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THE JUSTICE DIMENSIONS OF THE RELATIONSHIP  
BETWEEN FUNDAMENTAL RIGHTS AND PRIVATE LAW

Martijn W. Hesselink

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## **The Justice Dimensions of the Relationship between Fundamental Rights and Private Law**

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# THE JUSTICE DIMENSIONS OF THE RELATIONSHIP BETWEEN FUNDAMENTAL RIGHTS AND PRIVATE LAW\*

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## I. Introduction

Does a private limited company have a fundamental right to freely conduct a business? Article 16 of the Charter of fundamental rights of the EU proclaims that '[t]he freedom to conduct a business in accordance with Union law and national laws and practices is recognised.' The Charter speaks of a 'freedom' that is 'recognised' (by the EU, presumably<sup>1</sup>). However, in the recent *Alemo-Herron* case, the Court of Justice of the EU referred to this freedom as a 'fundamental right'.<sup>2</sup> The turn of phrase may have been due to a slip of the pen but the Court's use of language may also have been deliberate.<sup>3</sup> This raises the question of what exactly it would mean to have a fundamental right to conduct a business. Would it be a human right? Human rights are rights that we all have as human beings, i.e. by virtue of our humanity. However, in *Alemo* the presumed right holder was not a natural person but Parkwood Leisure Ltd, a private limited company. Perhaps the shareholders in the company could be the ones who hold the fundamental right to conduct a business, but that does not seem to be what the Court had in mind and in any case they were not a party to the dispute. If Art. 16 were indeed to confer a right then the next question would be: a right to what and against whom? For, when someone has a fundamental right - or indeed any right - that person is entitled to something against someone. So, against whom do we have a right to conduct a business and what is the content of that right, i.e. who is under a duty to do or abstain from what towards the right holder? *Alemo* was a case about the interpretation of a directive on the safeguarding of employees' rights in the event of transfers of businesses.<sup>4</sup> According to the Court, the 'fundamental right' to conduct a business 'covers, inter alia, freedom of contract'.<sup>5</sup> And, still according to the Court, as a result of the ('dynamic') protection that United Kingdom's contract law grants employees in the case of the transfer of a business, the transferee's 'contractual freedom is seriously

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<sup>1</sup> See the closing sentence of the Preamble: 'The Union therefore recognises the rights, freedoms and principles set out hereafter.'

<sup>2</sup> CJEU 18 July 2013, C-426/11, *Mark Alemo-Herron and Others v Parkwood Leisure Ltd*, para. 32.

<sup>3</sup> S. WEATHERILL, 'Use and Abuse of the EU's Charter of Fundamental Rights: on the improper veneration of "freedom of contract"', 10 *European Review of Contract Law* (2014), 167-182, is perhaps right when he suggest that we should not give too much importance to this case, but on the other hand the Court does not every day receive a reference for preliminary ruling from the supreme court of the United Kingdom.

<sup>4</sup> Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ 2001 L 82, p. 16).

<sup>5</sup> The Court refers to the official Explanations that have to be taken into account for the interpretation of the Charter. However, those explanations only refer to the freedom of contract as part of the *freedom* to conduct a business.

reduced to the point that such a limitation is liable to adversely affect the very essence of its freedom to conduct a business'. So, it seems that according to the Court a business has a fundamental right to conduct its business which covers, inter alia, freedom of contract, the essence of which neither the EU legislator nor the national legislator, when transposing a minimum harmonisation directive, is allowed to interfere with. In other words, the right to conduct a business, as the Court understands it, is a vertical right, not one that is directly horizontally effective; Parkwood Leasure Ltd does not have a fundamental right to conduct a business that covers, inter alia, freedom of contract, against Alemo-Herron and its other employees. Beyond positivism and *Begriffsjurisprudenz*, why does it matter whether the freedom to conduct a business can be understood as a fundamental right and what this entails? It matters because human or fundamental rights are usually considered to have a moral basis and, thus, to be capable of justification in moral terms. So the question is: what, if anything, is the moral basis of the 'right to conduct a business'?

Do consumers have a fundamental right to high-level consumer protection? Pursuant to Art. 38 of the Charter, Union policies must 'ensure a high level of consumer protection'. According to the official Explanation, the Article is based on 169 TFEU,<sup>6</sup> which is located in Part 3 of the Treaty, dedicated to 'Union policies and internal actions'.<sup>7</sup> 'Policies and actions' sounds rather pragmatic. Nevertheless, with regard to this provision similar questions could arise. In his Opinion in *Pohotovost*, AG Wahl pointed out with regard to Art. 38 that 'it seems that this article, which has nothing to say about a directly defined individual legal position, establishes a principle and not a right and is therefore judicially cognisable, under Article 52(5) of the Charter, only in the interpretation of Union acts and in the ruling on their legality, in this instance Directive 93/13'.<sup>8</sup> So, the article establishes a principle, not a right. Still, the question remains whether the principle is a purely pragmatic one or whether, as a result of its presence in a charter on fundamental rights, it is elevated to a 'fundamental principle' and perhaps acquires a moral dimension as well. On the other hand, are we really entitled to high-level consumer protection because of our humanity that we share with all other human beings? In other words, does Art. 38 state a universal principle to the effect that all human beings are entitled to a high level of consumer protection? Or, is the idea rather that the EU defines itself - among other things - as a community where such a standard is upheld? Or, still differently, does the principle merely serve the instrumental purpose of raising consumer confidence with a view to increasing cross-border business? Answers to these questions matter, both as important normative questions in their own right, and with a view to a proper understanding and interpretation of the Charter and its impact on contractual and other private law relationships.

According to the official Explanation to the Charter, '[t]he dignity of the human person ... constitutes the real basis of fundamental rights'. Is this equally true for all rights, freedoms and principles recognised by the Charter? Or should we perhaps distinguish between those rights, principles and freedoms that are truly

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<sup>6</sup> The official Explanation to Art. 38 is very brief. It merely states that '[t]he principles set out in this Article have been based on Article 169 TFEU'.

<sup>7</sup> Art. 169 TFEU is the only provision contained in Title XV (Consumer protection) of Part 3 TFEU.

<sup>8</sup> Opinion AG Wahl in C-470/12 (*Pohotovost*), para. 66.

based on human dignity and are therefore universal human rights with an important moral dimension, and other rights, principles and freedoms that are based on common values on which the EU is based, or merely instrumental to the objectives that the EU has set itself? If such a distinction must be drawn on moral grounds, then the label of the 'constitutional status of the Charter' and the dichotomous structure of primary EU law versus secondary EU law and national law may be too general or even simplistic. Perhaps we have to distinguish between provisions in the Charter with different moral weight, also in the context of their indirect application to private law relationships, such as the interpretation of directives.

These examples raise the question of the justice dimension of the relationship between fundamental rights and private law. In particular, there seem to be at least two good reasons for an inquiry into the justice dimension of the implications of the Charter for private law. First, the provisions of the Charter and certainly their impact on private law are highly indeterminate. The wording of the Charter provisions strongly underdetermines their consequences for private law. Mere logical or linguistic analysis, even if these were the most appropriate interpretation methods, would never get us from the text of the Charter to their effects on dispute resolution in private law cases. Therefore, inevitably normative considerations will inform our interpretation of the Charter, and of course on many views it should.<sup>9</sup> Secondly, a normative analysis of the relationship between the EU Charter of fundamental rights and private law, in terms of its justice dimension, can provide us with standards for evaluating, and perhaps with reasons for criticising, the Charter and its application by the Court. As we will see, this is not merely a hypothetical possibility.

So, what can be said from the perspective of justice about the relationship between the EU Charter of fundamental rights and contract law? Can the impact of the Charter on contractual relationships - or a certain interpretation of it by the Court - be regarded as unjust? And conversely, is it possible to determine what would amount to (sufficiently) just horizontal effects of fundamental rights? These will be the central questions in this paper.

The paper is organised as follows. First, I will explore what some of the leading contemporary moral and political theories have to say on the nature and foundations of fundamental right, and their relationship to private law (II). Then, I will address how a legitimate constitutional democracy should deal with the plurality of philosophies of fundamental rights, and will discuss the possibility of a political conception of justice and fundamental rights in private law (III). The idea will then be tested against the EU Charter of fundamental rights and its possible horizontal effects (IV). I will argue and conclude, in particular, that the interpretation of the Charter (and of EU law its light) will have to distinguish between provisions having more or less moral weight, and that an activist or even ideological interpretation of the Charter, including its horizontal effects, will be difficult to match with a political conception of justice, and therefore with a legitimate role of a court in a society characterised by the fact of reasonable

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<sup>9</sup> From Dworkin to Habermas and beyond. There is no need to pursue this matter any further here.

pluralism (V). Throughout, special attention will be given to Art. 16 (freedom to conduct a business) and 38 (consumer protection), two Charter provisions likely to be particularly relevant for legal relationships governed by private law.

## II. Philosophies of fundamental rights and private law

There exists a variety of different (and sometimes radically divergent) understandings of fundamental rights, their normative basis and their impact on relationships governed by private law. I will briefly discuss liberal-egalitarian (A), libertarian (B), utilitarian (C), communitarian (D), and republican (E) views. From each of these perspectives, I will address the nature and normative basis of fundamental rights, and their possible effect on contract and other private law disputes. I will present these different philosophies of fundamental rights and their horizontal effects in a rather summary and stylised way. The aim is to show the main differences and similarities. The risk is, of course, that these models represent the view of no single philosopher or theorist.

### A. Liberal-egalitarian

Liberals or liberal-egalitarians - i.e. the egalitarian heirs to classical liberalism, to be distinguished from libertarians - are perhaps rightly regarded as the champions of 'taking rights seriously'.<sup>10</sup> The idea that individual rights should sometimes trump the majority decisions made by parliaments, or a cost/benefit analysis conducted by experts or another type of social utility calculus, is at the heart of liberalism.<sup>11</sup> The recognition of individual rights is part of the fundamental idea of the priority of the right over the good (including the common good) that deontological (Kantian) liberal-egalitarians share with libertarians, and which distinguishes both from both utilitarians and communitarians. The main difference between liberal-egalitarian and libertarian Kantians, who will be discussed below, is that liberal-egalitarians tend to recognise a range of rights that is much broader than those recognised by libertarians and usually includes also certain social and economic rights.<sup>12</sup> However, not all liberal theories of fundamental rights are deontological. Raz, for example, understands morally fundamental rights as being justified on the ground that they protect interests of ultimate (i.e. non derivative) value.<sup>13</sup> And according to Sen, many human rights can be seen as rights to particular capabilities.<sup>14</sup> Indeed, it is perhaps exactly because rights are so central to liberalism that there exist so many different liberal-egalitarian conceptions of rights. And many of the disputes among liberals, e.g. concerning the relationship between moral and legal rights, judicial review and democracy, or the foundations of human rights, turn on the proper understanding of the nature and role of fundamental rights. Still, what many liberals have in common is that their

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<sup>10</sup> R. DWORKIN, *Taking rights seriously* (Cambridge, Massachusetts: Harvard University Press, 1977).

<sup>11</sup> R. DWORKIN, *Justice for hedgehogs* (Cambridge, Massachusetts: Belknap Press, 2011), 339. Against the idea of rights as trumps, see e.g. A. SEN, *The idea of justice* (London: Penguin, 2009), 360.

<sup>12</sup> SEN, *ibidem*, 379.

<sup>13</sup> J. RAZ, *The morality of freedom* (Oxford: Clarendon Press, 1986), 192.

<sup>14</sup> A. SEN, 'Human rights and capabilities', 6 *Journal of human development* (2005), 151-166.

understanding of human rights derives directly from their conception of the moral person and of human flourishing.<sup>15</sup>

Similarly, different approaches to the horizontal effect - direct or indirect - of fundamental rights are compatible with different versions of liberalism. One well-known way of understanding the horizontal effect of rights is by transforming the conflicting rights-claims made by individuals, typical of disputes concerning horizontal effect, into 'principles' which instead of the binary (yes/no) character of rights violations, have a dimension of weight, which allows to balance them against each other and even to find right answers to these questions.<sup>16</sup>

## B. Libertarian

Rights play a central role in libertarianism too. Think only of the opening sentence of Nozick's *Anarchy, State and Utopia*: 'Individuals have rights, and there are things no person or group may do to them (without violating their rights).'<sup>17</sup> It is characteristic of the libertarian view of rights that it combines a limited set of rights with a strong protection of these rights. This means, on the one hand, that from a libertarian perspective, social rights, such as a right to work,<sup>18</sup> with paid holidays,<sup>19</sup> or a right to education,<sup>20</sup> free for the elementary part,<sup>21</sup> or cultural rights, such as the right to enjoy the arts,<sup>22</sup> have no moral or other basis. On the other hand, libertarians tend to accept hardly any exceptions to the core rights to liberty.

This has a strong impact on private law as well. Not only should contracts for the sale of pornography, drugs, guns, or organs, on the libertarian view, be permitted and enforced like any other contract. Also, the libertarian laissez-faire understanding of the binding force and freedom of contract, the right to property, and fault-based tort liability leads to the rejection of such doctrines as unfair exploitation (or unconscionability), abuse of right, and strict liability respectively. From the libertarian point of view, the ruling of the *Bundesverfassungsgericht* in the *Bürgschaft* case should be rejected as an unacceptable interference with liberty (and redistribution, which in itself constitutes a violation of the right to self-ownership).<sup>23</sup> The same applies to the equal treatment directives, to give just one other example.<sup>24</sup>

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<sup>15</sup> This is true for all perfectionist liberals, but not or in a much more limited way for non-perfectionist comprehensive liberals (such as Dworkin) and for political liberals like Larmore, Rawls and Nussbaum. See below.

<sup>16</sup> R. DWORKIN, *A matter of principle* (Oxford: Oxford University Press, 1985).

<sup>17</sup> R. NOZICK, *Anarchy, state and utopia* (Oxford: Blackwell Publishing, 2006), ix.

<sup>18</sup> Art. 23, Universal Declaration; Art. 15 (1), CFREU.

<sup>19</sup> Art. 24, Universal Declaration; Art. 31 (2), CFREU.

<sup>20</sup> Art. 2, First protocol ECHR.

<sup>21</sup> Art. 26, Universal Declaration; Art. 14 (2), CFREU.

<sup>22</sup> See 27, Universal Declaration that contains 'the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits'.

<sup>23</sup> *Bundesverfassungsgericht*, 19 October 1993, *BVerfGE* 89, 214.

<sup>24</sup> See directives 2000/43/EC on equal treatment between persons irrespective of racial or ethnic origin, and 2004/113/EC on equal treatment between men and women in the access to and supply of goods and services.



The moral basis for liberty and property rights is usually sought by libertarians in a natural right to personal liberty, in either the Lockean or the Kantian tradition.<sup>25</sup> Some libertarians are convinced that the introduction of free markets will naturally bring a country more individual freedom.<sup>26</sup> From the libertarian perspective, the rights to personal liberty and property (including 'self-ownership')<sup>27</sup> should be respected by everyone, both individuals and the state. Thus, in the libertarian conception of rights direct horizontal effect of rights is intrinsic (even conceptually and morally prior) to vertical effect.

### C. Utilitarian

If we were to ask what role fundamental rights would have to play in a utilitarian private law the short answer would be: none. Utilitarians do not attribute any direct importance to fundamental rights. Indeed, the priority of rights (as part of the priority of right) is one of the most important difference between utilitarians (understood broadly, as consequentialists), on the one hand, and liberals and libertarians, on the other. Jeremy Bentham famously dismissed the concept of natural rights as 'nonsense upon stilts'.<sup>28</sup> From the utilitarian perspective, upholding a fundamental right in spite of the fact that not doing so would lead to more happiness, welfare or preference satisfaction, would amount to granting an unjustified privilege, very similar to the feudal privileges that the classical utilitarians fought against. This means that trade-offs between fundamental rights and other interests are not only permitted, but also required, given utilitarianism's commitment to the maximisation of welfare. This is explained by the fact that for utilitarians the individual is but a mere location of utility, not an aim in itself, worthy of dignity.

A fundamental right can never override or trump the utilitarian calculus in terms of social utility or welfare. However, to the extent that people care about rights that does count.<sup>29</sup> Fundamental rights do enter the utility calculus to the extent that they make people happy or that people have a preference for them (and for that reason alone). In other words, fundamental rights are recognised to the extent that it leads to an increase in social welfare. In principle, existing fundamental rights only have to be respected insofar as it is in the general interest. In other words, an 'efficient rights violations' (in analogy to efficient breach) should be permitted, except if such a relativist attitude towards fundamental rights were to lead to social costs that outweigh the benefit. In other words, even in the absence of a pervasive 'taste for rights' in a given

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<sup>25</sup> See J. LOCKE, *Two Treatises of Government* (Peter Laslett, ed) (Cambridge: Cambridge University Press, 2009), II, 4; I. KANT, *The metaphysics of morals* (M. Gregor, ed) (Cambridge: Cambridge University Press, 1996), 30 [6:238].

<sup>26</sup> This may explain why both Hayek and Milton Friedman praised dictators such as Pinochet and Deng Xiaoping for their contributions to liberty.

<sup>27</sup> See LOCKE, *ibidem*, II, 27 ('every Man has a *Property* in his own *Person*'), and NOZICK, n. 17 above, 172.

<sup>28</sup> J. BENTHAM, *Anarchical fallacies; Being an examination of the declaration of rights issued during the French revolution* (1792), republished in J. Bowring (ed) *The works of Jeremy Bentham* (Edinburgh: William Tait, 1843), vol. II.

<sup>29</sup> Cf. D.C. MUELLER, *Public choice III* (Cambridge: Cambridge University Press, 2003), 646. This has been suggested as a way out of Sen's famous paradox. See A. SEN, 'The impossibility of a Paretian liberal' 78 *Journal of political economy* (1970), 152-157.

society there may be reason to recognise rights and protect them, as a matter of indirect utilitarianism.

Some of the well-known problems with utilitarianism surface also - or especially - with regard to its attitude towards fundamental rights. For example, utilitarians have no way of excluding 'external' preferences (e.g. sadist ones: I am happy if you suffer) and 'illegitimate' preferences (e.g. a preference for discrimination) other than by sneaking liberal or otherwise deontological notions in. And without such deontological corrections the rights of unpopular minorities (indeed their wellbeing) seem to be at great risk. Moreover, the problem of incommensurability (i.e. its reductive nature: to count human dignity to the extent and for the reason that it makes people happy) is particularly acute here too. And, of course, most fundamentally, as Rawls famously put it, 'utilitarianism does not take seriously the distinction between persons'.<sup>30</sup> On the other hand, the main merits of utilitarianism are also clearly visible when it comes to the protection of fundamental right. Should we protect rights against any cost? Indeed, can we? Given that it is impossible to fully protect everyone's right at the same time, does not utility provide the most transparent and impartial standard for arriving at trade-offs?

Because utilitarians do not attribute any direct importance to fundamental rights there is also no principled reason, relating to the nature of fundamental rights, to accept or reject horizontal effects: the question of what impact (if any) fundamental rights should have on contractual and other private law relationships depends entirely on the net balances of good and bad consequences that such an effect would have for all the affected parties (in their own estimation). Nor do utilitarians have to make a principled choice between direct and indirect horizontal effects. If one of these mechanisms is more efficient or otherwise utility enhancing then that may constitute a reason to favour indirect over direct horizontal effect (or vice versa), but from the utilitarian perspective neither of them seems to be inherently more compatible with the nature of fundamental rights.

Similarly, distinctions between rights, freedoms, and principles also do not play any primordial role in the utilitarian understanding of fundamental rights and their possible impact on contract and other private law relationships. From a utilitarian point of view, there exists no categorical difference e.g. between the market freedoms, the freedom to conduct a business, and the principle of consumer protection, which all are instrumental, at least in part, on the one hand, and human rights, such as the right to the integrity of the person (Art 3 CFREU), on the other. Indeed, in the eyes of a utilitarian all rights are instrumental: they should be recognised and protected to the extent that they contribute to maximising welfare.

#### **D. Communitarian**

Individual rights have a less prominent place in communitarian than in liberal and libertarian political and legal theories. Communitarians denounce the

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<sup>30</sup>J. RAWLS, *A theory of justice*, revised ed. (Cambridge, Massachusetts: Belknap Press, 1999), 24.

atomism that is characteristic of a strongly rights-oriented society.<sup>31</sup> They consider community, tradition and culture to be more important. Communitarianism has in common with utilitarianism that it regards the common good as paramount. The difference between the two is, of course, that while for utilitarians the common good means nothing more than the aggregate of all individual goods (defined subjectively, e.g. in terms preference satisfaction), the communitarian understanding of the common good is avowedly perfectionist, in terms of objective value, i.e. the common values on which 'our' nation, culture, tradition, religion et cetera is based. However, what both have in common is that they reject the idea that individual fundamental rights may trump the common good. At best they may derive from the common good, because they are utility enhancing (indirect utilitarianism) or because certain rights belong to 'our' tradition or 'our' culture.

Communitarians are often accused by liberals of relativism exactly because they sacrifice the rights of individuals and certain non-dominant groups (who may even represent the numerical majority, e.g. women) that do not identify with the dominant understanding of the common good and common values. The liberal critique is that identity, adherence to a tradition, and the hierarchy among our allegiances ultimately should be a matter of individual choice. Individuals should at least be guaranteed exit options from oppressing traditions.<sup>32</sup>

The Preamble to the Charter, in its opening phrase, has a distinctly communitarian touch to it when it 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.' However, that sentence is followed immediately by the claim that, although we Europeans derive these values from Christianity and Enlightenment, these are in fact universal: 'Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity (...)'.<sup>33</sup>

One strand of communitarianism is nationalism. From the perspective of the national community, international and European fundamental rights may be experienced as foreign, and their interpretation by non-national courts, such as the Strasbourg and Luxembourg courts, as intrusive and disrespectful of 'national values' or 'our' local way of life, and be resented for that reason. From this perspective, horizontal effects (certainly if direct) of the Charter or the ECHR will seem worrying.<sup>34</sup> This may be different for rights contained in national

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<sup>31</sup> C. TAYLOR, *Philosophical papers*, vol. 2: *Philosophy and the human sciences* (Cambridge: Cambridge University Press, 1985), ch. 7; M.J. SANDEL, *Liberalism and the limits of justice*, 2<sup>nd</sup> ed. (Cambridge: Cambridge University Press, 1998), 60.

<sup>32</sup> M.C. NUSSBAUM, *Sex and social justice* (Oxford: Oxford University Press, 1999), ch. 1; A. SEN, *Identity & violence; the illusion of destiny* (London: Penguin, 2006), 32.

<sup>33</sup> The claim is formulated in even stronger terms in the Preamble to the TEU: 'Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law.'

<sup>34</sup> On the implications for national private law of the understanding by the Strasbourg Court of the ECHR as a 'dynamic text' and a 'living instrument' (in *Pla and Puncernau v Andorra* (2004), 69498/01), see A. HARTKAMP, *European law and national private law* (Deventer: Kluwer, 2012), 232-234.

constitutions, which will be regarded by nationalists as enshrining ‘our’ common values, and their radiating effects may therefore be experienced as beneficial.

### E. Republican

Republicans have been among the most forceful critics of the liberal understanding of the nature and role of fundamental rights, in particular the judicial review of democratic decisions,<sup>35</sup> and especially judicial activism.<sup>36</sup> They reject the idea that constitutional courts are better placed than democratic legislators to take fundamental rights, including minority rights, and their implications into account when formulating policies and laws in the general interest. They point out that courts reach their decisions on a much narrower informational basis concerning the interests at stake (in private law cases, limited essentially to those put forward by the private parties to the case at hand) than democratic legislators, and that majority voting by judges (which is a recurrent practice) is less legitimate (because less representative) than by elected legislators. Republicans are committed to freedom as non-domination,<sup>37</sup> and there is a risk, they argue, that judicial review in the name of constitutional rights might constitute an arbitrary interference by judges with deliberative self-government.

Specifically relevant with regard to horizontal effect, is Sunstein’s points of the inadequacy of ‘compensatory justice’, i.e. justice through ‘the common law of tort, contract, and property’, i.e. general private law, when it comes to addressing the violation of fundamental rights, such the right to equal treatment.<sup>38</sup> Adherents of the more perfectionist (Aristotelian) versions of republicanism, that emphasise the virtues of active citizenship, will perhaps be alarmed by the risks of consumerism following from the constitutionalisation by the EU Charter of a principle of high-level consumer protection.<sup>39</sup>

### F. Conclusion

This brief overview has shown at least three things. First, there exists a broad diversity of views with regard to the moral foundations of fundamental rights

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<sup>35</sup> See R. BELLAMY, *Political constitutionalism* (Cambridge: Cambridge University Press, 2007), esp. ch. 1. P. PETTIT, *On the people’s terms: A republican theory and model of democracy* (Cambridge: Cambridge University Press, 2012), 23, however, suggests that the institutions required to give people control over government are likely to include judicial review. For a sustained liberal attack on judicial review, see J. WALDRON, ‘The core of the case against judicial review’ 115 *Yale Law Journal* (2006), 1346-406.

<sup>36</sup> See C.R. SUNSTEIN, *The partial constitution* (Cambridge, Massachusetts: Harvard University Press, 1993), esp. ch. 5. Contrast F. MICHELMAN, ‘Law’s republic’, 97 *Yale Law Journal* (1988), 1493-1537, 1498.

<sup>37</sup> PETTIT, n. 35 above, 101-102, suggests that a deontological version is conceivable (‘One way of linking rights-talk with republicanism would be to recognize certain natural, perhaps absolute, rights not to be interfered with on an arbitrary basis’), but rejects it in favour of teleological (consequentialist) one.

<sup>38</sup> SUNSTEIN, n. 36 above, ch. 11.

<sup>39</sup> Generally on the tendency by the EU to treat its citizens as consumers, see J.H.H. WEILER, ‘To be a European Citizen: Eros and Civilization’, in: idem, *The Constitution of Europe; “Do the New Clothes Have an Emperor?” and Other Essays on European Integration* (Cambridge: Cambridge University Press 1999), 324-357, 335; M.W. HESSELINK, ‘European Contract Law: A Matter of Consumer Protection, Citizenship, or Justice?’, 15 *European Review of Private Law* (2007), 323-348.

and their possible impact on private law relationships. Second, these different conceptions tend to be based on different conceptions of what is valuable in human life and of human personhood. Thirdly, in spite of their fundamental differences each of these views (or at least versions of each of them) seems to be generally compatible with a constitutional democracy of the kind we are familiar with in the European Union, i.e. the polity (or polities) that concern us here.

### III. A political conception of fundamental rights and their horizontal effects

When comparing and evaluating the different conceptions of fundamental rights and their impact of private law, two important facts have to be taken into account. First, the fact that today in Europe we live in a pluralistic society (or societies) in which people hold quite diverse and divergent worldviews, which are often mutually incompatible or even incommensurable (A). Sometimes these views constitute 'comprehensive doctrines' based on ultimate principles or values,<sup>40</sup> but more often they are much more incomplete and fragmentary.<sup>41</sup> The second fact is the relative indeterminacy of the EU Charter of fundamental rights and, in particular, its implications for relationships that are subject to private law (B). The text of most Charter provisions will not get us directly to specific contract law outcomes. Rather, there remains ample room for reasonable disagreement. Given these two facts, and because the Charter is part of the basic structure of society, political principles of justice should guide the determination of its horizontal effects (C).

#### A. The fact of reasonable value pluralism<sup>42</sup>

The familiar conceptions of fundamental rights that we just saw in the previous section are all based on what Rawls calls 'comprehensive doctrines', i.e. on conceptions of what is valuable in human life and of ideals of the person.<sup>43</sup> When assessing the relative merits of the different conceptions of fundamental rights and their impact of private law, that we just saw, we will have to take into account what Rawls called 'the fact of reasonable pluralism'.<sup>44</sup> This is the fact that in modern constitutional democracies a debate among reasonable persons on ultimate values and principles is unlikely ever to lead to an agreement. Rather, every new round of discussion probably will further entrench each position and exacerbate the disagreement among competing worldviews.

One cause of the fact of reasonable pluralism, i.e. one reason why disagreement about comprehensive world views is not likely to go away even among reasonable people (who are neither in bad faith nor biased or opportunistic), is

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<sup>40</sup> J. RAWLS, *Political liberalism*, expanded edition (New York: Columbia University Press 2005), 13.

<sup>41</sup> R. FORST, *The Right to justification: elements of a constructivist theory of justice* (New York: Columbia University Press, 2012), 99.

<sup>42</sup> This sub-section draws on M.W. HESSELINK, 'Could a fair price rule (or its absence) be unjust? On the relationship between contract law, justice and democracy', 11 *European Review of Contract Law* (2015), forthcoming.

<sup>43</sup> RAWLS, n. 40 above, 175.

<sup>44</sup> RAWLS, *ibidem*, 36. Similar, C. LARMORE, *The morals of modernity* (Cambridge: Cambridge University Press, 1996), 168: 'reasonable disagreement'.

what Rawls calls the 'burdens of judgment'. By this he means that the judgment of each of us inevitably will be determined, in part, by her or his particular vantage point. Each of us has had different experiences in our lives that will inevitably colour our general views on life and the world around us, and will burden our judgments, also on subjects under public deliberation. Each of us will assess the available evidence, balance the interests, evaluate the arguments, and interpret the questions differently.<sup>45</sup> Even if everyone participating in the political debate is perfectly reasonable and guided by the utmost public spirit, then still people are likely to disagree, especially on the most foundational questions of life and the world we live in. This fact leads Rawls to the conclusion that reasonable pluralism is a permanent condition of modern democracies, one that we should not regret, and that the only way to overcome this diversity would be through the oppressive use of power.

Under these circumstances (i.e. our circumstances), the State would not show equal respect and concern for its citizens if it took sides and established one such controversial worldview or set of ultimate values, as the official state doctrine, or, less radically, decided to adopt (or reject) policies and laws (including private laws) that could only be justified (or rejected) in terms of such a controversial worldview or in the name of a controversial value.<sup>46</sup> Therefore, the state should try to remain neutral with regard to ultimate values. For, a partisan state would not only lead to instability, because its laws would only last until the other faction came to power and implemented its agenda in the name of its own controversial principles, but it would also be unjust because it would treat all those citizens holding a different worldview than the officially established one as second-rate citizens. Therefore, the state should refrain from acts, such as the promulgation of laws, that can be justified only in terms of such a controversial worldview, and not also by reasons that no one could reasonably reject.<sup>47</sup>

According to Rawls, the best we can hope for in non-oppressive, pluralist societies - and what we should strive for instead - is an 'overlapping consensus' among different reasonable comprehensive doctrines on a limited set of self-standing, political principles of justice that should govern our main institutions, and that could be inserted by each citizen, as a module, into the (reasonable) comprehensive doctrine that she or he happens to adhere to.<sup>48</sup> And he proposes his well-known two principles of justice as a candidate for such an overlapping consensus. Larmore formulates the same point somewhat differently by stating that in case of irreconcilable difference we have to recede to our last point of common ground.<sup>49</sup> Nussbaum proposes her version of the capabilities approach for an overlapping consensus on basic political principles.<sup>50</sup> Habermas subscribes to the project of political liberalism, but rejects the categorical priority Rawls gives to basic liberties, and underlines that rights and democracy

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<sup>45</sup> RAWLS, n. 40 above, 54.

<sup>46</sup> The equal treatment of both acceptances and rejections based on partisan reasons, is required in order to avoid status quo bias. Cf. SUNSTEIN, n. 36 above, 4.

<sup>47</sup> T.M. Scanlon, 'Contractualism and utilitarianism', in: A. Sen & B. Williams (eds), *Utilitarianism and beyond* (Cambridge: Cambridge University Press, 1982), 103-128.

<sup>48</sup> RAWLS, n. 40 above, 58.

<sup>49</sup> LARMORE, n. 44 above, 135.

<sup>50</sup> M.C. NUSSBAUM, *Creating capabilities; The human development approach* (Cambridge, Massachusetts: Belknap Press, 2011), 90.



mutually presuppose each other.<sup>51</sup> And according to Forst, we are morally entitled to our laws being capable of justification with reasons that no one could reasonably reject, i.e. reasons that are both reciprocal and general.<sup>52</sup> For present purposes, we do not need to take sides in (or resolve) what Habermas has called a 'family quarrel' among political liberals concerning the question of how a society can arrive at political principles of justice.<sup>53</sup> In other words, the positions taken in the present paper should be compatible, in principle, with the different political conceptions of justice in a pluralist society proposed by Rawls, Habermas, Larmore, Nussbaum and Forst.<sup>54</sup>

What is highly relevant for our purposes, however, is that the conceptions of fundamental rights and their implications for private law relationships, that we saw in the previous section, are all based on controversial ultimate values, namely the values of utility, liberty, equality, community and active citizenship respectively. And it cannot be reasonably expected from citizens to accept that one of these values to which they do not adhere, is adopted by the state as the ultimate value on which to base (and by which to evaluate) political action and laws, including fundamental rights and private laws, and their interpretation. Given the fact that even perfectly reasonable people will never reach consensus on the ultimate basis of fundamental rights and their relationship with private law, and that therefore sectarian theories on these questions could only be imposed by oppressive state power, we need a political conception of fundamental rights and their horizontal effects.

#### **B. The indeterminacy of the Charter and its impact on private law**

The impact of the Charter on private law is highly indeterminate. It is very difficult to determine (let alone foresee) what consequences the various Charter provisions might have on contractual and other private law relationships. This second fact, i.e. the fact of the indeterminacy of the Charter's impact on private law, provides a second, practical reasons why we need political principles concerning the horizontal effects of fundamental rights. The indeterminacy derives from several aspects of the Charter, relating both to its open-ended wording and its institutional status as primary ('constitutional') EU law albeit with a limited substantive scope (only where EU law already applies).<sup>55</sup>

The Charter provisions that could become relevant to contractual or other private law relationship, are formulated in such wide and general terms that a purely textual or systematic interpretation would not yield single distinct answers to questions concerning their application - direct or indirect - to contractual and other private law relationships. A broad variety of interpretations seem compatible with texts such as the following:

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<sup>51</sup> See J. HABERMAS, *The inclusion of the other; studies in political theory* (Ciaran Cronin and Pablo De Greiff, eds) (Cambridge: Polity Press, 1996), 71.

<sup>52</sup> FORST, n. 41 above.

<sup>53</sup> See HABERMAS, n. 51 above, 50.

<sup>54</sup> On some differences in emphasis, especially with regard to reasons for deference to the democratic legislator's interpretation of rights (indeterminacy of the basic liberties or co-originality of private and public autonomy), see further below, IV.D.

<sup>55</sup> Art. 51(1), CFREU. See CJEU 26 February 2013, C-617/10 *Åkerberg Fransson*, para. 19.

'Human dignity is inviolable. It must be respected and protected.'<sup>56</sup>

'Everyone has the right to respect for his or her physical and mental integrity.'<sup>57</sup>

'The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.'<sup>58</sup>

'Intellectual property shall be protected.'<sup>59</sup>

'Union policies shall ensure a high level of consumer protection.'<sup>60</sup>

The way these provisions are formulated allows for quite divergent interpretations, which may well be partisan but not per se unreasonable. It is not difficult to imagine e.g. libertarian, utilitarian, liberal-egalitarian or communitarian readings of the principle that '[i]ntellectual property shall be protected'. And it is quite clear that a debate concerning the values on which intellectual property law is ultimately based will not lead to an agreement concerning the meaning and implications of this principle, but only exacerbate the differences. This raises the question of what political considerations of justice may guide the interpretation of these provisions, generally and specifically with regard to their impact (including by posing limits) on private law or relationships governed by it.

Questions concerning indirect effect of the Charter on relationships governed by private law, such as contractual relationships, can come up either in the context of the judicial review of the compatibility of EU directives with the Charter<sup>61</sup> (or perhaps of other Treaty provisions, or even of unwritten general principles of EU law, interpreted in the light of the Charter) and - probably more frequently - the determination of compatibility of national law with a directive, as interpreted in light of the Charter.<sup>62</sup> In each of these contexts, the poli-interpretability of the legislation (EU directive, national law) is added to the already open-textured provisions of the Charter. For directives, an additional factor is that they themselves are not directly applicable in the Member States, but first have to be transposed into the legal orders by the national legislators who, in principle, enjoy a significant degree of leeway. Directives are binding upon the Member States only as to the result to be achieved,<sup>63</sup> which will often leave room for different ways (and degrees) of respecting fundamental rights.

The possible direct impact on private law relationships of the Charter is even more indeterminate. In principle, it is possible that Charter provisions become directly applicable in private law relationships to which EU law is already directly horizontally applicable. This may occur, in principle, with regard to primary EU law, in the (limited) cases where internal market freedoms have direct horizontal effect, and, with regard to secondary EU law, e.g. concerning the

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<sup>56</sup> Art. 1.

<sup>57</sup> Art. 3(1).

<sup>58</sup> Art. 16.

<sup>59</sup> Art. 17(2).

<sup>60</sup> Art. 38.

<sup>61</sup> E.g. CJEU 1 March 2011, C-236/09 *Association Belge des Consommateurs Test-Achats and Others v Conseil des ministres*.

<sup>62</sup> E.g. *Alemo-Herron*, n. 1 above.

<sup>63</sup> Art. 288(3) TFEU.



regulation on air passengers' rights or the Rome I regulation.<sup>64</sup> Again, often a variety of relevant possible interpretations of fundamental rights will seem reasonably compatible with reasonable interpretations of market freedoms and other EU provisions having direct horizontal effects.

### C. Political principles of justice

Political principles of justice, as said, make no truth-claims - and remain neutral - with regard to conflicting worldviews.<sup>65</sup> They do not derive from controversial values, but are self-standing and should be reasonably acceptable to people who disagree about ultimate values, the meaning of life, and what would be good and bad (beyond justice) for the EU, its Member States and the relationships between them.

Political principles of justice apply to us when, as citizens, we deliberate on questions concerning the basic structure of our society, i.e. those institutions that are primarily responsible for social justice.<sup>66</sup> These institutions include, in particular, the constitution and the main economic institutions. It is contested whether contract law as such should be regarded as part of the basic structure thus understood.<sup>67</sup> However, we can leave that question open (although I think the answer should be positive), because clearly the constitution (and therefore also the 'constitutional' treaties of the EU), and certainly the fundamental rights section contained in it, is part of the basic structure of a society. Therefore, the Charter, which is part of the EU's constitutional framework on a par with the founding Treaties,<sup>68</sup> is part of the basic structure of the EU and, consequentially, of the Member States.<sup>69</sup>

This brings us to the question whether it is possible to derive some principles or guidelines from the idea of a political conception of justice, or from the thrust of the different interpretations of political principles proposed by Rawls, Habermas, Larmore, Nussbaum, Forst and others, specifically for the horizontal effect of the Charter.

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<sup>64</sup> Regulation 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights; regulation 593/2008 on the law applicable to contractual obligations (Rome I).

<sup>65</sup> HABERMAS, n. 51 above, 50

<sup>66</sup> RAWLS, n. 40 above, Lecture VII

<sup>67</sup> See most recently J. KLIJNSMA, *Contract Law as Fairness* (Amsterdam, 2014), 34 ff.

<sup>68</sup> The CJEU has expressly referred to the founding treaties as 'constitutional' on several occasions.

<sup>69</sup> It could be argued that prior to the question whether the EU's basic structure meets the standards set by political principles of justice, there is the separate question of the moral agency of the EU, i.e. the question of whether the EU can be regarded as a society and a polity with its own moral responsibility for justice. However, in my view, this way of addressing the matter gets things backward. Rather, the fact that the existence and operation of the EU's institutions already have profound human rights and distributive implications means that there has to be a polity that can be held morally responsible. The Euro crises with its devastating impact on the Greek people is not a natural disaster.

## **IV. A political reading of the Charter and its impact on private law relationships**

So, what could reasonably be regarded as the implications of a political conception of justice for the understanding and interpretation of the Charter and its impact on private law and private relationships? What would a political, sufficiently neutral understanding of the horizontal effect of the Charter entail?

It should be remembered that a political conception of justice, although neutral, is still a moral understanding based on considerations (i.e. principles or other reasons) of justice, and therefore does not necessarily have to be very formal or entirely procedural, but can still be substantive. Here are some proposed principles, guidelines or rules of thumb.

### **A. Direct or indirect horizontal effect**

The normative question of horizontal effect can be addressed from two different perspectives, i.e. the place of private law in a political conception of fundamental rights, and the place of fundamental rights in a political conception of private law. Obviously, the answer from the two different perspectives should be consistent. The objective is to arrive at a political understanding of the system of private rights and obligations.

From the political perspective, the question of whether horizontal effects should be direct or indirect does not seem to be the most pressing one. On the contrary, the debate on direct or indirect effect seems to be dominated by ideological concerns, e.g. on whether private law should be kept 'pure' and be understood as based on its own immanent system of values (chiefly private autonomy), while from a point of view that is neutral with regard to conflicting worldviews, the more appropriate questions seem to be which rights, freedoms and principles should have horizontal effect and how strong their respective impact should be.<sup>70</sup>

### **B. No constitutionalisation of 'common values' or the 'common good'**

#### **1. Constitutional values**

From the perspective of a political conception of justice, the constitutionalisation of 'common values' or of a certain definition of the 'common good' is highly problematic. This is so, chiefly, because in a pluralistic society individuals will differ on matters of value and of individual and common goods. Therefore, official definitions of the 'common good' or statements of 'common values' will be endorsed by some but will inevitably be experienced by others, who do not regard these as truly common values or the common good, as being imposed upon them. These latter citizens rightly may feel being treated as second-rate citizens, given their rejection of (or indifference towards) the official values of the political community.

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<sup>70</sup> From the Rawlsian perspective of justice as fairness, arguably both the first principle (on basic liberties) and the second one, in both its first and second parts (i.e. non-discrimination and difference principle respectively), require some horizontal effects (not necessarily direct) of certain fundamental rights. See KLIJNSMA, n. 67 above.

Indeed, there will probably even be disagreement about which community - if any - would be the most relevant in this regard. Just like different individuals may rank fundamental values differently, so too may they rank their allegiance to communities most appropriate for defining common values and the common good differently in accordance with their self-understanding as national, European or world citizens.

The constitutionalisation of the good can take two different shapes. First, certain values may be indicated explicitly in the constitution as the common values shared by the political community. Secondly, certain constitutional provisions - e.g. one indicating a certain religion as the official state religion - can only be explained by understanding a certain value as an official common value.

The opening sentence of the preamble to the Charter on fundamental rights explicitly refers to the 'common values' shared by 'the peoples of Europe'. That reference suggests not a moral but an essentially ethical basis, i.e. in a common conception of what is valuable in human life. The ethical, communitarian basis in the common good (rather than in the right) is even more explicit in subsequent sentences: 'Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity. ...The Union contributes to the preservation and to the development of these common values'. And it is '[t]o this end' (i.e. to the end of preserving and developing these common values) that 'it is necessary to strengthen the protection of fundamental rights ... by making those rights more visible in a Charter.' So, the Charter is instrumental to preserving and developing further the common good of the peoples of Europe. That is an objective quite distinct from protecting human rights within the territory of the EU Member States. Indeed, from the preamble one could conclude that the 'fundamental rights' of the EU are not human rights at all.<sup>71</sup>

Moreover, the values are said by the Preamble to be shared by 'the peoples of Europe'. It is not clear whether the 'peoples of Europe' referred to in this phrase should be understood in a comparatively 'thin', merely political sense, as the polities of the respective Member States of the European Union, or in a thicker, more ethical and cultural (perhaps even ethnical) sense of 'nations'. In either case, the Charter of fundamental rights of the EU addresses people in Europe not only not as moral persons (as human rights would do), but also not in their (admittedly derivative) capacity of European citizens.<sup>72</sup>

In sum, the concept of 'constitutional values', which are ethical (as opposed to constitutional principles that refer to justice), is problematic in the pluralist societies that the EU and its Member States are. Therefore, an interpretation of provisions in the Charter guided by the demands of justice should perhaps refrain from relying on these 'constitutional values', especially from cherry-picking one of them and giving it an ideological reading, e.g. a libertarian reading of freedom, a social-democratic reading of equality, or a Christian-democratic reading of solidarity.

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<sup>71</sup> See further below, IV.E.

<sup>72</sup> See Art. 9 TEU. According to J. HABERMAS, *The Crisis of the European Union* (London: Polity, 2012), the EU belongs to both its peoples (understood politically) and its citizens.

Not only the preamble but also certain provisions in the Charter seem to constitutionalise certain (inevitably controversial) goods and values. Articles 16 (freedom to conduct a business) and 38 (consumer protection) provide good examples that are particularly relevant for private law.

## 2. The good of consumerism

A high level of consumer protection (Art. 38) is a controversial good. According to the European Commission, 'consumer rights' are good because they make it easier for consumers confidently to buy goods and services in other Member States, which in turn will increase the volume of cross-border sales, which in its turn will lead to economic growth, which - it must be presumed - the Commission understands to be good in itself.<sup>73</sup> However, not everyone thinks economic growth is an important good, certainly not if compared to other goods (such as the environment). Moreover, other people believe that while economic growth is in fact very good, consumer protection is bad, because it paternalistically treats grown-ups like children that are unable to take proper care of their own interests. Still others regard a high-level of consumer protection as a form of weaker party protection and, as such, as an important part of the welfare state, which is an important common good. The latter point of view seems to be shared by the CJEU, at least in its interpretation of the Unfair terms directive 1993.<sup>74</sup> However, although arguably the categorical protection of consumers could be regarded as a proxy for corrective justice, understood in a substantive sense, which could perhaps be justified in terms of political principles of justice,<sup>75</sup> the objective of a 'high level' of consumer protection seems to resonate more with certain (controversial) conceptions of the good (the social democratic welfare state, the Christian-democratic social market economy) than with justice, and should, insofar, be avoided as the sole ground for private rights and their interpretation.

## 3. The good of free enterprise

Entrepreneurship and business initiative will flourish in a good business climate.<sup>76</sup> However, both the value of entrepreneurship and that of a good business climate are controversial values. Some people think that capitalism is the root of all evil. Others, on the contrary, believe that a society where free enterprise thrives is not only a better society in itself, for that reason, but is also likely to lead to other goods, e.g. because in such a society individuals will flourish more generally.

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<sup>73</sup> See e.g. the 'Inception impact assessment' concerning a 'proposal on contract rules for online purchase of digital content and tangible goods' published by the European Commission in July 2015 (available at [http://ec.europa.eu/smart-regulation/roadmaps/docs/2015\\_just\\_008\\_contract\\_rules\\_for\\_digital\\_purchases\\_en.pdf](http://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_008_contract_rules_for_digital_purchases_en.pdf)): 'The main objective of the initiative is to contribute to faster growth of the Digital Single Market.' The so-called 'consumer rights' directive introduced hardly any rights, understood as subjective rights with corresponding obligations on (certain) others.

<sup>74</sup> See e.g. CJEU 26 October 2006, C-168/05 *Mostaza Claro*, para. 37; CJEU 4 June 2009, C-243/08 *Pannon GSM*, para. 26, with reference, not to the Charter, but to Art. 3(1)(t) EC (compare now Art. 4(2)(f) TFEU).

<sup>75</sup> See M.W. HESSELINK, 'Unjust conduct in the internal market: on the role of European private law in division of moral responsibility between the EU, its Member States and their citizens' (forthcoming, available at <http://ssrn.com/abstract=2532375>).

<sup>76</sup> Cf. the Worldbank's *Doing Business* reports: [www.doingbusiness.org](http://www.doingbusiness.org).

According to the CJEU's reading of the official Explanation to Art. 16, the freedom to conduct a business 'covers, inter alia, freedom of contract'.<sup>77</sup> However, it is far from clear that the basic liberties recognised by political principles of justice would also include 'freedom of contract'. Perhaps they would, in the limited sense of leaving at least certain contract options open (with a view to giving at least some substance to the right to individual property),<sup>78</sup> but certainly not if read ideologically as *laissez-faire*.<sup>79</sup>

Therefore, not only the freedom to conduct a business but also the freedom of contract read into it, are highly controversial values, especially if read in a *laissez-faire* libertarian way. And, as a result, the application of Art. 16, directly or indirectly, to contractual relationships and other relationships governed by private law, can easily be experienced by the parties (and rightly so) as partisan and therefore illegitimate from the perspective of the principles of justice that should prevail in a pluralist society.

### C. No partisan interpretations

More generally, beyond official constitutional values, interpretations of Charter provisions that are explicitly based on - or can only be justified in terms of - controversial ultimate values should be avoided by courts and other interpreters committed to the kind of neutrality that is required from the state in a pluralist society. Or, to put it in a less 'either/or' and a more practically relevant fashion: interpretations of the Charter are less legitimate (from the perspective of political principles of justice) to the extent that they are more partisan, i.e. based on controversial ultimate values.

Arguably, the *Alemo-Herron* ruling of the CJEU is a case in point. The reading by the Court of the freedom to conduct a business - itself already an expression of a controversial value, as we saw - has a distinctly libertarian flavour to it and seems partisan, in the sense that it is difficult to see how a reading not based on a libertarian understanding of liberty could ever yield such an outcome. Indeed, it could be regarded - admittedly with some exaggeration - as a European *Lochner*.<sup>80</sup>

### D. Deference to rights interpretations with a strong democratic basis

The fact of reasonable pluralism and the fact of the indeterminacy of the Charter together seem to require deference to interpretations with a strong democratic basis made by European and national legislators, of fundamental rights

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<sup>77</sup> In reality the Explanation, on p. 23, states only that Art. 16 is 'based on Court of Justice case-law which has recognised ... freedom of contract ...'.

<sup>78</sup> K.A. KORDANA and D.H. TABACHNICK, 'Rawls and Contract Law', 73 *George Washington Law Review* (2005), 598-632.

<sup>79</sup> See explicitly Rawls n. 30 above, 54. See also PETTIT, n. 35 above, 164, who points to the risks of domination.

<sup>80</sup> See *Lochner v. New York*, 198 U.S. 45 (1905). See also Oliver Wendell Holmes, Jr.'s dissenting opinion: 'This case is decided upon an economic theory which a large part of the country does not entertain. ... But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.'

expressed in the Charter.<sup>81</sup> This means, in particular, that if the fundamental rights issue was already addressed explicitly in an inclusive democratic deliberation and if the interpretation of the right that is now invoked in the case at hand, was explicitly rejected with reciprocal and general reasons that no one could reasonably reject, then a court that sets aside a rule relying on that same interpretation of that fundamental right, seems to risk being justifiably regarded as partisan, given the extraordinary open-endedness of the Charter provision and the burdens of judgment that determine, in part, the fact of reasonable pluralism.

This principle or guideline could be regarded as a political version of the republican argument. It is political because it does not rely on the controversial ultimate value of freedom as non-domination or of men and women as political animals.

By this standard, the *Mangold* ruling, for example, seems doubtful, because in that case the Court set aside the German Bundestag's interpretation of the principle of non-discrimination on the ground of age in favour of its own reading which may not have been guilty of partisanship (except perhaps of Europeanism, which is also a ground that can only be justified by some version of communitarianism), but is still problematic from the perspective of justice because it sets aside a more legitimated reading of a general principle of EU law.<sup>82</sup> (The case was not based on the Charter, indeed pre-Charter, but can easily be imagined to be so.)<sup>83</sup>

Special deference seems to be due when it comes to the interpretation and review of minimum harmonisation directives. This is required not only with a view to the vertical division of labour within the EU, as Bartl and Leone have forcefully argued,<sup>84</sup> but also from the perspective of democratic legitimacy.

Similarly, there seems to be good reason for courts to be cautious in striking down, in the name of the constitution, democratic laws with strong (re)distributive implications, or - what comes down to the same but seen from another perspective - in adopting an interpretation with strongly distributive implications of a fundamental right, either because it radically changes or because it entrenches the existing distribution.<sup>85</sup> *Lochner* is of course the classical example, but *Alemo-Herron* may be caught by this principle as well.

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<sup>81</sup> Compare the ECHR's doctrine of a margin of appreciation, which is also based on the fact of indeterminacy, but does not distinguish between more and less democratic interpretations of rights. Therefore, the interpretative principle proposed here, although akin to the ECHR's doctrine of the margin of appreciation, is probably both more and less demanding.

<sup>82</sup> CJEU 22 November 2005, C-144/04 *Mangold*. In the same sense, F.W. SCHARPF, 'Legitimacy in the multilevel European polity', 1 *European Political Science Review* (2009), 173-204, albeit on slightly a different grounds. Scharpf's argument is based on the empirical assumption that socially shared legitimacy beliefs help to ensure voluntary compliance with undesired rules, while the present argument is moral, i.e. based on considerations of justice.

<sup>83</sup> Nor did the German legislator explicitly consider the EU principle of non-discrimination on the ground of age (how could it? no one knew it existed). However, its explicit aim was to remedy the discrimination of older workers on the labour market.

<sup>84</sup> M. BARTL and C. LEONE, 'Minimum harmonisation after *Alemo-Herron*: the Janus face of EU fundamental rights review', 11 *European Constitutional Law Review* (2015), 140-154.

<sup>85</sup> In the same sense, on republican grounds, SUNSTEIN, n. 36 above.

At the European level, the practice by the Commission of explicitly addressing fundamental rights implications, if undertaken seriously, is particularly relevant in this regard. A mere unsubstantiated claim or loose reassurance will not suffice.<sup>86</sup> What is needed is that the EU legislator addresses more explicitly and in more detail the rights that are potentially affected by a certain piece of legislation, and gives reasons why it considers the particular legislative provisions to be compatible with the rights that might be affected. Then, the Court could check whether the constitutional claim that is raised in the legal dispute was already addressed in the legislative procedure and whether sufficient reasons were given by the democratic legislator.

Very often, however, fundamental rights are not properly addressed, or the entire law of contract has no (robust) democratic basis. Think for example of provisions in civil codes enacted by authoritarian regimes (like the Italian and Portuguese civil codes), or pre-dating the universal franchise, such as the French and Austrian civil codes. Think also of the recently proposed French reform of the law of contract by presidential decree.<sup>87</sup> In those cases, where no reasons have been given or where the addressees cannot even regard themselves as the authors of the law, individual rights can, of course, become very powerful tools for those whose interests and arguments have been disregarded, to raise them in judicial proceedings, including civil cases.

In this regard, it is important to realise, however, that the Charter itself cannot boast a strong democratic basis either. It was not the result of a constitutional moment where 'we the people' of Europe constituted ourselves and gave ourselves rights. On the contrary, where the Constitutional Treaty, that the Charter was part of, was subjected to referendums for ratification, it was rejected by the electorates of several Member States. And the Lisbon Treaty, that officially upgraded the Charter's formal status from ambiguous to official at the same level as the Treaties, suffers from the same lack of strong democratic legitimacy that all previous Treaties have suffered from. To be sure, the market freedoms, that many (especially on the left of the political spectrum) hope the Charter will help counterbalancing, do not enjoy any stronger legitimacy. First, they suffer from the same lack of democratic pedigree as the Charter. Secondly, for the most part they do not seem to amount to the kind of basic freedoms, capabilities or human rights that would justify a constitutional status from the perspective of a political conception of justice.

#### **E. Differentiate between rights, freedoms, and principles**

Courts and other interpreters of the Charter should distinguish between human rights and other rights, freedoms and principles, which have decreasing moral content and cogency, and therefore provide increasing reason for judicial restraint. The generic (and hyper-positivistic) reference to the 'constitutional' or primary-EU-law status of the entire Charter is far too crude.

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<sup>86</sup> See the CESL-proposal, recital 37: 'This Regulation respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union and specifically Articles 16, 38 and 47 thereof ...'.

<sup>87</sup> See 'Projet d'ordonnance portant réforme du droit des contrats, du régime général et de la preuve des obligations' (available at [http://www.justice.gouv.fr/publication/j21\\_projet\\_ord\\_reforme\\_contrats\\_2015.pdf](http://www.justice.gouv.fr/publication/j21_projet_ord_reforme_contrats_2015.pdf)).



Human rights are rights that we all have by virtue of our humanity. These are rights that all human beings have equally, independent from where and when. In other words, human rights are universal. They have a moral core and can therefore be justified with moral reasons, i.e. reasons concerning what we owe each other. This does not mean that human rights necessarily have to be conceived of as natural rights, based on a controversial metaphysical conception of human life.<sup>88</sup> They can also be grounded in a more political conception of the person and of human dignity.<sup>89</sup>

The Universal Declaration of Human Rights (1948) provides an authoritative political statement of human rights.<sup>90</sup> The objective of the European Convention on Human Rights (1950) was to make some of the rights contained in the Universal Declaration enforceable.<sup>91</sup> In other words, the European Convention provides for the local (or rather regional) enforceability of universal, human rights.

In comparison, the basis of the Charter of Fundamental Rights of the European Union (2000) seems to be less universal.<sup>92</sup> As we saw, the opening sentence of the preamble to the Charter does not refer to universal human rights, but to the 'common values' shared by 'the peoples of Europe'. That is not a moral but an essentially ethical basis. The Charter is instrumental to preserving and furthering the common good of the peoples of Europe, rather than the protection of human rights within the territory of the EU Member States. Indeed, from the preamble one could conclude that the 'fundamental rights' of the EU are not human rights at all.

However, most of its provisions nevertheless do in fact contain human rights. Not only can this be derived from the universalist terms in which their scope is stated ('everyone' and 'no one'), but also from the fact, pursuant to the preamble, that the Charter 'reaffirms the rights as they result' from the ECHR (among others). Moreover, according to the official Explanations to Art. 1, on human dignity, '[t]he dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights'. And even more importantly, pursuant to Art. 52 (Scope and interpretation of rights and principles), Para 3, '[i]n so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.' So, the Charter aims to recognise and protect human rights after all.

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<sup>88</sup> See *Déclaration des droits de l'homme et du citoyen* (Paris, 1789), preamble: 'les droits naturels, inaliénables et sacrés de l'Homme'. See also Art. 2 : '[l]es droits naturels et imprescriptibles de l'Homme'.

<sup>89</sup> See RAWLS, n. 40 above, 29; FORST, n. 41 above, ch. 9.

<sup>90</sup> Adopted by the UN General Assembly, New York, 1948. The preamble speaks of the 'inherent dignity' and 'equal and inalienable rights of all members of the human family' as the 'foundation of freedom, justice and peace in the world'. See also Art. 1: 'All human beings are born free and equal in dignity and rights.'

<sup>91</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 1950). As the preamble underlines, the parties to the convention were 'resolved ... to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration'.

<sup>92</sup> Solemn declaration European Parliament, the Council and the Commission (Nice, 2000).



Still, from this it does not follow that all provisions contained in the Charter necessarily aim to recognise and protect human rights. Indeed, the Charter itself consistently distinguishes terminologically between rights, freedoms and principles. Whereas rights can be ‘exercised’ by the right holder (Art 52), principles are not self-executing: they do not on their own create any subjective rights. See explicitly Art. 52, Para 5: ‘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.’ The official Explanation, that has to be taken into account when interpreting the Charter,<sup>93</sup> is even clearer:

‘Paragraph 5 clarifies the distinction between “rights” and “principles” set out in the Charter. According to that distinction, subjective rights shall be respected, whereas principles shall be observed (Article 51(1)). Principles may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers, and by the Member States only when they implement Union law); accordingly, they become significant for the Courts only when such acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union’s institutions or Member States authorities.’

From the perspective of the political principles of justice that should guide the application and interpretation of the Charter provisions, it is highly relevant that neither Art. 16, on the freedom to conduct a business, nor Art. 38, on the principle of high-level consumer protection, contain or recognise any human rights.

Although the Explanation refers to the freedom to conduct a business as ‘this right’,<sup>94</sup> which suggests that Art. 16 is meant to contain a subjective right, with certain corresponding obligations, for the state (EU and MS) and perhaps even for other private persons (natural and legal),<sup>95</sup> nothing in the text of the Charter or the Explanation suggests that this right is also a human right.<sup>96</sup> On the

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<sup>93</sup> Art. 6(1) subpara. 3 TEU and Art. 52(7) CFREU. Cf. *Åkerberg Fransson*, n. 55 above, para. 20.

<sup>94</sup> *Explanation*, p. 23.

<sup>95</sup> In the constitutions of the Member States that have recognised a freedom to conduct a business, the freedom does not seem to amount to a subjective right either, and certainly not the right (against whom?) to conduct a particular business in a particular way. Compare, in this regard, Art. 41 Italian Constitution; Art. 38 Spanish Constitution; and Art. 61 Portuguese Constitution.

<sup>96</sup> If the freedom to conduct a business does in fact constitute a right, with corresponding duties, then still an interference with that right has to be established (cf. Rawls, n. 30 above, 177, on the ‘triadic structure of liberties’). So, who was interfering with the plaintiff’s ‘right’ in the *Alemo* case? It is important in this regard to remember that contract law is a ‘permissive law’: no one is obliged in principle to conclude any contracts (there are notable exceptions, especially where the provision of utilities and other ‘essential services’ have been privatised). Therefore, the enforcement of a voluntarily concluded contract does not in principle constitute an interference with someone’s liberty. Of course, there is the risk that the contract was not really freely concluded. That is why the binding force is subject to the substantive control of freedom of contract including freedom from contract. However, in the *Alemo* case none of this seems to have happened. Parkwood Leasure’s freedom from contract never seems to have been at stake: it was never obliged to take over the formerly public undertaking. It could easily and freely have

contrary, if indeed ‘the dignity of the human person is part of the substance of the rights laid down in this Charter’, as the Explanation points out, then it is difficult to see how Art. 16 can lay down such a right. In any case, the freedom to conduct a business cannot constitute or lay down a human right, at least not insofar as it extends not only to natural persons, but also to legal persons. Or, to put it differently, Art. 16 either contains a human right, i.e. a universal right (which exists in all times and places) to conduct a business, but then a private limited company like Parkwood Leasure Ltd in *Alemo-Herron* cannot be the holder of such a right (at most its shareholders could, if they are natural persons), or it does not, but then its status and normative weight is (or should be) much lower.

It is also important to point out, in this regard, that according to the Explanation, ‘none of the rights laid down in this Charter may be used to harm the dignity of another person’.<sup>97</sup> This means that even if Art. 16 did contain a right for legal persons to conduct a business that includes a right to freedom of contract, then still that freedom of contract cannot be used to harm the dignity of another person. In other words, the freedom of contract for businesses, that is recognised by the Charter according to the Explanation and the CJEU in *Alemo-Herron*, is intrinsically limited in a way quite similar to the way in which freedom of contract was limited by the German Bundesverfassungsgericht in the *Bürgerschaft* case: the private autonomy of the other party cannot be understood in a merely formal sense, because that would in fact amount to heteronomy (*Fremdbestimmung*) which is incompatible with the right to human dignity.<sup>98</sup> Therefore, very concretely Art. 16 may not be interpreted and applied in a way that harms the dignity of Mr Alemo-Herron and the other employees of Parkwood Leasure Ltd.

In sum, beyond ideology it is difficult to see how the freedom to conduct a business can be turned into a right to conduct a business, which in turn includes a right to freedom of contract. And, as said, in the pluralistic society that the European Union is, justice requires that the CJEU (and national courts) refrain from interpreting provisions in the Charter (or the Treaties, for that matter) in a way that can only be justified in terms of a controversial ideology.

Art 38 of the Charter clearly does not establish a right to a high-level of consumer protection, with corresponding duties on others (e.g. the EU, the Member States, professional sellers and service providers). This follows not only from the wording of the Article, which is not phrased as a right, but also from the fact that, as said, Art. 52(5) makes clear that ‘principles’ have no direct effect. Therefore, it does not follow from the principle of a high level of consumer protection that a particular consumer has a right to a certain type of consumer protection in a particular (type of) contract against a particular seller or service provider.

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rejected the terms on which the take-over was offered. The fact that the available range of terms that could be offered to it was limited by law, in this case national law transposing an EU directive, certainly did not limit its freedom from contract, which arguably is indeed an important aspect of private autonomy (and of freedom of contract), also in a political (‘thin’) understanding.

<sup>97</sup> P. 17.

<sup>98</sup> See n. 22 above.

One interpretation that could come close, in practice, to a right to consumer protection in most cases, would be one where the principle would be regarded as a maximising principle. Then, of course, from the outset, any balancing against other interests and values would be futile, as long as an interpretation of the EU directive (or regulation) that would protect consumers even more would be still available. However, as said, there does not seem to exist any reason in justice why the objective of consumer protection should trump all other considerations.

## V. Conclusion

In conclusion, three main justice dimensions of the relationship between fundamental rights and private law stand out.

First, a partisan interpretation of the Charter and its horizontal effects in terms of controversial values is difficult to match with the reasonable pluralism of worldviews that characterises the EU. Rather, the interpretation of fundamental rights will have to be guided by the demands of a political conception of justice that is acceptable to people adhering to divergent understandings of individual and common good.

Secondly, courts and other interpreters of the Charter must distinguish between different fundamental rights, freedoms and principles having different moral content and cogency. The generic and hyper-positivist reference to the 'constitutional' or primary-EU-law status of the entire Charter is far too crude. In particular, human rights, that every person equally has because of their humanity, should have much stronger force than merely instrumental freedoms and principles.

Thirdly, the facts of the reasonable pluralism of worldviews and of the indeterminacy of the Charter and its horizontal effects together call for judicial restraint.<sup>99</sup> Because the fundamental rights, as formulated in the Charter, strongly underdetermine private law rules and outcomes of civil disputes, courts and other interpreters should in principle be deferential in cases where the reasons and interest raised by a constitutional right claim has already been addressed adequately in a robust democratic process.

From the perspective of justice in each of these dimension, the CJEU probably has been too activist in some recent private law cases such as *Mangold* and, in particular, *Alemo-Herron*. Note that the arguments presented here differs from those arguing that private law should be kept pure.<sup>100</sup> The present argument does not derive from the asserted autonomy of private law with its own immanent values, especially private autonomy, but from moral justifiability, chiefly in terms of democratic legitimacy, in a context of value pluralism and moral and constitutional indeterminacy.

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<sup>99</sup> More positive with regard to the 'deliberative potential' of fundamental rights in the decision of hard case by courts, C. MAK, 'Judges in Utopia - Fundamental Rights as Constitutive Elements of a European Private Legal Culture', *Amsterdam Law School Research Paper No. 2012-89* (available at <http://ssrn.com/abstract=2127137>).

<sup>100</sup> See O.O. CHEREDNYCHENKO, 'Subordinating contract Law to fundamental rights: towards a major breakthrough or towards walking in circles?', in S. Grundmann (ed), *Constitutional values and European contract law* (Alphen a/d Rijn: Kluwer Law International, 2008), 35-60.