access to and participation in* employment.<sup>105</sup> Nonetheless, the Court did not touch upon the question of horizontality in its ruling. It remains to be seen whether this approach will be taken forward in this context. As this chapter has argued, such reasoning would be a desirable and broadly transposable reading of the horizontal effect of the Charter.

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<sup>102</sup> Habermas, *Internal Relation* (n 33) 259-60; Habermas, *Legitimation* (n 20) 118.

<sup>103</sup> See Von Bogdandy (n 44) 513. It must be acknowledged that the argument made in this article applied in respect of a limited set of rights outside the scope of EU law strictly speaking. However, the discussion regarding citizenship remains useful. See also Opinion of Advocate General Poiares Maduro, delivered on 12 September 2007, in Case C-380/05, *Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni* [2008] ECR I-349, para 22.

<sup>104</sup> Case C-354/13, *FOA v Kommunernes Landsforening*, EU:C:2014:2463, para 53.

<sup>105</sup> *Ibid*, para 54. See also Case C-363/12, *Z v A Government Department and The Board of Management of a Community School*, EU:C:2014:159, paras 76-77.

Indeed, ultimately, the imposition of a horizontal obligation to observe the right to equal pay or the right not to be discriminated against is about recognising the link between the exercise of these rights and the ability to participate in public life in modernity. There is no *inherent* value in constitutional-order rights derived from EU law having an ‘absolute nature’ (as the Court did in *Defrenne*<sup>106</sup>), thereby applying to private relations. Developing an adequate *rational* argumentation about justice is necessary in order to establish a culture of mutual respect in a constitutionally pluralist community and to develop a public sphere geared towards reaching mutual understanding.<sup>107</sup> Thus, rather than being based on a determination of whether specific Charter rights constitute general principles of law or absolute rules that should be recognised by all legal persons, it is possible to render the application of the Charter dependent on equality in particular, in the sense of the equal right to enjoy a basic set of safeguards through which reasonable political discourse as authorship can be exercised.<sup>108</sup> In other words, a private relationship engages the application of constitutional rights when it affects a person’s ability equally to enjoy them in public life.

It follows that horizontality must be determined both based on the content and meaning of Charter rights *as well as* the institutional power enjoyed by different private actors. As such, both right-by-right and case-by-case analyses of horizontality will be inherently incomplete. For this reason, it would also be inaccurate to offer a classification of ‘horizontal’ and ‘vertical’ Charter provisions in this thesis. Of course, as some of the Court’s Advocates General have already pointed out, some of the Charter’s provisions (such as the right to be informed and consulted within the undertaking and employment rights more broadly)<sup>109</sup> and some types of private relations (such as employment relations)<sup>110</sup> are readily

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<sup>106</sup> Case 43/75, *Defrenne v Sabena* [1976] ECR 455, para 39.

<sup>107</sup> J Habermas, *The Theory of Communicative Action, Vol 1 – Reason and the Rationalization of Society* (reprint edn, T McCarthy tr, Polity Press 1984) 285-8; Habermas, *Between Facts and Norms* (n 16) 166; JS Dryzek, *Deliberative Democracy and Beyond. Liberals, Critics, Contestations* (OUP 2000) 48. See also RC Post, ‘Who’s Afraid of Jurispathic Courts? Violence and Public Reason in *Nomos and Narrative*’ (2005) 17 *Yale J L Hum* 9, 14-16.

<sup>108</sup> See Benhabib, *Rights of Others* (n 32) 181. See also MA Wilkinson, ‘Political Constitutionalism and the European Union’ (2013) 76:2 *MLR* 191, 209.

<sup>109</sup> See Opinion of Advocate General Cruz Villalón, delivered on 18 July 2013, in Case C-176/12, *Association de médiation sociale v Union locale des syndicats CGT*, EU:C:2013:491, paras 38-40.

<sup>110</sup> See *Viking Opinion* (n 94) para 47.



amenable to horizontal analysis. In such cases, the impact of a breach of a fundamental right on political equality is plain: the equal political status of all employees is prejudiced insofar as those who work for public employers enjoy a greater number of rights than those who work for private employers. However, this should not be taken to mean that there are Charter provisions or social institutions that can *ipso facto* be excluded from horizontality. It is open to the Court of Justice through its engagement with horizontality in practice to test whether a particular provision and institutional relation is in fact amenable to horizontal effect. Questions about whether institutions such as the family or religious community, as well as rights such as the freedom of expression and the right not to be trafficked have horizontal dimensions will be particularly interesting aspects of this exercise.

#### **6.4 Conclusion: a political conception of horizontality under the Charter**

This chapter has argued that horizontal effect in the Charter context cannot be discussed in isolation from the broader constitutional interpretation of fundamental rights in the EU. At a first stage, the chapter demonstrated that a conception of fundamental rights focusing on political equality is the justification that resonates most powerfully with the Charter's content and goals. It then went on to show that horizontal effect is not a goal in itself or a self-referential 'doctrine' as we often call it (I have certainly been guilty of this characterisation on multiple occasions in this thesis alone). It is part of a broader system for the protection of fundamental rights that enables us to engage with each other in the public sphere on equal terms. Thus, whereas a justification for horizontality based on political equality may, at first glance, appear causally remote, its value becomes clear once we understand the Charter in its proper context, that is as part of a broader process of constitutional change that sought to restore a sense of authorship in the 'peoples of Europe' about the constitutional arrangement in which they live.<sup>111</sup>

A political conception of fundamental rights differs from the Court's approach in two crucial ways. Firstly, it distinguishes the application of the fundamental rights enshrined in the Charter from the application of other legal

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<sup>111</sup> See further Chapter 2.

rules with horizontal dimensions. By adding an extra layer of review based on political equality, it determines when a private dispute falls within the sphere of constitutional, public law entitlements that cannot be regulated by ordinary, rather than constitutional, law. Secondly, it looks at society and the actors that comprise it without collapsing it into the market: in applying the fundamental rights that define the communicative conditions of an EU-wide public sphere (even if that public sphere is still, to a great extent, to-come), this conception of rights distinguishes actors with political status from mere market actors. In this sense, the horizontal effect of the Charter has an inclusionary impact on previously underrepresented groups in the European Union (e.g. non-market-active citizens or undocumented migrants) by recognising their equal political disposition. By the same token, it contains the highly problematic equalisation of fundamental rights and market freedoms or, more broadly, of market and polity, which has characterised some of the case law to date.<sup>112</sup>

It follows that, in order to work for the Charter as an instrument with a constitutional character in a supranational context, the horizontality doctrine cannot just be tweaked or differentiated on a case-by-case basis. It has to be radically reimaged. An inalienable tenet of political equality is equality before the law. This is not so in the highly formalistic sense in which, to paraphrase Anatole France's words, the law prohibits rich and poor alike from stealing loaves of bread and sleeping under bridges (thus structurally privileging the rich over the poor), but in a more substantive sense. A horizontal rendering of fundamental rights facilitates the use of existing legal structures in order to redress violations of rights attributable to social forms of public power. As a legal representation of our mutual responsibilities to one another, horizontality can have transformative implications for the *status quo*, as it allows for the recognition in constitutional law of the many different forms that power can take in modern public life.

Thus, horizontality is, ultimately, a code of 'active participation and solidarity' within the EU polity.<sup>113</sup> It is a discourse about the duties that attach to the enjoyment of fundamental rights, such that it is impossible for the Court to

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<sup>112</sup> See further Chapter 5.

<sup>113</sup> Ingram (n 52) 413. See also, in the EU context: Fontanelli (n 37) 240.

assess it without regard for the purpose of fundamental rights within the EU and a proper delimitation of when the supranational standard, the Charter, is engaged (as opposed to national standards of rights protection). The adjudication of fundamental rights operating within a multi-layered constitutional polity involves a great number of interpretations – even conflicting interpretations – about the values underlying these rights. Disagreement about these things is sometimes necessary and indeed desirable. Its *locus* is, however, within the public sphere, constructed and accessed through an existing rights framework, rather than being the subject of judicial determination. By contrast, the safeguard of access to the framework of fundamental rights that enables the operation of the public sphere falls squarely within the realm of constitutional adjudication and requires not only national but also supranational guarantees, in order to be effective.

## 7 A Supranational Model of Horizontality for the Charter

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### 7.1 Introduction

In previous chapters, this thesis has reconstructed the EU practice of horizontal effect in the field of fundamental rights; criticised the overall lack of substantive constitutional reasoning on the part of the Court of Justice; and argued in favour of a constitutional reinterpretation of horizontality that takes into account the political nature of fundamental rights in the EU constitutionalisation process. Chapter 6, in particular, argued that the equalising functions of the horizontal effect of fundamental rights in the modern public sphere would provide an adequate conceptual justification for its application to the Charter. In order to reason effectively in this regard, the Court would need to determine the level of protection of fundamental rights in the EU by looking at the meaning of the right and whether it is in fact equally enjoyed, in light of the institutional power present in certain private relations. Nonetheless, the thesis has not so far considered which operational rules for horizontality would be justified in the context of *supranational* constitutional adjudication. It is essential to assess the impact of the use of the reasoning advocated in Chapter 6 on certain settled features of the EU constitutional order in horizontal cases. Indeed, the idea of horizontality does not stop at ‘whether,’ significant though this question may be, but also requires an understanding of ‘how’ a right enters private relations. As we have seen in previous chapters, the latter question has been the subject of much of the existing debate in EU law, with direct horizontal effect being subject to special rules and exclusions.<sup>1</sup>

Overall, this chapter argues that uniformity of national remedies is not essential in order for the Charter standard to be delivered effectively in horizontal relations. There are two main steps to this argument: first, the chapter argues that it is necessary for the Court of Justice to take into account the coherence of the EU constitutional order and the relationship between EU and national courts in developing a supranational doctrine of horizontality for the Charter. Horizontality

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<sup>1</sup> See Chapters 3 and 4 for a more detailed discussion.

raises different concerns in the supranational adjudication of fundamental rights, compared to its national counterpart. At the EU level, it relates not only to the substantive meaning and goals of the Charter's provisions, but also to the appropriate delimitation of competences between the CJEU and Member State courts, which often have different mechanisms of applying fundamental rights to private relations. The supranational arbiter is entrusted primarily with setting the relevant standard of protection. That involves an assessment, firstly, of the horizontal applicability of a particular provision on the basis of transparent reasoning based on an identifiable normative criterion (e.g. political equality, as discussed in Chapter 6); and secondly, of the effectiveness of national means for protecting that standard. In turn, insofar as different instantiations of horizontality at the national level (direct, indirect and state-mediated effect) are outcome-neutral in terms of delivering the relevant standard,<sup>2</sup> their determination does not fall within the institutional mandate of the Court of Justice but instead remains within the jurisdiction of national courts (Section 7.2).

Secondly, this chapter highlights that the existing conceptualisation of horizontality, which presents it as an extension of the principle of direct effect of EU law, is not only problematic because it gives rise to tensions between the CJEU and national courts. It also misrepresents the constitutional operation of the horizontality doctrine in a multi-layered legal context and, as such, cannot deliver a nuanced supranational constitutional theory of horizontality, in its current form. The case law appears to be premised on the assumption that the supranational remedies of direct effect, consistent interpretation, and state liability in fact correspond to different manifestations of horizontality at the national level (direct, indirect, and state-mediated). However, the interpretation of the appropriate constitutional form of horizontality at the national level and the question of direct effect of EU law in horizontal situations are separate issues. The determination by the Court of Justice of whether a provision meets the criteria for horizontal direct effect is distinguishable from the remedy of direct horizontal effect at the national level. While the former concerns the ability of individuals to *invoke* a Charter right in national proceedings against a private party, the latter concerns more

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<sup>2</sup> See R Alexy, *A Theory of Constitutional Rights* (J Rivers tr, OUP 2002) 358.

specifically the manner in which the private party becomes liable for a breach of a fundamental right within national law. Thus, even if the Court were to continue to make assessments regarding the direct effect of Charter provisions, it would be essential to clarify – and indeed to contain – the implications of its findings in this regard for national courts. In a supranational constitutional model of horizontality, the question of EU direct effect has a limited scope: it concerns a procedural standard and not the main normative question before the Court of Justice in this field, which is that of horizontal applicability (Section 7.3).

## **7.2 Understanding the role of the CJEU in the adjudication of the horizontal effect of the Charter**

Fully understanding the controversies surrounding the adjudication of the EU Charter and, by necessary implication, its horizontal adjudication, necessitates a discussion of the constitutional landscape of the European Union in the field of fundamental rights – a landscape Advocate General Cruz Villalón speaking extra-judicially has tellingly referred to as a ‘crowded house.’<sup>3</sup> As noted earlier, the Charter draws on national constitutional traditions as well as the international human rights standards to which they commit.<sup>4</sup> This suggests that its horizontal application should develop with responsiveness to the way in which fundamental rights are put in place in intersubjective disputes in the broader regime of fundamental rights protection in the EU. Insofar as the Charter’s interpretation stands between national and international protections of fundamental rights, it is necessary to ensure that its application does not antagonise, but rather complements these standards.<sup>5</sup> Thus, EU law requires a theory for judging the application of fundamental rights, which can both coexist with a plurality of national constitutional systems and provide an adequate justification for the application of the supranational constitutional standard, the Charter.<sup>6</sup>

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<sup>3</sup> P Cruz Villalón, ‘A Crowded House in the Protection of Fundamental Rights’ (2012) KCL Working Paper in European Law 01/2012, <<https://www.kcl.ac.uk/law/research/centres/european/research/CELWPEL012012FINAL.pdf>> accessed 20 February 2014.

<sup>4</sup> See further Chapter 2.

<sup>5</sup> See P Eeckhout, ‘Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?’ (2015) 38:4 *Fordham Int’l LJ* 955.

<sup>6</sup> See C Joerges, ‘The Idea of a 3-Dimensional Conflicts Law as Constitutional Form’ (2010) RECON Working Paper 2010/05,

A degree of accommodation for national constitutional practices would be consonant with the structure of the EU constitutional order. Eeckhout has poignantly observed that the concept of integration in the EU does not merely relate to a judge-driven paradigm of legal integration to advance the EU project in its early years.<sup>7</sup> It also has an empirical dimension within a multi-layered constitutional polity, especially in the field of fundamental rights: ‘there is not only integration *through* law, but also the integration *of* laws. The EU, ECHR, and national systems of human rights protection are systemically integrated, and this integration is intensifying.’<sup>8</sup> Respect for national and international legal regimes has been necessary for both the legitimacy and the smooth operation of the EU’s supranational order; and, at the same time, responses to clashes between EU and national law have been instrumental in the development of EU fundamental rights standards themselves.<sup>9</sup> As Besselink puts it: ‘Also in the field of fundamental rights, Europe is composed of mutually dependent and interacting orders, together forming one encompassing constitutional order.’<sup>10</sup> It is neither the aim nor the mandate of EU constitutional law to harmonise national constitutional practices. It is, rather, intended to integrate them in a mutually accommodating way in order to give effect to the protections of the Charter.

Indeed, the EU constitutional order is based on the idea that national courts are, in principle, better placed to deliver EU law within the structures of national law. Today this is confirmed in the Treaty, which emphasises that the Union is premised on respect for national constitutional identities.<sup>11</sup> In turn, Article 51(1) of the Charter mentions that its provisions shall apply ‘with due regard to the principle of subsidiarity.’ The proper functioning of EU law

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[http://www.europeanrights.eu/public/commenti/jeorges\\_testo.pdf](http://www.europeanrights.eu/public/commenti/jeorges_testo.pdf) accessed 10 May 2016.

<sup>7</sup> P Eeckhout, ‘Human Rights and the Autonomy of EU Law: Pluralism or Integration?’ (2013) 66:1 *CLP* 169, 171-172.

<sup>8</sup> *Ibid* (emphasis original).

<sup>9</sup> *Ibid*.

<sup>10</sup> LFM Besselink, ‘General Report. The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions’ (2012) XXV FIDE Congress, Tallinn, 30 May – 2 June 2012, [http://www.fide2012.eu/index.php?doc\\_id=94](http://www.fide2012.eu/index.php?doc_id=94) accessed 5 March 2014, 47.

<sup>11</sup> Article 4(2) TEU.

necessitates both that national courts apply it at the national level and that they refer questions about EU law to the Court of Justice. As the latter has put it:

The system of references for a preliminary ruling is based on a dialogue between one court and another, the initiation of which depends entirely on the national court's assessment of whether a reference is appropriate and necessary.<sup>12</sup>

It follows that the Court's role involves not only the handing out of authoritative interpretations of the law, but also the cultivation of a culture of mutual trust, premised on the understanding that these systems are dependent on one another, rather than being in a hierarchical relationship in the classical sense. Just as national courts turn to the Court of Justice for answers to their EU law questions, the Court of Justice relies on the cooperation of national courts in order to ensure that factual considerations and national law intricacies are properly accommodated in EU adjudication. As Advocate General Szpunar put it in his Opinion in *AKT*, 'the legal order of the European Union rests upon the systemic principle that recognises the essential role of the national courts in implementing its provisions.'<sup>13</sup>

So far, the EU horizontal effect doctrine has not worked well from this perspective. The case law both before and after the entry into force of the Charter has focused almost exclusively on the question of whether a particular right could give rise to direct horizontality, without considering the legal structures available to give effect to fundamental rights in private relations within national law. As Chapter 1 explained, horizontal effect is, in principle, three-dimensional and comprises direct, indirect and state-mediated manifestations. Yet, in practice, most legal orders only offer partial recourse to fundamental rights in horizontal relations and understand its dimensions very differently: some conceptualise horizontality through indirect effect only (e.g. Germany) and few offer direct recourse to fundamental rights in private relations (e.g. Ireland and, in certain

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<sup>12</sup> Case C-210/06, *Cartesio Oktató és Szolgáltató bt* [2008] ECR I-9641, para 91; Case C-104/10, *Kelly v National University of Ireland* [2011] ECR I-6813, para 63.

<sup>13</sup> Opinion of Advocate General Szpunar, delivered on 20 November 2014, in Case C-533/13, *Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Öljytuote ry, Shell Aviation Finland Oy*, EU:C:2014:2392, para 77.



cases, the UK).<sup>14</sup> The current EU horizontality framework has never accommodated these constitutional differences. Rather, it is EU law as interpreted by the Court of Justice, and not national constitutional law, that determines the mode of horizontal effect granted.

As earlier chapters have highlighted, it is not so much the idea of horizontality generally but mainly direct horizontal effect that creates tension in this field.<sup>15</sup> The use of direct horizontal effect has been problematic from the perspective of the internal coherence of national constitutional orders in which this mechanism is not otherwise available, as it involves significant constitutional changes in respect of the situations that come within the scope of EU law.<sup>16</sup> For example, if EU law required the application of direct horizontal effect for the right to human dignity in its interpretation of Article 1 EUCFR, then a national system only recognising indirect horizontality would need to be altered without necessarily offering inferior – but merely different – protection of the right in question. Thus, national constitutional orders not protecting Charter rights *in the way* stipulated by the Court require important changes, even though it is not always clear whether these have a substantive impact on the enjoyment of fundamental rights. Indeed, as the preceding chapters have indicated, the constitutional interaction between EU law and national and international law so far has focused less on the substantive fundamental rights issues in question and more on the affirmation of the primacy and uniformity of EU law.<sup>17</sup>

This state of affairs has caused substantial concerns on the part of national constitutional courts. The most noteworthy debate in this field took place in Germany following the *Mangold* ruling, with the tension between national and EU law culminating in the *Honeywell* decision of the German Constitutional Court.<sup>18</sup> The case concerned the application of the *Mangold* judgment in a

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<sup>14</sup> See further Chapter 1.

<sup>15</sup> See further Chapters 1-3.

<sup>16</sup> See R Herzog and L Gerken, 'Stop the European Court of Justice,' EU Observer, 10 September 2008, <<https://euobserver.com/opinion/26714>> accessed 14 May 2016.

<sup>17</sup> A Albi, 'An Essay on How the Discourse on Sovereignty and the Co-Operativeness of National Courts Has Diverted Attention from the Erosion of Classic Constitutional Rights in the EU' in M Claes and others (eds), *Constitutional Conversations in Europe: Actors, Topics and Procedures* (Intersentia 2012) 43. See further Chapter 5.

<sup>18</sup> *Honeywell* – BVerfGE 126, 286 (Az: 2 BvR 2661/06) paras 61, 68. For a detailed discussion, see M Payandeh, 'Constitutional Review of EU Law after Honeywell: Contextualising the

situation entailing virtually the same facts. Honeywell had employed an older worker on a short-term contract. That contract had been concluded in line with the German legislation that, in *Mangold*, the Court had considered incompatible with the general principle of non-discrimination on grounds of age, as given specific expression in Directive 2000/78.<sup>19</sup> After having similar obligations imposed on it (despite having relied on valid national law), Honeywell, a private company, sought to have the constitutionality of that decision reviewed by the German Constitutional Court, as it had created an unforeseeable obligation not otherwise present in German law. In a strong tone, the German Constitutional Court stated that the existing EU horizontality doctrine was ‘unstructured’ and that it came close to *ultra vires* action on the part of the Court of Justice.<sup>20</sup> While it ultimately decided that, on the facts, the *Mangold* ruling was just short of *ultra vires*, the national court made clear that the challenge posed to German constitutional principles in that case had been sufficient to enable it to review the legality of the CJEU’s findings.<sup>21</sup> That is not surprising, in light of the extent to which indirect horizontality is embedded in German law. Despite its wide-ranging nature, that principle was challenged by the obligation to give direct horizontal effect to the fundamental right not to be discriminated against.

Sarmiento has rightly noted that the interpretation of the Charter strikes at the very heart of one of the core constitutional problems of the European Union, namely the ‘federal question’ of how national courts and the CJEU shall interact in respect of constitutional issues.<sup>22</sup> This debate rests on the belief, on the part of both sides, that they are the ones having the final say on primacy in fundamental rights questions.<sup>23</sup> Nonetheless, the Charter should not be seen as a vehicle of further supervision of national courts by the Court of Justice but, rather, as an

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Relationship between the German Constitutional Court and the European Court of Justice’ (2011) 48 *CML Rev* 9.

<sup>19</sup> See further Chapter 3.

<sup>20</sup> *Honeywell* (n 18) para 61.

<sup>21</sup> *Ibid*, para 68. See C Möllers, ‘German Federal Constitutional Court: Constitutional *Ultra Vires* Review of European Acts Only Under Exceptional Circumstances; Decision of 6 July 2010, 2 BvR 2661/06, *Honeywell*’ (2011) 7:1 *EuConst* 161.

<sup>22</sup> D Sarmiento, ‘Who’s Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe’ (2013) 50:5 *CML Rev* 1267, 1272. See P Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’ (2002) 39:5 *CML Rev* 945.

<sup>23</sup> Sarmiento, *ibid*, 1267-8.

opportunity for national courts to assume a more active role in the maintenance of fundamental rights in the EU.<sup>24</sup> It is necessary to recognise that national constitutional courts in Europe are powerful entities, often playing a crucial role in national decision-making, as well as in national sentiment-formation.<sup>25</sup> Even though concerns about whether the CJEU is ‘taking rights seriously’<sup>26</sup> could be minimised if, in line with the discussion in Chapter 6, the Court advanced adequate public justifications for its interpretation of the Charter, this would not be in itself sufficient to render the interaction between national courts and the CJEU more harmonious. It would not necessarily legitimise the setting of a specific *supranational remedy*, which remains an important point of concern. Where constitutional narratives differ, the Court’s insistence on entirely uniform standards on the basis of the primacy and effectiveness of EU law risks being received with distrust, rather than fostering a constructive debate about private responsibility for the breach of fundamental rights in the EU.

Maintaining the existing approach would not only be unrepresentative of the different ways in which Member States give effect to the Charter’s provisions in private relations. It would also be unnecessarily harmonising, as it would require different remedies in the application of fundamental rights coming within the scope of EU law only. To the extent possible, this should be avoided.<sup>27</sup> The idea, often maintained by the Court of Justice, that the coherence of national law is immaterial to the overall functioning of EU law (even if it can result in reverse discrimination) raises an important question of legitimacy of the EU horizontality standard.<sup>28</sup> Both national and supranational decisions must be justified ‘in the

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<sup>24</sup> Sarmiento, *ibid*, 1299-1300. See also B de Witte, ‘Direct Effect, Primacy and the Nature of the EU Legal Order’ in PP Craig and G de Búrca (eds), *The Evolution of EU Law* (2<sup>nd</sup> edn, OUP 2011) 357.

<sup>25</sup> A Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP 2000) 61-91.

<sup>26</sup> J Coppel and A O’Neill, ‘The European Court of Justice: Taking Rights Seriously?’ (1992) 29:4 *CML Rev* 669, 669-70; Cf JHH Weiler and NSJ Lockhart, “‘Taking Rights Seriously’ Seriously: The European Court and Its Fundamental Rights Jurisprudence – Part I’ (1995) 32:1 *CML Rev* 51, 70-71.

<sup>27</sup> Advocate General Slynn had made this point in his Opinion in *Marshall* (though the Court quickly dismissed it): Opinion of Advocate General Slynn, delivered on 18 September 1985, in Case 152/84, *Marshall v Southampton and South-West Hampshire Area Health Authority* (Teaching) [1986] ECR 723, 739. See further Chapter 3.

<sup>28</sup> M Dougan, ‘The Vicissitudes of Life at the Coalface: Remedies and Procedures for Enforcing Union Law before the National Courts’ in Craig and de Búrca (n 24) 416. See also C Harlow, ‘A

context of a coherent and integrated EU legal order.’<sup>29</sup> The Court’s interpretation of fundamental rights must therefore serve not only the supremacy principle, but also a broader public interest within the Charter context. Furthermore, it must be shown that such an interpretation in fact falls within the Court’s mandate, rather than the mandate of national courts or the supranational legislature. As Craig puts it, in a balanced constitutional community, ‘the component parts of the constitutional regime should operate for the general public good, rather than to satisfy narrow sectional demands.’<sup>30</sup>

It follows that the constitutional tensions in this field require a careful delineation of the different role of national and supranational courts in the delivery of fundamental rights standards and not merely by appeal to the supremacy principle. The horizontality exercise does not concern *only* a determination of the fields of application of the Charter – an issue covered by Article 51(1) and authoritatively interpreted in *Fransson*.<sup>31</sup> It also concerns the question of when and how supranational jurisdiction should be utilised within those fields. That does not necessarily imply a uniformity of means at the national level. While the substantive primacy of the Charter was affirmed in *Melloni*, this does not in fact require the complete harmonisation of national procedures.<sup>32</sup> The Court’s stipulation in respect of the protection of the Charter concerned the need for primacy and uniformity *of the standard of protection*.<sup>33</sup> A ‘procedural’ or ‘structural’ primacy<sup>34</sup> can only become relevant, from the EU perspective, in

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Common European Law of Remedies?’ in C Kilpatrick, T Novitz and P Skidmore (eds), *The Future of Remedies in Europe* (Hart 2000).

<sup>29</sup> M Poiares Maduro, ‘Contrapunctual Law: Europe’s Constitutional Pluralism in Action’ in N Walker (ed), *Sovereignty in Transition* (Hart 2003) 501.

<sup>30</sup> PP Craig, ‘Democracy and Rule-making within the EC: An Empirical and Normative Assessment’ (1997) 3:2 *ELJ* 105, 117-8.

<sup>31</sup> Case C-617/10, *Åklagaren v Åkerberg Fransson*, EU:C:2013:105, para 19.

<sup>32</sup> Case C-399/11, *Melloni v Ministerio Fiscal*, EU:C:2013:107, para 60.

<sup>33</sup> *Ibid.* Furthermore, the extent to which the primacy standard set out in this ruling is in fact an absolute one can be debated. However, it is impossible to consider this question in detail in the thesis as it is largely beyond its scope. For a thoughtful discussion see See LFM Besselink, ‘The Parameters of Constitutional Conflict after *Melloni*’ (2014) 39:4 *EL Rev* 531.

<sup>34</sup> De Witte (n 24) 343. See also D Simon, ‘Les Exigences de la Primauté du Droit Communautaire: Continuité ou Métamorphoses?’ in *L’Europe et le Droit. Mélanges en Hommage de Jean Boulois* (Dalloz 1991) 481; and R Dehousse, *La Cour de Justice des Communautés Européennes* (Montchrestien 1995) 50.

cases where national law does not offer an equivalent and effective protection.<sup>35</sup> As Advocate General Jacobs has argued, the Court must reach ‘a balance between the need to respect the procedural autonomy of the legal systems of the Member States and the need to ensure the effective protection of Community rights in the national courts.’<sup>36</sup> In this regard, ‘it is sufficient that individuals are given, by the national procedural rules, an effective opportunity of enforcing their rights.’<sup>37</sup> Differentiation in the remedies offered at the national level does not necessarily indicate lack of effective protection.<sup>38</sup> As Advocate General Bot put it in his Opinion in *Dansk Industri*: ‘It is for the national courts to provide the legal protection which individuals derive from the rules of EU law and to ensure that those rules are fully effective.’<sup>39</sup>

A conceptual justification of horizontality based on political equality is helpful from the perspective of the overall coherence of the EU fundamental rights regime. It is compatible with the idea of a margin of appreciation for Member States in respect of *how* they deliver fundamental rights, as long as these are in fact delivered equally and adequately within a national order and is thus capable of accommodating a plurality of constitutional traditions to which the EU guarantees respect without compromising the effective application of the Charter. Of course, it might be pointed out that margin-of-appreciation-based reviews of rights at the supranational level have been powerfully criticised. In the Convention context, in particular, it has been argued that the use of the margin of

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<sup>35</sup> De Witte, *ibid*; Case C-119/05, *Ministero dell'Industria, del Commercio e dell'Artigianato v Lucchini SpA* [2007] ECR I-6199, para 63. See also Case 33/76, *Rewe-Zentralfinanz v Landwirtschaftskammer für das Saarland* [1976] ECR 1989; Case 45/76, *Comet BV v Produktschap voor Siergewassen* [1976] ECR 2043. For a detailed analysis, see Dougan (n 28) 408ff.

<sup>36</sup> Opinion of Advocate General Jacobs, delivered on 15 June 1995, in Joined Cases C-430/93 and C-431/93, *Van Schijndel and Van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] I-04705, para 18. See also the Opinion of Advocate General Jacobs, delivered on 4 May 1994, in Case C-312/93, *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* [1994] I-4601, para 17.

<sup>37</sup> *Van Schijndel*, *ibid*, para 25. The Advocate General indeed emphasised the requirement of effectiveness in respect of the substantive standards: paras 27 and 31ff.

<sup>38</sup> M Dougan, *National Remedies before the Court of Justice. Issues of Harmonisation and Differentiation* (Hart 2004) 113ff.

<sup>39</sup> Opinion of Advocate General Bot, delivered on 25 November 2015, in Case C-441/14, *Dansk Industri (DI) v Estate of Karsten Eigil Rasmussen*, EU:C:2015:77, para 42; This approach has been further expressed in some (though not all) of the Court's prior case law. See in particular Joined Cases C-397/01 to C-403/01, *Pfeiffer and Others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECR I-8835, para 111, and Case C-268/06, *Impact v Minister for Agriculture and Food and Others* [2008] ECR I-2483, para 42.

appreciation can be utilised by the Strasbourg court in order to avoid engaging with the merits of the rights at stake.<sup>40</sup> However, unlike the minimum-level-of-protection-affirming margin of appreciation that is employed in the ECHR context, the framework I have suggested fully retains the prescriptive character of the Charter within the EU. It still posits the interpretation of the binding standard for the protection of a fundamental right at the supranational level (i.e. the determination of the nature and extent of the protection offered and the assessment of its impact on the public sphere), as highlighted in Chapter 6. In other words, understanding horizontal effect as a tool for substantive political inclusion simply places the focus on the outcome (the effective and equal protection of fundamental rights) rather than on the means by which this outcome is delivered (direct effect, indirect or state-mediated effect). It is based on the *effective deliverance of a reasoned and commonly agreed constitutional standard* and not on an unquestioned application of the supremacy principle.<sup>41</sup>

A similar approach was adopted by Advocate General Mengozzi in his Opinion in *Arjona Carmacho*, a horizontal case concerning equal pay between men and women. In determining adequate levels of compensation for failure to comply with the right to equal pay, the Advocate General emphasised the Member States' obligation to achieve '*a particular outcome*,' namely to offer redress for unequal pay.<sup>42</sup> He thus urged the Court to assess whether national law met that outcome and had 'useful effect by protecting the rights of those subject to its legal system.'<sup>43</sup> It is indeed important to highlight that the suggestion advanced in this chapter does not signal a substantive departure from the Court's case law, but a procedural one. From the perspective of existing EU law itself, it is not always clear whether it is essential to render the Charter's provisions available to a claimant through the mechanism of direct effect only, or whether not to do so would undermine the effectiveness of the right in question. As the reconstruction

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<sup>40</sup> See for example G Letsas, 'Two Concepts of the Margin of Appreciation' (2006) 26:4 *OJLS* 705.

<sup>41</sup> See further Chapter 6.

<sup>42</sup> Opinion of Advocate General Mengozzi, delivered on 3 September 2015, in Case C-407/14, *Arjona Camacho v Securitas Seguridad España*, EU:C:2015:534, para 23 (emphasis added, footnotes omitted). The Court largely followed the Advocate General's approach, even though it did not specifically discuss the above reasoning: see Case C-407/14, *Arjona Camacho v Securitas Seguridad España*, EU:C:2015:831, paras 29ff.

<sup>43</sup> *Ibid.*

of the case law in previous chapters has shown, the specific means of horizontality followed has had little impact on the outcome of particular cases, even within EU law. For example, in a case like *Foster v British Gas*, the Court attributed a private employer to the state, thus requiring it not to discriminate, *as if* it were a public authority.<sup>44</sup> In *Murphy*, it found an employer liable through indirect effect.<sup>45</sup> In *Defrenne*, this outcome was reached through direct horizontality.<sup>46</sup> All of these cases concerned, effectively, the same fundamental right (subsets of non-discrimination on grounds of gender) and all operated in the employment context. Furthermore, the effect of each of these cases was that private employers had to observe the right in relations with their employees in the future and pay compensation for not having done so in the cases in question.

As such, it is difficult to justify the focus on uniform remedies in the EU horizontality doctrine, when the protections that EU law has offered through different means are considered in terms of their content. The Court's role is to determine whether a particular provision of the Charter requires, within the scope of EU law, a degree of horizontality. To the extent that a case falls within the scope of EU law and the Charter applies, the Court needs to assess the impact of this instrument based on objective and coherent constitutional reasoning.<sup>47</sup> Its duty to do so concerns the interpretation of the Charter standard rather than whether the case involves a directive, a regulation or any other measure. In other words, the assessment of horizontality that falls upon the supranational arbiter can be reconstructed as a conceptual rather than as an operational one: it concerns the *horizontal applicability* of a particular provision of the Charter and the standard of protection that needs to be met to deliver it effectively. In turn, it is open to national courts to assess their respective constitutional orders and to deliver the Charter standard effectively.

Is this to say, though, that the questions of form that have dominated the Court's approach to date, namely the distinction between directives and other

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<sup>44</sup> Case C-188/89, *Foster v British Gas plc* [1991] ECR I-3313.

<sup>45</sup> Case 157/86, *Murphy and Others v Bord Telecom Eireann* [1988] ECR 673.

<sup>46</sup> Case 43/75, *Defrenne v Sabena* [1976] ECR 455.

<sup>47</sup> See further Chapter 6. That chapter argued that the relevant criterion, in light of the Charter's goals and functions in EU, should be political equality. However, other valid justifications can be adduced, provided they are adequately reasoned.

sources of EU law and, more broadly, the question of direct horizontal effect, are altogether irrelevant in the context of a supranational constitutional model of horizontality? Such a claim cannot be made in an absolute manner. In the remainder of this chapter, I nonetheless hope to demonstrate that, even if the Court chose to retain a discussion of the direct effect of different provisions of the Charter, the bearing of this question on the determination of horizontal applicability and, particularly, on the application of Charter provisions at the national level, would be more limited than the case law has so far suggested.

### **7.3 The application of a supranational constitutional model of horizontality**

As noted in Chapter 6, the main question the Court needs to discuss (and provide adequate reasons for) in this field is the extent to which private action affects the ability of individuals to enjoy fundamental rights on equal terms. That is a complicated question requiring extensive constitutional justification, based on the goals of the Charter and the impact of private relations on the public sphere.<sup>48</sup> As this thesis has so far demonstrated, it is primarily this constitutional assessment that is lacking from the case law to date. This becomes clear as soon as the parameters of a supranational horizontality model are laid down and the role of national and supranational remedies in this field and, especially, the nature of direct effect therein, are distinguished.

#### ***7.3.1 Differentiating between national and supranational remedies***

In understanding the supranational operation of horizontality in the Charter context, it is essential to differentiate between the manner in which national courts interpret the principle of horizontality within their constitutional order (through direct, indirect or state-mediated effect) and the supranational EU remedies of direct effect, indirect effect (consistent interpretation) and state liability. These mechanisms operate at different levels.

In particular, it is crucial not to assimilate the direct effect of EU law with the direct manifestation of horizontality. On the one hand, the horizontal direct effect of EU law concerns the manner in which EU law enters national law. Its meaning and purpose is that individuals can invoke qualifying provisions of EU

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<sup>48</sup> Ibid.



law before national courts in private disputes.<sup>49</sup> On the other hand, the direct manifestation of horizontality has a much more specific nature, which concerns the structure of the constitutional claim in national law. It stipulates not only that private parties are able to invoke a fundamental right *in* a private dispute but also that they can do so *against* another private party. In other words, it means that the constitutional claim applies to the private party as such and not, for example, because of the interpretation of private law in the light of fundamental rights (indirect horizontal effect) or in virtue of the court's duty not to sanction a violation of fundamental rights in a private dispute (state-mediated effect).<sup>50</sup>

In turn, the lack of EU direct effect does not negate the national courts' duty consistently to interpret national law with the standard set by the Court of Justice, or indeed the Member States' duty to observe the relevant provision. It only means that, from a supranational perspective, there is no requirement of *direct private enforcement* of the provision in question.<sup>51</sup> The national court should still, in light of the supranational principle of consistent interpretation, seek to read the body of national law in conformity with the Charter. Finally, it is essential to emphasise that the supranational remedy of state liability remains applicable to those cases where national law has not offered adequate protection to the Charter standard. That remedy simply flows from the Member States' duty to ensure the protection of the Charter within the scope of EU law. It is additional to any other breach of EU law that a Member State may be liable for (e.g. breach of a directive). It thus involves the inclusion within the EU state liability paradigm of the broader discourse on positive obligations to take measures to give effect to EU law and not just *Francovich*-type actions. Traces of such reasoning are present, as Chapter 3 has highlighted, in case law such as *Spanish Strawberries* and *Schmidberger*<sup>52</sup> but have not, so far, been applied to the horizontal

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<sup>49</sup> In this sense, it is crucial not to forget the history of the doctrine of direct effect as a revolutionising feature of what was, at the time, a new international law regime: Case 26/72, *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR I. See, generally, De Witte (n 24) 323.

<sup>50</sup> For a more detailed discussion of these types of horizontality see Chapter 1.

<sup>51</sup> On the distinction between the existence of a right and its enforceability, see JW Nickel, *Making Sense of Human Rights* (2<sup>nd</sup> edn, Blackwell 2007) 33-34.

<sup>52</sup> As further noted in Chapter 3, while marginalised in the horizontal context, that duty has been set out in Case C-265/95, *Commission v France (Spanish Strawberries)* [1997] ECR I-06959, para 32 and Case C-112/00, *Schmidberger v Austria* [2003] ECR I-5659, paras 77-82. See also Opinion

fundamental rights context. In his Opinion in *Fenoll*, Advocate General Mengozzi developed a similar argument. He emphasised the broadness of the doctrine of consistent interpretation and noted that the assessment of compatibility remained within the domain of national constitutional law. He then highlighted the possibility of recourse to state liability for breach of EU law.<sup>53</sup> However, the Court has not, so far, clarified its position in this regard. Doing so would be particularly welcome in order to establish the relevance of a coherent overall doctrine of state liability or, differently put, a positive obligation to observe the provisions of a binding Charter.

The differences between the supranational question of horizontal direct effect and direct horizontality in private disputes before national courts suggest that the Court's existing approach, which is premised on the assumption that a finding of direct effect necessitates direct horizontality, is procedurally incorrect. If direct effect forms part of the Charter standard, then *the substantive effects* of that standard will need to be transposed into private relations within national law. In other words, national law must provide a remedy for breach of the fundamental right *within* the intersubjective dispute. However, that does not extend as far as requiring that national law should accommodate the direct manifestation of horizontality for those provisions of the Charter that meet the conditions for direct effect. As the previous section and the discussion of different dimensions of horizontality in Chapter 1 have highlighted, direct, indirect and state-mediated versions of horizontality do in fact operate within the private dispute and can substantively lead to the same outcome. A supranational finding that a provision meets the conditions of (EU) direct effect simply means, therefore, that national remedies for the protection of the right cannot be offered outside the private dispute (e.g. in a separate action against the state for its failure to protect fundamental rights). They must, rather, be afforded within the original intersubjective claim. This excludes only the use of remedies falling outwith the private dispute strictly speaking, such as compensation from the state at the

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of Advocate General Jacobs, delivered on 11 July 2002, in Case C-112/00, *Schmidberger v Austria* [2003] ECR I-5659, paras 96-118.

<sup>53</sup> Opinion of Advocate General Mengozzi, delivered on 12 June 2014, in Case C-316/13, *Fenoll v Centre d'aide par le travail La Jovenne, Association de parents et d'amis de personnes handicapées mentales (APEI)*, EU:C:2014:1753, paras 55-61.

national level in a separate action, but it does not stipulate the remedy that must be followed, more specifically. Thus, when asked about the horizontal effect of the Charter, the role of the Court of Justice is to give as much guidance as possible as regards the standard of protection of fundamental rights in private relations so that the national court can adequately deliver that standard.

This is not to say that the mode of horizontality chosen does not matter at all. The Court would need to be mindful of relevant debates about the appropriate forms of horizontality, as further discussed in Chapter 1, in order to ensure that the standard of protection offered at the national level is effective. One way to achieve that would be to use the method of comparative law.<sup>54</sup> As Bruno De Witte rightly notes, the Court:

Could be less vague about the ‘common constitutional traditions’ by venturing, when a case so warrants, into a genuine comparative evaluation of Member State constitutions; this would make a rejection of the arguments taken from the law of just one State more compelling [...] particularly in the field of fundamental rights.<sup>55</sup>

Carrying out a comparative assessment of national constitutional laws in order both to identify consensus regarding the means of applying fundamental rights horizontally, where it exists, as well as to assess the effectiveness of different tools, where it does not, would be beneficial for the purposes of adequately reasoned guidance to national courts.<sup>56</sup> Nonetheless, it would ultimately remain up to those courts to select the most appropriate remedy to give effect to that interpretation.<sup>57</sup> Indeed, tempting as it may be to develop an ideal theory of horizontality at the EU level, that would be neither consonant with the Charter’s drafting context and goals – one of mutual agreement to abide by a set of rights and duties as premises of the EU public sphere – nor with the Court’s

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<sup>54</sup> A Torres Pérez, *Conflicts of Rights in the European Union: a Theory of Supranational Adjudication* (OUP 2009) 147-155; See also JHH Weiler, ‘Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Human Rights in the Legal Order of the European Communities’ (1986) 61 *Washington L Rev* 1103, 1125.

<sup>55</sup> B De Witte, ‘The Past and Future of the European Court of Justice in the Protection of Human Rights’ in P Alston (ed), *The EU and Human Rights* (OUP 1999) 859, 882.

<sup>56</sup> Torres Pérez (n 54) 158-162.

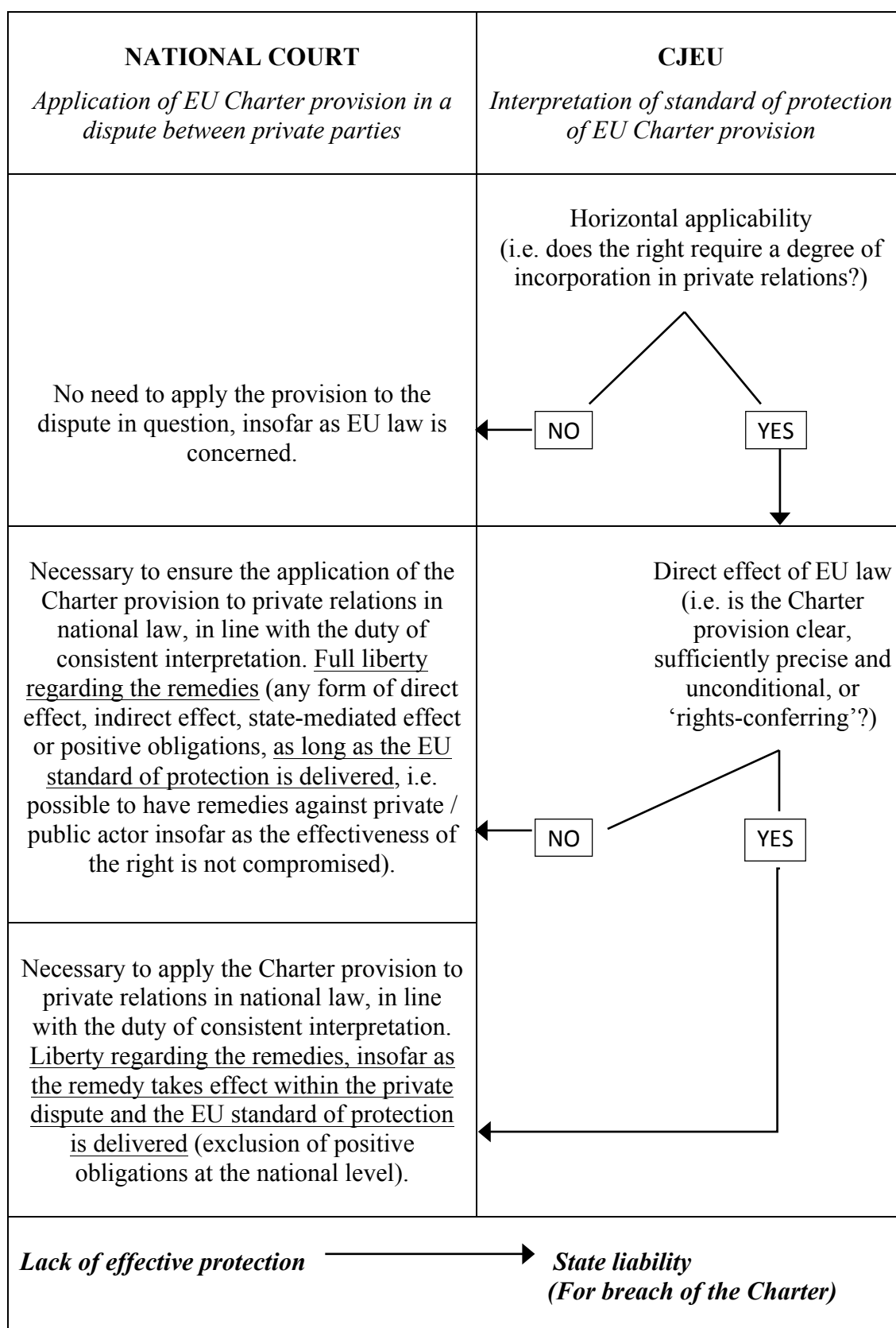
<sup>57</sup> See *Pfeiffer* (n 39) paras 111-114; Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135, para 8.

constitutional mandate in this field, which is not to harmonise national constitutional structures but to ensure the full effectiveness of the Charter.

The idea that horizontality necessarily requires explicit stipulations as to how a particular Charter provision should take effect in a dispute between private parties (e.g. through direct effect) should, therefore, be reconsidered. The following two issues must be clarified, in order for a doctrine of horizontality to work well in the supranational fundamental rights context: first, direct effect at the supranational level merely indicates against whom a remedy should be offered at the national level, rather than in what way. As long as effective recourse to the right in question is offered within the private dispute, the national court is free to select the most appropriate remedy. Secondly, the absence of direct effect at the supranational level does not, in a case falling within the scope of EU law, altogether negate the binding nature of the Charter provision. The national court is still required to provide effective protection thereto – but it can do so by offering a remedy in the private dispute or against the state. Failure to do so ultimately engages the supranational remedy of state liability.

To summarise: insofar as different instantiations of horizontality are outcome-neutral, it is not the Court's role to reassess them. By contrast, the question of the standard of protection of the Charter and indeed its horizontal applicability, as further discussed in Chapter 6, as well as the review of the effectiveness of national means of giving effect to that standard, fall squarely within the domain of supranational constitutional law, irrespective of whether a particular provision is directly effective or not. Of course, it must be borne in mind that a directly effective provision of the Charter does suggest that the EU level of protection will be high (after all, the provision would enjoy a heightened degree of specificity, precision, and unconditionality). That is something that national courts would need to bear in mind in applying it to private relations, so as to ensure that the relevant standard is in fact met. In this sense, national courts may still need to extend their conceptions of indirect and state-mediated horizontality in order to accommodate a directly effective Charter provision. Nonetheless, their flexibility to fit that standard within existing constitutional structures is higher than the Court's case law has so far suggested.

### Diagram of the Operation of Horizontality for the EU Charter



### **7.3.2 Understanding the operation of the horizontal effect of the Charter: application to the case law**

Before concluding, it is useful to consider how the Court might have addressed the question of horizontal effect more adequately in some of its most contested case law based on the model advanced above and, in turn, to highlight its implications for domestic courts. Let us firstly take the two provisions that have received starkly different treatment in the existing case law, Articles 21 and 27 EUCFR, and use the factual background in two judgments, *Kücükdeveci* and *AMS*, as examples, without altering the main tenets of the Court's findings therein.

As discussed in more detail in Chapter 3, the *Kücükdeveci* case concerned discrimination on grounds of age. The Court found, in line with settled case law,<sup>58</sup> that this right should be protected in public and private employment relations alike. It has nonetheless remained unclear in later case law<sup>59</sup> whether this finding was conditional upon the existence of further legislation or whether the right enshrined in Article 21 EUCFR would have been sufficient for the Court's decision in itself. Both possibilities will therefore be considered.

First, the Court could find that the right not to be discriminated against on grounds of age enshrined in Article 21 EUCFR is a condition that, in itself *and not in virtue of its specific expression in further legislation*, meets the conditions for direct effect (i.e. that it is clear, sufficiently precise and unconditional).<sup>60</sup> In that case, German law must fully integrate this right in private relations and offer an individual like Ms Kücükdeveci an adequate remedy for the discrimination she has suffered against Swedex GmbH, her employer. However, whether German law calls this a direct horizontal effect of EU law or a *Drittwirkung* (third party effect) of constitutional rights, thus filtering it through its own version of the horizontality doctrine, is immaterial from an EU perspective, to the extent that the same standard of protection is met. The finding that Article 21 meets the conditions for direct effect limits the national court's discretion with regard to the

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<sup>58</sup> See further Chapter 3 and, particularly, Case C-144/04, *Mangold v Helm* [2005] ECR I-9981.

<sup>59</sup> See in particular Case C-441/14, *Dansk Industri (DI) v Estate of Karsten Eigil Rasmussen*, EU:C:2016:278.

<sup>60</sup> As Chapter 4 has shown, it is still unclear whether the Charter in itself and not in conjunction with other legislation, is capable of producing direct horizontal effect.

type of remedies it can offer. While the national court is at liberty to offer any remedy it considers appropriate *within* the given employment dispute, it cannot employ remedies falling outside that dispute (e.g. it cannot resort to a remedy requiring Ms Küçükdeveci to launch a case against the state in order to obtain reparation).

If, on the other hand, the Court found that Article 21 EUCFR, in itself, was not directly effective but, *through a directive*, its content had become sufficiently precise, then two constitutionally coherent outcomes would be available. First, the Court could maintain what indeed seemed to be its position in this ruling (by analogy):<sup>61</sup> while the contents of the Charter may not be specific enough as such, if its provisions have been further concretised in secondary legislation, that legislation can be taken into account in determining the direct effect of primary law (the Charter). That is so even if the relevant legislation happens to be a directive. In this case, Article 21 EUCFR would be directly effective and the case would be resolved as above.

Alternatively, the Court could fall back on the rule concerning the lack of horizontal direct effect of directives. Indeed, while this rule is conceptually criticisable,<sup>62</sup> it would not affect the coherence of constitutional law, if consistently applied. In that case, the Court would need to note that, since Article 21 does not in itself meet the conditions for direct effect and can only do so through a directive, then the Charter provision cannot produce direct effect from the perspective of EU law. However, even if it reached this finding, the Court's reasoning would not differ markedly in any other respect: the Court would still state what the standard of protection is (equal treatment in respect of age in all employment relations) and would consider whether the relevant national legislation breached that standard. It would thus still find that Article 602 of the German Civil Code breaches the right not to be discriminated against, insofar as it is incompatible with the principle of equal treatment and applies in a blanket manner incapable of justification.

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<sup>61</sup> As noted further in Chapter 3, the ruling used the language of general principles to reach this outcome. As noted earlier, this terminology is criticisable in this context. As such, for the purposes of clarity, in this section I shall assume that the Court's reasoning would have applied to Article 21 EUCFR.

<sup>62</sup> See further Chapters 3 and 4.

The Court would then leave the national courts free to decide how to reach the Charter standard and what degree of incorporation within private relations they would offer (e.g. only positive obligations, state-mediated effect, a reading-in function, or a striking out of a provision incompatible with the right). For example, while the German court might read the provision in light of the fundamental right not to be discriminated against, in a similar case a Greek court might strike out the legislation in question and enable the claimant to obtain reparation from the state. A UK court might decide the case differently still. It could grant direct effect to that provision or, as a public authority required to observe the Charter in private disputes, it might prevent an employer from becoming unjustly enriched because of a discriminatory law allowing them to dismiss younger employees without adequate notice (state-mediated effect). In line with the duty of consistent interpretation, each of these legal orders would need to abide by the Court's definition of the right not to be discriminated against under the Charter.

Finally, the claimant would be able to claim compensation in state liability if the national court's choice of remedies was insufficient, irrespective of whether the provision in question enjoyed direct effect in EU law. Liability would attach not only for the breach of any relevant directive but also for the failure adequately to compensate for its failure to protect Article 21 EUCFR. Insofar as a provision was found not to confer rights and state liability was unavailable, the only remaining remedy would, of course, be for the Commission to initiate proceedings under Articles 258-260 TFEU under a broad construction of the positive obligations doctrine.<sup>63</sup>

Let us now imagine a different scenario. As Chapter 4 has highlighted, in its ruling in *AMS*, the Court of Justice found that the right to be informed and consulted in the workplace enshrined in Article 27 EUCFR was not specific enough to give rise to obligations on the part of a private employer, *either in itself or in virtue of its specific expression in a directive*. However, the Court subsumed

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<sup>63</sup> See *Spanish Strawberries* (n 52). It could be discussed whether this duty would apply to the Charter's principles, insofar as they merely give rise to claims to observance and not positive action: see further Chapter 2. As the distinction remains unclear, though, the Court would need to settle this issue when defining the relevant standard of protection for provisions falling within this category.



the question of direct horizontality under that of horizontal applicability altogether. Whereas the judgment answered the former question, it did not speak to the latter. A rendering of horizontality consistent both with a political conception of rights and with the supranational character of the EU legal order would have been the following. First, the Court would have considered the content, nature and goals of Article 27 and would have assessed whether, against that background, the right has horizontal dimensions. Reference to and engagement with that context was needed in order to add depth to a rational interpretation of the right to be informed and consulted within the undertaking in the constitutional order of the European Union. While it would be difficult to reconcile an interpretation of Article 27 as applying to state employers only with political equality,<sup>64</sup> it nonetheless remained fully within the Court's institutional mandate, in a situation falling within the scope of EU law, to make that interpretation of principle.

If the Court then turned to the nature of the protection of Article 27 from the more technical perspective of EU direct effect, as the second step in its assessment of the relevant standard, the implication of that finding would be starkly different to the Court's reasoning in the ruling.<sup>65</sup> The Court could still have reached the finding that Article 27 EUCFR was not directly effective. However, a lack of direct effect for Article 27 would have meant that, whether the right to be informed and consulted was offered to workers in private undertakings in France through the means of direct effect, indirect effect, state-mediated effect or indeed in a manner not yet envisaged, was not relevant. What still mattered, though, was that French law incorporated *a standard for the effective protection of Article 27 in all relations to which this right applies, in all situations that fall within the scope of EU law*. Whereas it was up to the Court of Justice to stipulate

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<sup>64</sup> As noted in Chapter 6, the workplace is one of the domains through which private parties have been shown most clearly to destabilise the equal application of fundamental rights. The ruling, therefore, appears to be incompatible with a substantive conception of political equality.

<sup>65</sup> Discussed in detail in Chapter 4.

the relevant standard, it was in turn up to the national court to ensure that that standard was delivered.<sup>66</sup>

Thus, in the absence of a proper implementation of (or the existence of) secondary legislation that transposes the Charter's provisions to private relations, it is essential for the Court to consider whether, in the constitutional order of the European Union, that right can produce horizontal effects at all. In cases like *Küçükdeveci* and *AMS*, where secondary legislation referring to the right in question has been put in place, the Court needs to offer particularly compelling reasons as to why, in principle, a horizontal interpretation of these provisions should be resisted. Only at a second stage may the question of direct effect be answered.<sup>67</sup> Furthermore, EU direct effect merely implies that a right can be invoked before a national court and that a remedy must be offered within the private dispute – not that the remedy should be structured so as to be directly applying the fundamental right to a private actor. This could also be done, for example, through reading a private law obligation in line with fundamental rights. As such, the question of direct effect of EU law does not altogether answer the operational question of horizontality at the national level.

Last but not least, it is worth exploring in what way the model I have described above can affect judicial reasoning at the national level. A case concerning modern slavery provides a topical example in this field. In two cases regarding inhumane working conditions amounting to modern slavery in the Sudanese and Libyan embassies in London, the UK Court of Appeal made use of the possibility of direct horizontal effect of the Charter.<sup>68</sup> It found that Article 47 EUCFR was applicable not only in disputes between individuals and the state but also in disputes between individuals and non-state entities.<sup>69</sup> The Court of Appeal considered that the impossibility of claiming any form of legal protection against

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<sup>66</sup> In turn, questions relating to the justiciability of Charter provisions that amount to principles or non-rights-conferring provisions only, would be resolved in the setting of the relevant supranational standard.

<sup>67</sup> From a conceptual perspective, this question is entirely separate to the question of horizontal applicability and is not strictly required. There may be Charter provisions that meet the conditions for direct effect but there is no reason to apply them horizontally on a particular occasion.

<sup>68</sup> *Benkharbouche and Another v Embassy of the Republic of Sudan and Another* [2015] EWCA Civ 33.

<sup>69</sup> *Ibid*, para 80.

an embassy under the Working Time Regulations 1998,<sup>70</sup> in line with the State Immunities Act 1978, was incompatible with the right to an effective remedy. This right was capable of being invoked directly against private actors.<sup>71</sup> As such, the State Immunities Act 1978 could be disapplied to give effect to employment protection.<sup>72</sup>

If the reading of the Charter that I have put forward in this thesis is correct, the national court was indeed required to acknowledge horizontality in order to give effect to the Charter's provisions, in line with the discussion in Chapter 6. Ms Janah and Ms Benkharbouche were excluded from the entirety of the fundamental rights that the Charter grants them, including the right to an effective remedy and the right not to be subjected to slavery, servitude or compulsory labour,<sup>73</sup> due to the State Immunities Act, as they were employed by embassies. This legislation applied as a derogation from EU law, which otherwise would have provided protection for the claimants under the Working Time Directive, implemented in the UK through the Working Time Regulations.<sup>74</sup> It is reasonably clear that, in this situation, the claimants' equal right to enjoy the Charter's provisions had been prejudiced, as the case fell within the scope of EU law<sup>75</sup> and there was no institutional possibility of claiming the protections enshrined in the Charter against these employers in the UK. The claimants were, in fact, entirely precluded from accessing its provisions. As such, a degree of horizontal protection was needed.

However, especially since this point is subject to an appeal before the UK Supreme Court, it is necessary to emphasise that it is this, overall protection of a fundamental right in private relations, *and not its direct horizontal effect*, that

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<sup>70</sup> SI 1998/1833.

<sup>71</sup> The Embassies were considered non-state actors for the purposes of UK law.

<sup>72</sup> *Benkharbouche* (n 68) paras 80-81. The case is currently pending an appeal before the Supreme Court.

<sup>73</sup> This point is not discussed in the judgment, as the argument concerned Article 47 only. The freedoms from slavery, servitude and compulsory labour enshrined in Article 5(1-2) EUCFR are, nonetheless, also relevant. See, further, in this regard, *Siliadin v France*, App No 73316/01 (ECtHR 16.07.2005).

<sup>74</sup> Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003, concerning certain aspects of the organisation of working time (OJ L 299/9, 18/11/2003) (the 'Working Time' directive).

<sup>75</sup> See Case C-260/89, *Elliniki Radiofonia Tileorassi AE (ERT) v Dimotiki Etairia Pliroforissis and Others* [1993] ECR I-2925, para 41.

matters from the perspective of compliance with the Charter. Direct horizontal effect may indeed have been the form of horizontality that provided the best fit with UK law on this occasion, to the extent that the latter also recognises it in other contexts.<sup>76</sup> However, the national court would be better placed than the Court of Justice to make this assessment, in light of its expertise with regard to national constitutional structures. In turn, it would be too hasty to assume that direct effect would be the *only* possible remedy that would have been acceptable across the EU legal order. A strong form of indirect horizontality could in principle lead to the same outcome.<sup>77</sup>

#### **7.4 Conclusion: horizontality in a supranational constitutional polity**

This chapter has put forward the second main feature that should underpin a constitutional doctrine of horizontality, namely the recognition of the supranational nature of the EU constitutional order and a delimitation of the role of different courts therein. It has argued that, as regards the supranational dimension of the Charter's horizontality, the question that must be answered is one of constitutional interpretation: Is it necessary to give effect to a fundamental right in a private dispute? This question involves the development of constitutional reasoning about the meaning and standard of protection of fundamental rights in the European Union, as well as an assessment of the effectiveness of the means chosen to protect them. It does not, however, involve specific, uniform stipulations of those means, to the extent that the requisite standard is met.

Additionally, the chapter clarified that the assessment of direct effect in EU law is of limited significance to the above, overarching question. It entails a limitation to the type of remedies that a national court may offer, as it necessitates that a remedy should be supplied within the private dispute as such. The existence or absence of EU direct effect does not, however, render obsolete a national court's autonomy with regard to the selection of appropriate remedies or indeed

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<sup>76</sup> UK law indeed recognises, for example, the direct horizontal effect of the right to private life in the context of the Human Rights Act 1998: See *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22; T Bennett, 'Horizontality's New Horizons – Re-examining Horizontal Effect: Privacy, Defamation and the Human Rights Act Part 1' (2010) *Entertainment L Rev* 96.

<sup>77</sup> See further Chapter 1.

its duty to give effect to EU law within national law, more broadly. In this sense, this chapter demonstrated that the emphasis on direct horizontal effect that prevails in the case law is, to a great extent, misplaced.

That is not to say that, by adopting the framework I have hereby proposed, the Court of Justice would wholly address the contestability of the horizontality doctrine or that the powers of national courts would increase substantially. Constitutional tensions would remain if national courts disagreed with the Court's reasoning regarding the relevant standard of protection or, indeed, if that standard effectively necessitated the broadening out of national means of applying fundamental rights to private disputes. By nuancing the conceptual arguments advanced in Chapter 6 by reference to the principle of national procedural autonomy, though, my aim was to emphasise that an adequate constitutional rendering of horizontality ought to place that doctrine within the broader structures and, crucially, purposes of EU public law.

Adjudicating at the EU level involves not only constitutional reasoning, but a kind of constitutional reasoning that matches the EU polity: one that recognises the limits of supranational adjudication in the effective rendering of fundamental rights, enables individuals to exercise their rights as close as possible to their lives, and takes their sometimes localised concerns and different life choices (some more and some less affected by EU action) seriously. Not only does the current case law encompass a false conceptualisation of the meaning and scope of application of horizontality and its different dimensions in supranational constitutional adjudication. Moreover, and more importantly, once it is appreciated for its overall inclusionary qualities, the horizontal effect of supranational fundamental rights requires broader guidance on matters of principle, which are not representable through technical distinctions between different instantiations of horizontality or the horizontal direct effect of different sources of EU law. Whereas attempts are sometimes made to re-cast existing patterns of horizontal effect to the Charter, as is clear in judgments such as *Dominguez* and *AMS* but also in much of the academic discourse surrounding

horizontality,<sup>78</sup> this would be highly problematic. The existing horizontality doctrine does not provide a coherent fit with the structure and participants of Europe's constitutional space. This space is comprised of and not antagonised by national constitutions, together with cosmopolitan aspirations and ideals.<sup>79</sup> It is primarily the conceptual debate about the horizontal applicability of different fundamental rights and not the parameters of horizontal effect that concerns the Court of Justice, under its duty to ensure respect for the Charter as a supranational constitutional limit on public and private forms of political power within the EU and as a basic safeguard of the principles of democracy, equality, and the rule of law, upon which it is founded.<sup>80</sup>

Ultimately, the question of how horizontality would best be rendered will remain a difficult one, with which EU law is likely to struggle for some time. But once a preoccupation with its underlying constitutional justifications enters the EU horizontality discourse, its proper limits can be discussed by reference to clearer reasoning that addresses private responsibility under the Charter framework. As Advocate General Jacobs has rightly pointed out, a degree of flexibility (at times comprising innovation in the technique and principles used) and dynamism of interpretation is inherent in constitutional adjudication.<sup>81</sup> By identifying, through a horizontal application of fundamental rights, power imbalances within the public sphere, courts both at the national and at the supranational level are instrumental in ensuring that the influence of such power on the ability of consociates to enjoy rights equally is minimised, or at least legally contained. It would be a shame to allow operational disagreements about direct horizontal effect to overshadow this significant function.

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<sup>78</sup> See, e.g. D Leczykiewicz, 'Horizontal Application of the Charter of Fundamental Rights' (2013) 38 *EL Rev* 479.

<sup>79</sup> See P Eleftheriadis, 'Cosmopolitan Law' (2003) 9:2 *ELJ* 241.

<sup>80</sup> Article 2 TEU.

<sup>81</sup> F Jacobs, 'Is the Court of Justice of the European Communities a Constitutional Court?' in D Curtin and D O'Keeffe (eds), *Constitutional Adjudication in European Community and National Law* (Butterworths 1992) 25, 62.

## Conclusion

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This thesis has advanced two main arguments: firstly, it has argued that the existing EU horizontality doctrine is not capable of accommodating the question of whether and how the Charter of Fundamental Rights should be applied to relations between private parties. Secondly, it suggested that the EU horizontal effect doctrine should be reinterpreted from a constitutional perspective in order to serve a meaningful purpose in respect of the application of the EU Charter of Fundamental Rights. A reconceptualised doctrine of horizontality involves the development of constitutional reasoning regarding the purpose and functions of the Charter in the EU, and hence its impact on private relations, as well as the delimitation of national and supranational competences in the effective safeguard of fundamental rights.

More specifically, at a first stage, the thesis criticised in detail the lack of conceptual coherence which has characterised the case law concerning the horizontal effect of fundamental rights so far.<sup>1</sup> While, from early on, EU law has recognised that private action can substantively impede the enjoyment of rights (including fundamental rights), the constitutional functions of horizontality were not adequately considered. In this regard, the thesis sought to demonstrate that the Court's approach in this field is premised on a privatisation of constitutional law, rather than on a careful discussion of the role of fundamental rights within a changing public sphere.<sup>2</sup> An emphasis on formalism, manifested in technical distinctions (e.g. Treaty rights/directives) and the absorption of the overall concept of horizontality in a debate about direct horizontal effect have dominated this field.<sup>3</sup> Furthermore, the reconstruction of both pre-Lisbon and post-Lisbon case law made clear that the horizontality doctrine has been developed in an *ad hoc* manner, and has been largely detached from broader developments in EU

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<sup>1</sup> Chapters 3-5.

<sup>2</sup> See in particular Chapter 5.

<sup>3</sup> Chapters 3-4.

constitutional law.<sup>4</sup> In turn, the introduction of a binding Charter has not brought real changes to the Court's reasoning.<sup>5</sup>

At a second stage, the thesis argued that a rediscovery of the constitutional reasons for applying fundamental rights to private parties remains essential in the EU context – a context of reduced sovereignty in which private (and particularly corporate) activity has historically played a key role.<sup>6</sup> Both the question of principle and the parameters of the horizontal effect of the EU Charter raise, as the preceding chapters have argued, constitutional concerns about the role of private actors in the establishment of a supranational order with economic, social and political dimensions, premised on the rule of law. In order to illustrate the appropriateness of a constitutional rendering of horizontality in the Charter context, the thesis retraced the history of the Charter as a declaration of the main commitments to individuals made within the ever closer Union envisaged after Maastricht and, especially, as part of the Constitution for Europe.<sup>7</sup> By drawing attention to the Charter's significance in this inherently political project, it was argued that horizontality concerns primarily the extent to which a community transitioning from a market to a polity can foster the equal participation and inclusion of its members, outside of market parameters.<sup>8</sup>

In particular, the thesis showed that adequate supranational constitutional reasoning in respect of the Charter's horizontality is a two-step process. Firstly, it requires a thorough and explicit engagement with the goals of the Charter's provisions from an EU perspective as well as an assessment of the ways in which horizontality advances them.<sup>9</sup> As fundamental constitutional rights concern the functioning of the public sphere, a reconstruction of the matters that pertain to EU public law is required in order for a meaningful judicial discourse on the horizontal effect of the Charter to be developed. Such a theory can be premised upon political equality. It involves a commitment to fundamental rights, not as means of integration, but instead as vehicles of politicisation and active

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<sup>4</sup> Chapters 3-5.

<sup>5</sup> Chapter 4.

<sup>6</sup> Chapters 5-7.

<sup>7</sup> Chapter 2.

<sup>8</sup> Chapter 6.

<sup>9</sup> *Ibid.*



citizenship – a hope that was indeed at the heart of the Charter's creation.<sup>10</sup>

Drawing upon perspectives from constitutional theory and discourse ethics, I sought to demonstrate that the horizontal effect of fundamental rights is an inherent element of participatory constitutional frameworks in contexts where traditional distinctions between public and private activity do not accurately represent the public sphere.<sup>11</sup> In modern societies, the latter cannot be construed strictly. It consists in varied forms of interaction with one's consociates and requires the containment of several forms of institutional power distinct from public power in the strict sense. Fundamental rights therefore require a degree of accommodation in private relations to maintain their normative significance and assume their politically enabling functions.<sup>12</sup> It is the substantive-equality-enhancing function of horizontality, rather than its ability to enhance the primacy and uniformity of EU law, that renders it a desirable feature of a modern constitutional order.<sup>13</sup>

Secondly, adequate reasoning about horizontality in this field requires a recognition of the supranational character of EU adjudication and a careful delimitation of the role of different judicial actors in the application of fundamental rights to private relations.<sup>14</sup> The thesis argued in favour of a coordinating, rather than harmonising approach in respect of the horizontal effect of the Charter, which focuses on the requisite level of protection of fundamental rights, rather than the form that this protection should take.<sup>15</sup> A distinction should be made between, on the one hand, the supranational constitutional question of horizontality, which concerns the standard of protection of different provisions of the Charter and thus their horizontal *applicability* and, on the other hand, national constitutional debates about horizontality, which concern the technicalities of its operation within a particular constitutional context. Whereas the former question falls within the jurisdiction of the supranational arbiter, and should therefore be determined by the Court of Justice, the latter falls within the jurisdiction of

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<sup>10</sup> See further Chapters 2 and 6.

<sup>11</sup> Chapters 5 and 6.

<sup>12</sup> Chapter 6.

<sup>13</sup> Ibid.

<sup>14</sup> Chapter 7.

<sup>15</sup> Ibid.

national constitutional courts.<sup>16</sup> Thus, the thesis showed that, while the need to contain the initially open-ended nature of the horizontality doctrine in EU law has been met – and continues to be met – with the legalistic distinction between Treaty rights and directives, a proper application of horizontal effect is in itself imbued with some limits. Focusing, at the EU level, on the desirability of a horizontal protection of rights as a matter of principle would render it easier to establish a workable system of horizontal effect. Once this basic question is addressed, we might then move on to a discussion of the more technical aspects of its most effective functioning.

It would, therefore, be mistaken to associate the horizontality doctrine with direct horizontal effect only. Thinking about alternative means of horizontality does not necessarily mean lowering the current level of fundamental rights protection in the EU. Rather, it is a question of developing a more mature horizontality model in the field of fundamental rights, which combines pragmatism (the need to find workable solutions in a highly differentiated supranational context) with real opportunities for an effective protection of rights. In the context of supranational constitutional law, an overarching conception of horizontality for fundamental rights can be employed, which need not be concerned with the means through which horizontality takes effect in private relations, unless these undermine the effectiveness and goals of fundamental rights themselves.

In rounding up this project, it is important to acknowledge its main limitations, to discuss the possibilities it opens for further research and, finally, briefly to anticipate some of the main critiques the arguments advanced herein are likely to face. First of all, as one of the main arguments that this thesis has put forward has been that a supranational doctrine of horizontality rests upon the question of horizontal applicability rather than being concerned with the specific instantiation of horizontality followed within national law, it has only engaged to a limited extent with the merits of different forms of horizontal effect.<sup>17</sup> It should be emphasised that this does not entail a suggestion to the effect that the debate

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<sup>16</sup> Ibid.

<sup>17</sup> A description of different dimensions of horizontality was offered in Chapter 1.

regarding which form of horizontality should be followed is insignificant. On the contrary, the latter remains central to national constitutional law and a detailed assessment of the characteristics and functions of different dimensions of horizontality is useful therein.<sup>18</sup> A rigorous comparative assessment of the effectiveness of different forms of horizontal effect from the perspective of political equality – an assessment that would in itself involve a far greater amount of time and space than this thesis could have accommodated – would complement this research. Indeed, the results of a review of the operation of different types of horizontal effect could prove or disprove one of the main assumptions that this research has made, in view of the interchangeability of different forms of horizontality in EU case law, namely that direct, indirect and state-mediated forms of horizontality can lead to the same outcomes. The model I have proposed herein should remain open to revision in line with such evidence.

Another area of inquiry that the thesis has left open to further research is the complex notion of power. As the focus of this research has been the supranational constitutional operation of horizontality, the thesis utilised primarily secondary sources drawn from political philosophy to justify its findings with regard to the types of private power that come within the public sphere. However, in light of the centrality of the concept of power in the development of a constitutional doctrine of horizontality, empirical engagement with the nature of different forms of private power and their impact on public life in a supranational context is also required. It would be particularly useful in the application of this research by the courts, especially in determining whether a private relationship comes within the scope of constitutional law and if it affects the equal enjoyment of fundamental rights.

Secondly, one might question both the necessity and the uniqueness of the concept of horizontality as an opportunity for a more effective protection of fundamental rights: if fundamental rights prove ineffective, could we not focus on the re-evaluation of a vertical framework of rights protection and the thorough incorporation of individual rights within private law? Is horizontality the only solution to persisting social inequalities and the erosion of traditional state

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<sup>18</sup> R Alexy, *A Theory of Constitutional Rights* (J Rivers tr, OUP 2002) 358.

powers? It is certainly true that horizontal effect alone would be insufficient in the absence of a well-functioning system of vertical protection of fundamental rights and of a broader set of policies intended to alleviate questions of social exclusion.<sup>19</sup> Horizontality is only a complementary mechanism in the adjudication of rights, which can neither replace their vertical adjudication, nor function in itself as a means of achieving political equality, which consists not only in equality before the law but also in equality in society. Horizontality at the level of constitutional law should indeed be understood against a broader background of fundamental rights protection. It is one of many steps – at the level of politics, policy and legal regulation – required in order for fundamental rights to be substantively enjoyed (or, rather, to be enjoyed equally).<sup>20</sup>

One of the greatest challenges of completing a project in this field has been the stark discrepancy between theory and practice. The Court's approach to constitutional questions can be understood, if looked at from the perspective of an incremental, judicially driven process of EU integration. The interests of legal certainty can, sometimes, be better maintained by the retention of less-than-ideal precedent and the Court's horizontality case law may be an instance of that requirement. Additionally, the fact that the existing horizontality doctrine has protected claimants in a number of disadvantageous situations so far should not be discounted. Nonetheless, as I hope the thesis has clearly argued, this approach is inadequate today, to the extent that its continuation fails to recognise the significance of a binding Charter as a structural element of the EU public sphere and not just a tool for the affirmation of individual rights.<sup>21</sup> It is the institutionally flawed structure of the EU horizontality doctrine that most starkly affects the development of a meaningful discourse about private responsibility in the Charter context.<sup>22</sup>

Finally, it is necessary to acknowledge that, insofar as the supranational application of the Charter is correlative to the recognition of membership within

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<sup>19</sup> As Pogge has rightly noted, non-legal/soft law means for the application of human rights can be important: see T Pogge, 'The Health Impact Fund And Its Justification By Appeal To Human Rights' (2009) 40 *J Soc Phil* 542, 553.

<sup>20</sup> Ibid.

<sup>21</sup> Chapter 5.

<sup>22</sup> Ibid.

the EU political community, the question of whether the participants of this polity actually identify, at least on some level, with its authorship, becomes crucial. Under the existing EU framework, including the Charter, it is open to debate whether that is the case.<sup>23</sup> The creation of a list of fundamental rights and the fulfilment of formal constitutional prerequisites may have a constructional character or aspiration, but these things are not in themselves sufficient to instil a sense of authorship in the members of any political community. Discourse in the public sphere cannot simply be replaced with actions in courts. In turn, the effective application of the Charter (vertically or horizontally) will not do away with the important concerns that have surrounded its creation and, particularly, the lack of public debate regarding its content and the sense of distance from its addressees that appears to surround it.<sup>24</sup> Baquero Cruz therefore rightly expresses scepticism about the Charter's present value as a means of recognising political status:

[T]he Charter appears as a problematic speech act, as empty or almost empty speech. It doesn't seem to connect with its target audience, like a play performed in an empty theatre. It cannot connect, at least for the time being. It cannot work as a shortcut to legitimacy, which mainly rests in the political process, in the way it is structured, in participation, in representation. It may connect in some distant future, it is true, and achieve a measure of symbolic force. Myths, including political myths, usually grasp the public imagination many years after they are conceived.<sup>25</sup>

Moreover, one might question whether an appetite for EU-wide public engagement, required in order for the arguments I have advanced in this thesis to acquire salience, actually exists. While the thesis has mentioned on multiple occasions the commitment of 'the peoples of Europe,' made in the Charter's Preamble, 'to share a peaceful future based on common values,' alluding to ideas of a democratic political culture and a process of collective authorship,<sup>26</sup> it is not always clear whether these ideals amount to more than mere rhetoric. Not only did

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<sup>23</sup> See for example J Shaw, 'Process, Responsibility and Inclusion in EU Constitutionalism' (2003) 9:1 *ELJ* 45, 58ff.

<sup>24</sup> *Ibid.*

<sup>25</sup> J Baquero Cruz, 'What's Left of the Charter? Reflections on Law and Political Mythology' (2008) 15:1 *MJ* 65, 74. See also U Haltern, 'Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination' (2003) 9:1 *ELJ* 14.

<sup>26</sup> Charter Preamble. See further the Introduction to this thesis and Chapter 2.

the experience of the referenda rejecting the Constitutional Treaty show otherwise, but as I write these pages, the United Kingdom is preparing its exit negotiations from the Union, following its negative referendum on membership on the 23<sup>rd</sup> of June 2016. Is, then, a constitutional analysis of the horizontal obligations that the Charter creates, misplaced in light of the realities of EU integration today?

Ultimately, the normative framework I have put forward might be better served by a different EU constitutional arrangement altogether – one in which fundamental rights would be more clearly distinguished from operational rules regarding the free market.<sup>27</sup> However, in concluding this project, it is important to emphasise that the inclusionary potential of a reconceptualised doctrine of horizontal effect is evident today and not only in some distant or idealised future construction of Europe. As questions concerning the horizontal effect of the Charter continue to arrive at the Court of Justice, its responses have a direct and wide-ranging impact on claimants and national legal orders.<sup>28</sup> EU fundamental rights law now touches upon areas of great political significance, such as the regulation of migration and the rights of workers. As the preceding chapters have shown, horizontal fundamental rights in particular concern important aspects of our daily lives: questions of equal treatment, privacy, and rights at work. Can we meaningfully organise our common life without these things? Can we safeguard them effectively if we assert them against the state only?

The idea that the market would, in and of itself, develop into a stable constitutional structure that would be unquestioningly accepted in virtue of its progressive features proved to be a false assumption.<sup>29</sup> A carefully construed doctrine of horizontality for constitutional rights can operate as a break for the dynamics of marketisation and individualism, which have overtime become embedded in the European Union and appear to have contributed to the decline of

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<sup>27</sup> D Grimm, 'The Democratic Costs of Constitutionalisation : The European Case' (2015) 21:4 *ELJ* 460, 472ff. See further Chapter 5.

<sup>28</sup> See, for example: Case C-395/15, *Daouidi v Bootes Plus SL, Fondo de Garantía Salarial, Ministerio Fiscal*, pending.

<sup>29</sup> See MA Wilkinson, 'Political Constitutionalism and the European Union' (2013) 76:2 *MLR* 191.

public deliberation therein, not only at the EU level, but also within the local, national and supranational layers of the European public sphere.

A constitutional assessment of horizontal effect *qua* private responsibility for breaches of fundamental rights entails a rediscovery of the socio-political context that binds Europeans together (that defines, in other words, EU public life).<sup>30</sup> That context can be gleaned only to some extent from the ‘social market economy’ envisaged in early case law, such as *Defrenne*. It must also be supplemented by a deeper commitment to fundamental rights as enabling conditions for interaction in the public sphere – a public sphere in which private, and particularly corporate, activity has always played a key role. After all, we live, and therefore experience the law, not only through interaction with the state but also, if indeed not primarily, with a variety of non-state actors and with one another. It is necessary to place the constitutional dimension of those interactions, i.e. the extent to which they affect our capacity to enjoy basic conditions that enable us to make meaningful choices within the community within which we live and to take part in its public affairs, in its proper context. Rediscovering the person in their situatedness and not the mere ‘individual’ right-holder will therefore need to be a central feature of a modern EU horizontal rights discourse of constitutional significance. It is in this sense that the horizontal effect of the Charter can – and should – differ emphatically from the horizontality doctrine employed in the EU legal order to date.

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<sup>30</sup> See J Habermas and J Derrida, ‘February 15<sup>th</sup> or What Binds European Together?’ (2003) 10:3 *Constellations* 291.

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