EUROPEAN LAW JOURNAL
Review of European Law in Context

European Law Journal, Vol. 21, No. 5, September 2015, pp. 657–679.

The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality

Eleni Frantziou

Abstract: *This article analyses the horizontal effect of the Charter of Fundamental Rights of the European Union. Horizontal effect has been an integral part of the Union's application of fundamental rights, especially in the field of equality. However, the codification of fundamental rights in the Charter raises important questions as to how horizontal effect will continue to apply in the EU, particularly in the aftermath of the Court's reticent rulings in cases such as* Dominguez *and* Association de Médiation Sociale*. This article argues that the emphasis on prior approaches to horizontal effect in recent rulings fails to address the profound constitutional issues that the horizontal effect of a fundamental rights catalogue raises, which concern the role of private responsibility within the developing constitutional order of the European Union. It therefore calls for a more systematically theorised approach towards the horizontal application of fundamental rights under the Charter framework.*

I Introduction

Just over 5 years ago, the Charter of Fundamental Rights of the European Union acquired legally binding force.[1] Its provisions include the rights enshrined in the ECHR, a broad set of employment rights, as well as EU citizens' rights, to mention but a few. Thus, the Charter appears to confirm the 'fundamentally constitutive status' of these rights in the EU legal order and can play a constructive role in their further development.[2] The Charter's interpretation also raises several questions regarding the future of the Union's fundamental rights regime, which are of 'profound constitutional complexity'.[3] Whether and, if so, to what extent the Charter's provisions will affect private parties through the application of the horizontality doctrine is one such question. The horizontal effect of a bill of rights can impact how individuals live with and behave towards each other in a particular

[1] Together with the entry into force of the Treaty of Lisbon, on 1 December 2009.
[2] C. Thornhill, 'The Formation of a European Constitution: An Approach from Historical-Political Sociology', (2012) 8 *International Journal of Law in Context* 354, 382.
[3] P. Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question', (2002) 39 *Common Market Law Review* 945, 946.

community, and can greatly influence the way we perceive the role of private actors in the application of fundamental rights standards. Despite the importance of the issues it raises though, the horizontality debate in EU law has, until now, mainly focused on the status of particular rights (as directive based or treaty based) and on the limits of the Charter's scope under Article 51 thereof.[4] This paper argues that, while these considerations may be important in technically analysing the horizontality doctrine, they are not instructive in respect of the first-order reasons that actually justify its application.

The ascription of binding effect to the Union's first comprehensive bill of rights, even if it is one that merely enhances the visibility of existing rights,[5] has 'clear constitutional overtones'.[6] It is necessarily linked with debates regarding the Union's democracy deficit, its future and the relationship between the EU and the Member States in respect of fundamental rights issues. Discussing the Charter's horizontal effect thus raises questions that cannot be answered either by simply making reference to prior case law or by invoking the Charter's scope as an absolute benchmark. A much more forward-looking assessment is necessary: rather than making abstract references to 'the Charter' at large, it is essential to discuss the content of its provisions and the potential effects of their horizontal application. In addition, in granting horizontal effect to any or all of these provisions, an important question of principle must be tackled, namely whether horizontal effect is compatible with the values that the Charter is intended to advance within the Union and the role it plays in its evolving constitutional framework.

Of course, it is impossible to discuss these complex issues exhaustively in one paper, so it is necessary to set out some of its limitations from the start. This article takes on a reconstructive exercise: it analyses the Court's case law from the angle of horizontal effect qua tool in constitutional rights adjudication, rather than looking at horizontal effect qua EU doctrine, strictly construed and detached from conceptual underpinnings. It thus seeks, primarily, to identify the shortcomings of the Court's practice in this field from the perspective of rights protection at the supranational level. Secondly, it seeks to highlight the important possibilities for rights protection that a more thorough assessment of horizontality can give rise to. These are of deep value to the individuals claiming them: they concern important aspects of their lives, such as work, family and personal development. The horizontal effect of the Charter is inextricably linked with the extent to which the EU affects these questions. Although the article does not prescribe a single horizontality formula to address all of them, it seeks to steer the debate in their direction, so that they can start to feature more prominently in the reasoning underlying the horizontality doctrine in the field of fundamental rights in the future.

The article begins by illustrating why the current debates regarding the text and scope of the Charter are insufficient in tackling the horizontality question (Section II).

---

[4] See, for example, Case C-176/12, *Association de Médiation Sociale v. Hichem Laboubi* (hereafter 'AMS'), judgment of 15 January 2014, nyr; Opinion of Advocate General Trstenjak, delivered on 8 September 2011 in Case C-282/10, *Dominguez v. Centre Informatique Du Centre Ouest Atlantique*, judgment of 24 January 2012, nyr.

[5] House of Lords EU Select Committee, 'The Treaty of Lisbon: An Impact Assessment' (HL Paper 62, August 2007) paras 5.37–5.41.

[6] G. De Burca and B. Aschenbrenner, 'The Development of European Constitutionalism and the Role of the EU Charter of Fundamental Rights', (2003) 9 *Columbia Journal of European Law* 355, 372.

It then discusses why moving away from the old EU horizontality framework is necessary in the Charter era (Sections III and IV). Finally, before concluding, it goes on to set out some of the challenges that need to be addressed in order to develop a more coherent horizontal effect model for fundamental rights in the EU, which are both constitutional and conceptual (Section V).

II The Charter and Horizontal Effect: Text and Scope

As is well known, EU rights derived from primary law have traditionally been capable of horizontal application.[7] 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'.[8] In principle, therefore, it must be capable of being invoked horizontally, where a particular provision fulfils the conditions for direct effect.[9] However, Article 51(1) EUCFR states that the Charter applies to the 'EU institutions and to the Member States' when they are implementing EU law, but makes no mention of private parties. For this reason, it has been argued that it cannot create any horizontal effects.[10] The crux of this argument is that as Article 51(1) identifies a specific set of addressees, it would be impossible for the Court to apply it to interindividual disputes without acting beyond the reach of its jurisdiction.[11] This would risk extending the scope of EU law via the Charter, contrary to Article 51(2) thereof.[12]

The objections to horizontality relating to this provision are nonetheless surmountable.[13] First of all, Article 51 does not specifically exclude horizontal effect. Further, 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. Already in *Defrenne*, the Court was unimpressed by 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 had famously 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 in the action of public authorities, but also

[7] Case 43/75, *Defrenne v. Sabena* (No 2) [1976] ECR 455.

[8] Article 6(1) TEU.

[9] 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.

[10] Trstenjak, n 4 *supra*, paras 80–83; K. Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights', (2012) 8 *European Constitutional Law Review* 375, footnote 11. Cf C. Ladenburger, *FIDE Conference 2012 Institutional Report*, Brussels 2012, available at http://www.fide2012.eu/index.php?doc_id=88, accessed 5/03/2014, 34–35.

[11] Trstenjak, n 4 *supra*, paras 80, 128.

[12] *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'.

[13] See by analogy, P. Craig, 'Directives, Direct Effect, Indirect Effect and the Construction of National Legislation', (1997) 22 *European Law Review* 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. See *AMS*, n 4 *supra*.

extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals.[14]

This approach is relevant in the Charter context, as it is supported by clear references to the duties of individuals and of the community at large in its preamble, to the effect that 'enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations'.[15] Similarly, it would be difficult to imagine some of the Charter's provisions that reproduce horizontally effective treaty rights, for instance 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.[16] Indeed, to the extent that the Charter applies within the scope of EU law, as the Court confirmed in its ruling in *Fransson*, it is inevitable that certain horizontal situations—a core part of EU law to date—will come within it as well.[17]

Additionally, there are several Charter provisions that either directly or implicitly extend to private conduct. Many of the protections enshrined in Titles I–IV of the Charter[18] are phrased in a manner that guarantees minimum individual rights without specifying that they apply to public authorities only. For example, the rights to human dignity[19] and non-discrimination[20] are phrased in a manner that suggests a wide-ranging application.[21] Further, unlike Article 8 of the European Convention, which is limited to the actions of public authorities, the rights to privacy and the protection of private data, enshrined in Articles 7 and 8 of the Charter respectively, are not restricted to such action and, in conjunction with secondary legislation, do indeed create obligations for private parties.[22] Finally, provisions such as the protection of human integrity,[23] the prohibition of slavery and forced labour,[24] the rights of the child[25] and the rights that relate to the employment sphere, such as equality between women and men[26] as well as employee representation and rights at work,[27]

[14] *Defrenne II*, n 7 *supra*, paras 31–39; see also Case C-438/05, *The international Trasport Workers' Federation & The Finnish Seamen's Union v. Viking Line. ABP & Oü Viking Line Eesti* [2007] ECR I-10779, paras 58–59.

[15] Charter Preamble, recital 6.

[16] This is now confirmed by the Court's judgment in *AMS*, n 4 *supra*, 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'.

[17] See Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, judgment of 26 February 2013, nyr, para 44.

[18] These are, respectively, entitled: Dignity, Freedoms, Equality and Solidarity.

[19] Article 1 EUCFR.

[20] Article 21 EUCFR.

[21] See OJ 303/17, Explanations to the Charter of Fundamental Rights, 17 (Art 1), 24 (Article 21, para 2).

[22] See Case C-131/12, *Google Spain, SL, Google Inc v. Agencia Espanola de Proteccion de Datos*, judgment of 13 May 2014, nyr.

[23] Article 3 EUCFR and, particularly, Article 3(2) EUCFR concerning the fields of medicine and biology.

[24] Article 5 EUCFR. The explanations confirm that Article 5 was intended to regulate private as well as public conduct, at 18–19, most notably in the field of human trafficking.

[25] Article 24 EUCFR and, particularly, Article 24(2), which concerns action 'taken by public authorities or private institutions'.

[26] Article 23 EUCFR. Notably, this provision relates to 'all areas, including employment, work and pay' and forms part of Title III Equality, rather than Title IV Solidarity.

[27] 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 4 *supra*, para 49.

expressly include the actions of private parties at least in addition to the obligations they may create for Member States and Union institutions.

It follows that the text of Article 51 of the Charter, which regulates its scope of application, has limited interpretative value in respect of horizontality. Overall, the Charter is phrased in a cryptic way, giving rise to arguments both denying and supporting its horizontal effect. A dynamic interpretation is therefore required in order to analyse it meaningfully. Indeed, such an interpretation is needed not only in order to make sense of the textual difficulties identified earlier but also in order to reconcile the Charter analysis with the EU horizontality doctrine that had been developed prior to the Charter's entry into force.

III Towards a Historically Informed Understanding of Horizontal Effect in EU Fundamental Rights Law

In the EU context, fundamental rights have not been defined by the vertical/horizontal distinction but, rather, by their use by the Court of Justice as tools for integration via all possible avenues: direct and indirect, public and private. Although, initially, only few treaty provisions, such as the regulation of competition, were intended to apply to private parties,[28] the Court quickly expanded the concept of horizontal effect in its case law.[29] Having founded the enforcement of EU law against Member States on a wide-ranging culture of directly effective rights for individuals, the CJEU was eager to also recognise a corresponding set of EU law duties. In *Van Gend en Loos*, the Court had already used a very telling pairing, that of rights and obligations.[30] It was not long before the jargon of expectations and, crucially, equality and the balancing of competing interests were transposed to the fundamental rights domain in *Defrenne*.[31] Indeed, horizontal claims such as those between employer/employee, job seeker/job giver, service provider/service recipient and so on played an important role in the establishment of the internal market and fell well within the scope of the Treaty and the Union's regulatory framework. Thus, horizontal fundamental rights, equally structural in EU law as vertical ones,[32] have certainly played an important part in implicating the individual in the Union's activities not only as a bearer of rights but also as an actor of whom specific types of conduct are legally required.

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 this issue is tackled today has implications for legal certainty and the conceptual coherence of the EU fundamental rights regime. It is therefore important not to treat this as a new problem.[33] Not only had EU law developed a horizontality doctrine prior to the entry

[28] 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.

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

[30] *Van Gend En Loos,* n 9 *supra*.

[31] *Defrenne II*, n 7 *supra*.

[32] As regard the structural role of fundamental rights in polity building, see G. Souillac, 'From Global Norms to Local Change: Theoretical Perspectives on the Promotion of Human Rights in Societies in Transition' in S. Horowitz and A. Schnabel (eds), *Human Rights and Societies in Transition: Causes, Consequences, Responses* (United Nations University Press, 2004), at 79.

[33] Opinion of A.G. Cruz Villalón, delivered on 18 July 2013 in Case C-176/12, *Association de Médiation Sociale v. Hichem Laboubi*, judgment of 15 January 2014, not yet reported, para 34. See *Defrenne II,* n 7 *supra*, para 39.

into force of the Charter, but that doctrine already suffered from significant conceptual problems, which need to be overcome in order to move forward in the Charter era.

One of the issues that pervade the horizontality debate in the EU, and one that needs to be addressed at the outset is the concept of horizontal effect itself. There is no unitary definition of horizontal effect.[34] However, three levels of horizontality can generally be identified. Horizontal effect can involve the imposition of direct fundamental rights obligations on private parties ('direct effect'), the indirect application of fundamental rights to interindividual disputes through judicial interpretation ('indirect effect') or the de facto postulation of obligations to private parties through obligations formally imposed on the state ('state-mediated effect' or, to use a term more familiar in this context, 'positive obligations').[35] Direct horizontal effect offers the possibility of bringing a fundamental rights claim under a provision of a constitutional statute against another private party.[36] Indirect effect and positive obligations do not give rise to such claims. Indirect effect enters horizontal disputes through the development of legal principles applied by the Courts so that a law applicable to private parties is interpreted in the manner that is most favourable to fundamental rights.[37] When it comes to positive obligations, these do not bind individuals as such. The right is invoked against the state, even though its enforcement inevitably affects a horizontal relationship.[38]

For example, in the context of the right not to be discriminated against on grounds of health status, such as being HIV positive, the following claims might be available: (1) against an employer, requiring that the latter should observe the right and/or provide adequate compensation (*direct effect*); (2) in judicial review, requiring that a particular statute or legal principle—for instance, a law regarding health and safety at work or the principle of contractual freedom—be interpreted in a manner that accommodates the right not to be discriminated against on grounds of health status (*indirect effect*); and (3) against the state, asking for compensation for failure to ensure that the right to non-discrimination is observed by private parties, for instance, by establishing thorough checks or putting in place legislation prohibiting practices that discriminate on grounds of health status (*positive obligations*).[39] These three manifestations of horizontality are complementary. This is not to say that all fundamental rights must be horizontally applied in all three ways at any one time. Rather, each of these forms of horizontal effect serves a distinct aspect of the complex legal relations that funda-

[34] 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) *Maastricht Journal* 108, 110.

[35] R. Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2002), at 355–356. Further subcategories can be discussed, for instance the notion of exclusionary effect, and strong and weak forms of indirect horizontality, among others. 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.

[36] Or, equally, of invoking such a provision as a defence in an interindividual dispute.

[37] I avoid the use of the term 'private law' here as in some contexts it can be associated with particular types of legislation and not with all law directed at non-state actors, which we are concerned with here.

[38] See C. O'Cinneide and M. Stelzer, 'Horizontal effect/state action', in M. Tushnet, T. Fleiner and C. Saunders (eds), *Routledge Handbook of Constitutional Law* (Routledge, 2013), at 117.

[39] This example is inspired by the set of facts that gave rise to a real case: ECtHR, *IB v. Greece*, Appl. No. 552/10, judgment of 3 October 2013.

mental rights give rise to.[40] Direct horizontality binds individuals, indirect horizontality binds courts in their interpretation of the law and positive obligations bind state authorities.[41] The mode in which a right acquires horizontal effect depends both on the nature of the right in question, that is, whether it is understood as applicable to private disputes as well as to state–individual disputes and on the background against which a particular case is judged.

The purpose of this article is not, of course, broadly to describe different horizontality claims. The bearing for EU law of this short, perhaps oversimplified, overview of fundamental rights horizontality is the following. Despite in principle offering recourse to direct and indirect horizontal effect, as well as a type of positive obligations, EU law to date has largely failed to reflect the different role that these levels of horizontality play in adjudication. For a long time, the horizontal effect narrative in the case law has been dominated by a stark discrepancy between the horizontal application of fundamental rights enshrined in directives and those enshrined in Treaty articles. It is trite EU law that, while Treaty-based rights could enjoy direct effect,[42] 'a directive may not of itself impose obligations on an individual and [cannot] be relied upon as such against such a person'.[43] However, as Craig rightly notes, the policy rationale behind this distinction is not self-evident.[44] This is especially true in respect of the application of horizontal effect to fundamental rights.

Indeed, as the fundamental rights based on the Treaty were generally limited and directives were the EU's main regulatory mechanism for the harmonisation of the free movement of workers, including several aspects of employment law and equality, the source-based application of horizontality became a particularly problematic rule. Firstly, it excluded a number of direct fundamental rights claims from the Court's jurisdiction, generally without providing solid constitutional justifications or reasoning.[45] Secondly, in order to avoid making unfortunate distinctions in the first place, the Court sought ways to circumvent the non-horizontality issue, thus compromising on legal certainty.[46]

More specifically, in many of the cases brought before it, the Court chose to grant direct horizontal effect by construing the obligation in question either as flowing from the Treaty[47] or as applying to a state, rather than to a private party, through an

[40] Alexy, n 35 *supra*, 485.

[41] *Ibid*.

[42] *Defrenne II*, n 7 *supra*, para 39.

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

[44] P. Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions', (2009) 34 *European Law Review* 349, 355.

[45] This is of course connected with important features of EU law, particularly the idea that fundamental rights as general principles should give rise to private law liability (especially damages): T. Tridimas, *The General Principles of EU Law* (Oxford University Press, 2nd ed, 2006), at 29–35. It also stems from an important deficiency of EU law, which has not appropriately distinguished the application of public law from that of private law and indeed between different types of private law. This is particularly clear in relation to the non-discrimination principle, which has continuously been construed as part of the market-building process: H. Micklitz, 'The Visible Hand of European Regulatory Private Law—The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation', (2009) 28(1) *Yearbook of European Law* 3, 21–22, 44.

[46] Craig, n 13 *supra*, 527.

[47] See, for example, Case C-281/98, *Angonese v. Cassa di Risparmio di Bolzano* [2000] ECR I-04139.

inflated notion of public bodies.[48] Further, in recent years, it has occasionally and rather inconsistently resorted to the use of the 'general principles' mechanism in order to grant direct horizontal effect in non-discrimination cases involving the Equality Directive.[49] However, the application of this mechanism has been so *ad hoc* that it is difficult to extrapolate from it to make up a clear horizontality exception for all fundamental rights questions.[50]

Additionally, 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.[51] Yet 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,[52] 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.[53] Substantively, both of these provisions are manifestations of the right to equal treatment. Although it may be possible to distinguish amongst different aspects of equality, and indeed amongst 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 to the status of the party on whom the obligation might fall.[54]

Positive obligations discourse has also been greatly absent from the Court's case law in this field, in stark contrast to the ECtHR's position.[55] The Court has mostly equated state-mediated forms of horizontality to state liability under the *Francovich* doctrine, in cases where both direct and indirect horizontal effect had failed.[56] Indeed,

---

[48] 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, *Carmela Carratù v. Poste Italiane SpA*, judgment of 12 December 2013, nyr.

[49] Case C-144/04, *Mangold v. Helm* [2005] ECR I-9981; Case C-555/07, *Kücükdeveci v. Swedex* [2010] IRLR 346. The mechanism has not been followed in *Dominguez*, n 4 *supra*, or, more strikingly, in *AMS*, n 4 *supra*.

[50] See for instance the recent case law in *Dominguez*, n 4 *supra*, and *AMS*, n 4 *supra* and further discussed in Section IV infra.

[51] That is, an obligation to interpret national law consistently with EU law. 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; 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, para 29.

[52] Eg *Defrenne II*, n 7 *supra*, para 39.

[53] Eg 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 incorrect 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 as a matter of principle in the field of fundamental rights.

[54] See Opinion of Advocate General Lenz, delivered on 9 February 1994 in Case C-91/92 *Faccini Dori v. Recreb* [1994] ECR 1–3325, para 51; Opinion of Advocate General Jacobs, delivered on 27 January 1994 in Case C-316/93, *Vaneetveld v. SA Le Foyer* [1994] ECR 1-763, para 29; Craig (n 13) 536–537.

[55] Indeed, the ECtHR has substantially expanded the reach of the positive obligations doctrine: see, for a recent example, *IB v. Greece*, n 39 *supra*.

[56] Case C-6/90, *Francovich and Bonifaci v. Italy* [1991] ECR I-5375, paras 31–35; for a recent example of this assessment, see *AMS*, n 4 *supra*, para 50.

EU case law to date has not delineated the scope of the EU and the Member States' liability in respect of fundamental rights, or distinguished it from the obligations of private parties, as a matter of principle.[57] Guidance is needed though as to when positive obligations of the state as opposed to individual obligations arise, at least in the field of fundamental rights, where breaches can involve multiple actors, both private and public.[58]

It follows that, overtime, 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 for which the Union observes it. 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, its 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 secondary law, indirect effect/state liability were applied, with no further questions asked.

The treatment of indirect effect and positive obligations as fall-back measures,[59] applicable only when direct effect could not be established, rendered the EU horizontality doctrine particularly one dimensional, and resulted in a failure to discuss the appropriateness of the remedies offered by each of its different expressions, as alternatives.[60] Furthermore, the different rules developed overtime in the case law were applied erratically in the fundamental rights sphere, so that it is difficult to map out a consistent judicial practice in this field. Although some general themes can be identified, these are neither conducive to legal certainty nor revealing of a clear agenda for the horizontal effect of fundamental rights in Union law. [61]

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 resounded in the *Defrenne* approach. Overall, the doctrine appears to have been shaped so as to ensure the observance of Union law in all of its fields of application, safeguarding its effectiveness, uniformity and primacy.[62] It did not however make specific provision for fundamental rights issues qua questions of constitutional character. An unsatisfactory

---

[57] The View of Advocate General Jääskinen, delivered on 22 September 2010 in Case 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, delivered on 11 July 2002 in Case C-112/00, *Schmidberger v. Austria* [2003] ECR I-5659, para 102.

[58] 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, 16, 19–21.

[59] *Marleasing*, n 51 *supra*, para 8; Case C-213/89, *The Queen v. Secretary of State for Transport, Ex Parte Factortame Limited and Others* [1990] ECR I-2433, para 19.

[60] T. Tridimas, 'Horizontal Direct Effect of Directives: a Missed Opportunity?', (1994) 19 *European Law Review* 621, 635–636.

[61] Craig (n 13) 527; See also: T. Tridimas, 'Black White and Shades of Grey: Horizontality of Directives Revisited', (2002) 21 *Yearbook of European Law* 327, 327; Editorial note, 'Horizontal Direct Effect—A Law of Diminishing Coherence?', (2006) 43 *Common Market Law Review* 1, 2.

[62] N. Ferreira and others, '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 1 (Cambridge University Press, 2010), at 33–34; *Vaneetveld Opinion*, n 54 *supra*, 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 *European Law Review* 329.

and much-criticised state of affairs therefore preceded the Charter's entry into force.[63] Indeed, there was a significant mismatch between the horizontal effect doctrine described earlier—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.

This application of horizontal effect to fundamental rights can be contrasted to the constitutionalising effects of the Charter, which extend to all of its provisions, irrespective of whether they are Treaty-based or directive-based.[64] Further, the adjudication of horizontal fundamental rights raises important substantive concerns. Disagreement regarding the application of these rights is sensitive in light of the central role that fundamental rights play in post-war EU constitutional orders.[65] Additionally, their impact on the parties involved, who are often in precarious positions, requires particularly careful assessment.[66] The pre-Lisbon horizontality doctrine does not give rise to an adequate conceptual framework, which can serve as a starting point for addressing these issues with clarity as they start resurfacing in the Charter era.

IV Horizontal Effect and the Charter: Old Problems, (No) New Responses?

The Charter's primary law status heightens the constitutional value of rights in the EU legal order.[67] It codifies the fundamental rights commitments of an EU polity and creates the potential of invoking entitlements premised on an, at least minimally, common conception of the Union's objectives and values.[68] It thus goes beyond mere aspirations for a common constitutional framework and creates a concrete basis for the establishment of a set of rights as conditions upon which the EU political community, comprising supranational institutions, national structures and private parties, is founded. As such, as Advocate General Cruz Villalón put it in *Prigge*, there is now the question whether the source-based case law of the pre-Lisbon years must be reassessed altogether in light of the fact that fundamental rights have 'been enshrined in the "Lisbon Charter" and it is therefore from this source that the possibilities and limitations of [their] usefulness must flow'.[69]

---

[63] See, illustratively: Craig (n 13); Tridimas (n 60); 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 *European Public Law* 79; R. Mastroianni, 'On the Distinction Between Vertical and Horizontal Effects of Community Directives: What Role for the Principle of Equality?', (1999) 5 *European Public Law* 417.

[64] Opinion of Advocate General Cruz Villalón, delivered on 19 May 2011, in Case C-447/09, *Prigge and Others v. Deutsche Lufthansa*, judgment of 13 September 2011, nyr, para 26; See also: J. Kokott and C. Sobotta, 'The Charter of Fundamental Rights of the European Union After Lisbon', EUI Working Paper 2010/6, 6, available at http://cadmus.eui.eu/handle/1814/15208 [last accessed 29 June 2014].

[65] Most strikingly of course, in Germany: *Re Wünsche Handelsgesellschaft*, 2 BvR 197/83, 22 October 1986 (Solange II); and in the UK: *Thoburn v. Sunderland City Council* [2002] EWHC 195 (Admin), para 62 (per Laws LJ).

[66] It is noteworthy that vulnerability is increasingly a factor that is considered relevant in human rights law and, especially, in the ECtHR context, on which EU law is heavily reliant: See L. Peroni and A. Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law', (2013) 11 *International Journal of Constitutional Law* 1056.

[67] Kokott and Sobotta, n 64 *supra*, 6.

[68] The Charter's preamble makes clear, for instance, that the Charter is based on the values of dignity, freedom, equality and solidarity and the principles of democracy and the rule of law.

[69] *Prigge Opinion,* n 64 *supra*, para 26.

So far, the Court of Justice has not tackled this question. Instead, it has revived the principles set out in its prior case law, risking an extension of its deficiencies to the Charter era. This was made particularly clear in the *Association de Médiation Sociale* ('AMS') judgment.[70] The case 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.[71] In implementing this directive, France had excluded employees working under certain types of contracts, including accompanied employment contracts, 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 mainly concerned the horizontal applicability of Article 27 as expressed in Directive 2002/14.

Rather than discussing the purpose of Article 27, the scope of the protection it actually affords, and the reasons for its incorporation in the EU Charter, the Court restated its case law on the non-horizontality of directives and noted that indirect effect (qua consistent interpretation) was inapplicable in this case, as it would amount to a contra legem reading of national law.[72] It then confined its interpretation to a cursory reading of the Charter's text, finding that this provision did not create a right specific enough to be directly invoked as such in a dispute between private parties.[73] The Court did not go on to discuss the Charter's potential for horizontal applicability in the future, limiting its assessment to a discussion of the relevant directive.[74]

However, this approach prevented it from embarking on a much-needed interpretation of the content of the right in question, building on its social and legal context and the kind of goals it serves.[75] The Court's reasoning is unconvincing in the absence of such a discussion, especially when compared with judgments in which horizontality has previously been granted, such as *Mangold* and *Kücükdeveci*.[76] There were substantial similarities between these cases, which seemed to be pushed to one side,

[70] *AMS*, cited n 4 *supra*. 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 *European Constitutional Law Review* 332; N. Lazzerini, '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 *Common Market Law Review* 907; C. Murphy, 'Using the EU Charter of Fundamental Rights Against Private Parties after Association De Médiation Sociale', (2014) *European Human Rights Law Review* 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).

[71] OJ L 80/29, 23.3.2002, 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, Article 1 (1).

[72] *AMS*, n 4 *supra*, paras 39–40.

[73] *Ibid*, para 51.

[74] It must however be noted that the Court did leave the door open for horizontal effect in respect of Article 21: *AMS*, n 4 *supra*, para 47.

[75] Frantziou 'Case C-176/12', n 70 *supra*, 346–347.

[76] See *AMS*, n 4 *supra*, especially paras 39–49.

adding to legal uncertainty in this field. Further, the singling out of Article 27 and its specific expression in Directive 2002/14 is an alarming development in respect of the Charter's horizontality. Fundamental rights claims 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, as well as the vulnerability of those claiming them and equality of treatment, in this case between different groups of workers.[77] The case thus provides an excellent illustration of 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 diachronically significant contestations of authority. 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 its specificities, are puzzling.[78]

At the same time, the Court's conservative analysis of horizontality is not underpinned by a conceptual commitment to applying the Charter vertically, that is, to Member States and Union institutions alone. Rather, the Court is open to the creation of obligations in practice for (at least some) private parties, such as powerful search engine operators, in respect of (some) Charter rights, such as privacy.[79] Horizontal obligations flowing from the Charter are thus still attributed to private entities in the case law, even though the horizontality question is not openly examined. This is problematic: it can lead to an informal and unpredictable horizontality model, which is an important legal hurdle for private parties on whom obligations are imposed, while in turn offers little more than an uncertain prospect for parties seeking to have those obligations imposed on others. This is all the more true to the extent that the cases in which the Court makes reference to horizontal effect remain the exception to a rule of altogether avoiding discussions of this issue.[80]

To summarise, it is clear that, in assessing the Charter's horizontality, it is important to have regard to the way in which EU law has developed. Detached from this context, it is unfruitful to discuss either the arguments in favour of horizontal effect today or the arguments against it, as the rich history of horizontality in EU law inevitably affects them both. In the absence of horizontal effect for the Charter, a chasm in the degree of protection afforded by the Court to individuals pre-Lisbon and post-Lisbon would be created. Striving for coherence in developing the EU fundamental rights regime would be beneficial: if fundamental rights are to remain one of the building blocks of the developing EU polity, as both Article 2 TEU and the constitutionalisation of the Charter suggest, then it is necessary to be clear about what

[77] Professor S. Sciarra persuasively made the latter point at a symposium concerning the *AMS* judgment, which was held at University College London on 11 February 2014.

[78] Frantziou 'Case C-176/12', n 70 *supra*, 347.

[79] *Google*, n 22 *supra*; See also Case C-476/11, *HK Danmark v. Experian*, judgment of 26 September 2013, not yet reported, paras 19–21.

[80] See L. Pech, 'Between judicial minimalism and avoidance: the Court of Justice's Sidestepping of Fundamental Constitutional Issues in Römer and Dominguez', (2012) 50 *Common Market Law Review* 1841; M. De Mol, 'Dominguez: A Deafeninng Silence', (2012) 8 *European Constitutional Law Review* 280. Most illustratively in the case law, *Dominguez*, n 4 *supra*; Case C-132/11 *Tyrolean Air*, judgment of 7 June 2012, nyr; *HK Danmark*, *ibid*; Case C-104/09 *Roca Álvarez v. Sesa Start España* ETT SA [2010] ECR I-08661; Case C-429/12, *Pohl v. ÖBB-Infrastruktur AG*, judgment of 16 January 2014, nyr.

these fundamental rights obligations entail, who is affected by them and in what manner. Nonetheless, as this article has tried to illustrate so far, this cannot be carried out by relying lock, stock and barrel on an overcomplicated and, at times, directly contradictory set of rules. Rather, it is necessary to think more carefully about how these rules can apply to the more formal fundamental rights framework created by the Charter, and, most importantly, whether there are good enough reasons for maintaining horizontal effect in the first place.

In part, this question involves a thorough engagement with the problems of the previous horizontality model. In part, it is also a forward-looking exercise, which concerns the way in which we understand fundamental rights and why we chose to protect them at the EU level. In addition to the difficult task of rebuilding coherence in the Court's horizontality case law, granting horizontal effect to the Charter therefore gives rise to an equally difficult question regarding the desirability of extending a rights model traditionally applicable to states to private parties, which cannot be overlooked, even in the deeply ingrained horizontality model of the EU.

V Rediscovering Horizontality: Addressing Challenges and Finding Reasons

The overview of the history of horizontal effect in EU law provided in earlier sections has demonstrated that, while the Court of Justice subscribed to a form of horizontality from early on, it never truly engaged with the conceptual dilemmas arising in the fundamental rights arena. There are important objections to horizontal effect, however, which should not be underestimated. Some relate to the Union's complex, pluralist constitutional make-up and the difficulties involved in applying rights horizontally in some of the constitutional orders that comprise it; some challenges relate to the application of rights within the EU's own legal order; and some go even further: they relate to the question of whether rights should create obligations towards everyone in the first place.

A Constitutional Challenges

Horizontality in the fundamental rights context, as prescribed by a regional bill of rights, is a particularly sensitive matter to which there are no easy—or indeed exclusively legal—answers.[81] It is clear that different legal systems globally use the horizontality doctrine in substantially different ways.[82] Crucially, horizontal effect is also applied asymmetrically by EU Member States in their national constitutions and, while some constitutional orders have a strong horizontality tradition, in others it is still an evolving concept. For instance, in the United Kingdom, there is a long-

[81] See Ladenburger, n 9 *supra*, 2.

[82] For example, in South Africa it is possible to claim, under certain circumstances, constitutional rights directly against private parties, under Article 8(2) of the Bill of Rights. See also: Case CCT 53/01, *Khumalo v. Holomisa*, 14 July 2002, J. O'Reagan, para 33. Cf Case CCT 8/95, *Du Plessis v. De Klerk*, 7 November 1995, A.J. Kentridge, paras 45–62. By contrast, in the United States horizontal effect is only applied through protective duties falling on courts *qua* state authorities: *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. *See* in that regard S. Gardbaum, 'The 'Horizontal Effect' of Constitutional Rights', (2003) UCLA School of Law Research Paper No. 03-14, available at http://dx.doi.org/10.2139/ssrn.437440, 40, accessed 04/12/2013.

standing debate on this subject in respect of the Human Rights Act.[83] By contrast, in Germany, an established indirect horizontality model (*Drittwirkung* or 'third party effect') is in place. The Federal Constitutional Court has a broad duty of ensuring that all law is applied in accordance with an 'objective order' (*objective Wertordnung*) of constitutional law principles, which are inviolable in both public and private law proceedings.[84] Although the German model has been particularly influential in other EU Member States,[85] it is not universal. For example, the Irish Constitution has been interpreted as being horizontally directly effective, where this construction is possible.[86] A further layer of complexity is added to this picture by the regional human rights jurisdiction of the European Convention on Human Rights. As is well known, while the ECHR system of individual applications is restricted to claims against contracting states, a broad construction of the positive obligations doctrine is employed to ensure the Convention's application in cases where the violation stems from the actions of private parties.[87]

All of these elements influence the horizontal application of rights in the EU. The story of fundamental rights in Europe is not a story of EU rights only but, rather, an integrated and complex system of multiple levels of protection that have developed relationally over several years.[88] In this vein, the Charter contains EU rights that are also constitutionally protected in the Member States and some of which are further enshrined in the ECHR.[89] Its application thus raises questions of compatibility with a range of fundamental rights standards, both at the national and at the international level.

---

[83] See G. Phillipson and A. Williams, 'Horizontal Effect and the Constitutional Constraint', (2011) 74(6) *Modern Law Review* 878, 878–879; W. Wade, 'Horizons of horizontality', (2000) 116 *Law Quarterly Review* 217; J. Morgan, 'Questioning the "True Effect" of the Human Rights Act', (2002) 22 *Legal Studies* 259, 260–261; S. Pattinson and D. Beyleveld, 'Horizontal Applicability and Horizontal Effect', (2002) 118 *Law Quarterly Review* 623, 664; M. Hunt, 'The "horizontal effect" of the Human Rights Act', (1998) *Public Law* 423. More recently, the question appears to have been settled in favour of horizontal effect, in a case involving discrimination on grounds of sexual orientation: *Bull v. Hall and Preddy* [2013] UKSC 73.

[84] BVerfGE 7, 198—*Lüth*, 205.

[85] See for example the case of Estonia: T. Kerikmäe, 'EU Charter: Its Nature, Innovative Character, and Horizontal Effect', in Kerikmäe (ed), *Protecting Human Rights in the EU: Controversies and Challenges of the Charter of Fundamental Rights* (Springer, 2013), at 14–16; or Denmark: J. Christoffersen, 'Denmark: Drittwirkung and Constitutional Rights—Viewed from National and International Perspectives', in D. Oliver and J. Fedtke (eds), *Human Rights and the Private Sphere: A Comparative Study* (Routledge, 2007), at 27.

[86] *Murtagh Properties v. Cleary* [1972] IR 330.

[87] See, illustratively: *ECtHR*, *Airey v. Ireland*, Appl. No. 6289/73, judgment of 9 October 1979; ECtHR, *Plattform 'Ärzte Für Das Leben' v. Austria*, Appl. No. 1012682, judgment of 21 June 1988; ECtHR, *Osman v. United Kingdom*, Appl. No. 2345294, judgment of 28 October 1998; and *IB v. Greece* (n 39); D. Spielmann, *L'effet Potentiel de la Convention Européenne des Droits de L'homme Entre Personnes Privées* (Bruylant, 1996).

[88] P. Eeckhout, 'Human Rights and the Autonomy of EU Law: Pluralism or Integration?', (2013) 66 *Current Legal Problems* 169, 171–172; L. 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' (XXV FIDE Congress, Tallinn, 30 May–2 June 2012) 47.

[89] Irrespective of whether the Union eventually accedes to the Convention, any incompatibilities with the Convention's interpretation of rights under the Charter would be problematic under both Articles 52(3) and 53 EUCFR, in addition to the conflicting claims they would create for the Member States, all of which are signatories of the Convention.

A lot of fine-tuning remains to be performed as regards the interaction of the Charter with the ECHR in respect of horizontality. Although the Charter can offer more extensive protection than the Convention,[90] it should not be simply assumed that allowing horizontal claims of any kind will be compatible with ECHR standards. Direct horizontality in particular often involves balancing between competing rights, so that a thorough review of whether minimum standards are reached for all affected rights will need to be carried out in order to ensure compliance with the Convention. This is likely to be a complicated affair, requiring further dialogue between the Luxembourg and Strasbourg Courts, especially in respect of newer rights. For example, horizontal balancing between the protections of privacy and data protection enshrined in Articles 7 and 8 of the Charter and the freedom of expression and information enshrined in Article 11 thereof is a case in point.[91] Although the EU may allow—and indeed require—the imposition of obligations to protect privacy and private data on non-state actors, the Convention system is more restrictive in this regard due to its primarily state-oriented construction. Further, the Strasbourg Court has traditionally placed significant emphasis on the freedom of expression, which is often raised as a counter-claim in intersubjective disputes in this field, but this right appears to feature less prominently in the case law of the Court of Justice.[92] Where the balance is struck will naturally be a point of contention in cases in which rights compete.

Similarly, ascribing wide-ranging horizontal effect to fundamental rights through the Charter risks significantly upsetting domestic constitutional choices. It is likely to be a particularly divisive issue for those Member States that have limited or very deeply rooted horizontal effect regimes, to the extent that it involves potential constitutional changes, at least in respect of the situations that come within the scope of EU law. In light of the fact that there is no common EU stance in this field, a fully conceptualised horizontality model for fundamental rights—especially if it is one that includes direct horizontal effect—is likely to be met with resistance at the domestic level.[93] This concern lurks between the lines in the Court's post-Charter case law, most notably in respect of rights protected under the Solidarity chapter, such as information and consultation within the undertaking in *AMS* and paid annual leave in *Dominguez*.[94] The unwillingness to accord horizontal effect to these provisions may not be squarely justified in legal terms, as I have indicated earlier, but it can perhaps be understood in light of the political contestability of horizontal effect, especially as regards the Charter's Solidarity chapter.[95] Disagreements on whether these provisions should be capable of invocation in the same way as other articles of the Charter were abundant during the Charter's drafting. Their horizontal application could therefore be perceived as an open conflict with some Member States, and particularly those that signed Protocol 30.[96]

---

[90] Article 52(3) EUCFR.

[91] 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 *Human Rights Law Review* 761, 772–775.

[92] *Ibid.*

[93] See *Solange II*, n 65 *supra*.

[94] n 4 *supra*.

[95] For an insight into the political debate concerning the incorporation of solidarity provisions during the Charter's drafting, see: Q.C. Lord Goldsmith, 'A Charter of Rights, Freedoms and Principles', (2001) 38(5) *Common Market Law Review* 1201, 1212–1213.

[96] *Ibid.* The Protocol purports to define the application of the Solidarity chapter to the United Kingdom and Poland.

Although one might easily concede that horizontal effect can have an impact on both Member State—EU relations and on the EU's outlook towards fundamental rights protection internationally, the question of how the Court can manage this is more difficult. To date, the Court of Justice has not addressed these elaborate constitutional aspects of the horizontal application of rights openly. Rather, constitutional reasoning has emphatically been absent from the case law before, as well as after the Lisbon Treaty, despite its clear echoes in recent Opinions of Advocates General.[97] To a great extent, this could be attributed to the very nature of the preliminary reference procedure, as it has made it possible to focus on sub-issues and particularities of the case at hand without advancing broader, framework-building reasoning. In this sense, the individual 'rights and obligations' approach to horizontal effect that can be traced back to *Van Gend en Loos*, despite having provided a starting point for horizontal claims in the EU, has ironically also created a structural hurdle for developing a conceptually sound horizontal effect model for fundamental rights. In particular, as Joseph Weiler has recently put it, the existing EU rights framework

> 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 center but turns him into a self-centered individual.[98]

Building on this observation, two main points can be made. Firstly, it is necessary to resist minimalist judgments superficially shielded by the case-specific nature of the EU's application of rights to date.[99] Although the Court may not be in a position to tackle broad constitutional issues altogether in cases factually focusing on a particular individual interest, it is not impossible to create a judicial discourse that acknowledges (and in part responds to) the underlying questions, through a clearer explication of the reasons for the course eventually followed. Indeed, it is important to emphasise in this regard that, to the extent that the Court of Justice is posited as the final arbiter on the interpretation of the Charter, its rulings provide guidance regarding its interaction with national constitutional practices, also in the field of horizontal effect. This is crucial for lower national courts, for which the horizontal effect of Charter rights has until now remained an issue mandating a reference to their constitutional counterparts.[100] Similarly, it is important for individual claimants, who must be able to plan their lives 'cognisant of the legal consequences of their actions'.[101]

Secondly, there is an in-principle objection to tackling the horizontality question as one that pertains to individual rights and obligations only. Irrespective of how a specific claim reaches the Court, horizontality in the fundamental rights sphere cannot be equated to the affirmation of individual interests alone. Fundamental rights also

---

[97] See, most illustratively, the Opinion of Advocate General Cruz Villalon in *AMS,* n 33 *supra*; and the Opinion of Advocate General Kokott in *Roca Álvarez,* n 80 *supra*, para 55.

[98] J.H.H. Weiler, 'The Individual as Subject and Object and the Dilemma of European Legitimacy', (2014) 12(1) *International Journal of Constitutional Law* 94, 103.

[99] A thorough account of minimalism in fundamental rights cases is provided in: 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), at 13.

[100] See for example, in the United Kingdom, *Benkharbouche v. Embassy of the Republic of Sudan* [2014] ICR 169. Uneasy about how to interpret the Court's case law, the EAT felt it was necessary to refer the point to the Court of Appeal, before which the case is currently pending.

[101] Craig, n 13 *supra*, 354; *Vaneetveld Opinion*, n 54 *supra*, para 31.

safeguard—and can be justified by reference to—collective goods.[102] Societal goals as well as questions of exclusion and otherness feed directly into the fundamental rights paradigm and its horizontal application is only logically coherent on this basis. The concept of horizontality is founded upon an understanding of the individual qua socially encumbered, private-and-public being. The right to assert rights against others and the obligation in turn to safeguard the rights of others presuppose society, even of a post-national kind, and an assessment of what responsibility means within it.

This leads me into the final part of my assessment of horizontal effect, which advances the following tentative 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—shaped both by judicial and academic discourse—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.[103]

B Engaging with the Conceptual Foundations of Horizontal Effect and Its Social Impact

In addition to constitutional concerns relating to the EU fundamental rights regime, the very question of whether fundamental rights should apply to private parties is far from settled. As demonstrated in Section III above, the EU horizontality doctrine has so far applied to all provisions of EU law, rather than to fundamental rights in particular, so that its impact has not been examined in depth from the fundamental rights angle. This is to some extent understandable: as noted earlier, the evolution of the rights we have now come to regard as fundamental has in large part been indistinguishable from the broader EU system, in which individual rights (fundamental or not) played a vital role in the application of the law.[104] However, both in order to determine the reasons for applying rights horizontally and in order to identify the right way(s) of doing so, a more focused discussion of the impact of horizontal effect on fundamental rights is required.

The creation of a binding Charter does not only remove some of the uncertainty that has naturally surrounded the concept of fundamental rights in the EU but also places an obligation on the Court to observe and to apply them based on some kind of principled system. This raises two substantive questions in respect of horizontal effect: first, *should* fundamental rights apply horizontally? Secondly, if fundamental rights should be so applied, where can their limits be drawn? These questions are of an order that cannot be discussed exhaustively here. I will therefore confine my analysis to highlighting some of the issues that are, in my view, most useful in rediscovering a horizontal effect doctrine that is more closely tailored to fundamental rights protection. Ultimately though, the questions will be left open for further discussion, assessment and revision.

---

[102] R. Alexy, 'Individual Rights and Collective Goods', in C. S. Nino (ed), *Rights* (NYU Press, 1992), at 163, 164–165.

[103] It must be noted that Advocate General Cruz Villalon, has made important leaps in this direction, in a series of his recent Opinions, most notably: *AMS Opinion*, n 33 *supra* and Opinion of Advocate General Cruz Villalon, delivered on 22 May 2014 in Case C-201/13, *Deckmyn v. Vandersteen*, not yet reported.

[104] See Weiler, n 98 *supra*.

a) Should Rights Apply Horizontally and, If So, Why?

Fundamental rights are traditionally considered to be applicable to states.[105] Although there has been a move towards greater protection against fundamental rights violations by non-state actors internationally,[106] the extension of these rights to private parties broadly can be considered as being incompatible with most liberal systems of rights protection, which are constructed around the concepts of state authority and individual autonomy, largely to the exclusion of private forms of authority.[107] As Andrew Clapham succinctly notes, it is often thought 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'.[108] One of the main concerns inherent in this view is that horizontal effect could eventually reduce fundamental rights to ordinary private law claims, thus removing their symbolic value and the normative superiority that they possess constitutionally.[109] Finally, as current fundamental rights frameworks are not designed to apply horizontally, courts can rely on little more than intuition in applying them to private parties.[110]

All of these considerations are important and can become difficult to address in the absence of a common stance vis-à-vis the justifications of horizontal effect in this field in the EU. Nonetheless, a horizontality doctrine applied in a manner that is sensitive to the goals of the protected right can still have concrete benefits—not only in terms of the effective and uniform application of EU law (incidentally also in respect of fundamental rights)—but more concretely, in terms of social inclusion, welfare and, ultimately, equality.

The horizontal effect of fundamental rights can be conceptualised as a tool to respond to broader new phenomena in which the EU and its Member States are inevitably involved: contemporary developments such as globalisation, the privatisation of public functions and legal fragmentation clearly point towards an extension of some obligations to private actors.[111] Some private parties such as large multinational corporations, paramilitary groups and religious institutions are increasingly accumulating power equivalent to that of states.[112] But, even outside of the state-like framework, it is becoming clearer that, in a society in which we have to live with others, each individual 'I' is not a strictly private thing.[113] The traditionally 'private'

[105] C. Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford University Press, 2003), at 84; L. Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press, 2002), at 53.

[106] See, for example, UN Commission on Human Rights, *Promotion and Protection of Human Rights: Human Rights and Human Responsibilities*, Annex I, UN Doc. E/CN.4/2003/105 (2003); 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*, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003); A. Brysk, *Human Rights and Private Wrongs: Constructing Global Civil Society* (Routledge, 2005), at 125.

[107] See A. Clapham, *Human Rights Obligations of Non-state Actors* (Oxford University Press, 2006), at 438; Brysk, *ibid*, 23.

[108] Clapham, *ibid*, 58.

[109] M. Tushnet, 'The Issue of State Action/Horizontal Effect in Comparative Constitutional Law', (2003) 1 *International Journal of Constitutional Law* 79, 93

[110] A. Barak, 'Constitutional Human Rights and Private Law', in D. Friedmann and D. Barak-Erez (eds), *Human Rights in Private Law* (Hart Publishing, 2001), at 17.

[111] Clapham, n 107 *supra*, 3–19.

[112] J.H. Knox, 'Horizontal Human Rights Law', (2008) 102 *American Journal of International Law* 1, 19.

[113] See M. Sandel, *Liberalism and the Limits of Justice* (Cambridge University Press, 2nd ed, 1998), at 181.

domain—perhaps most importantly of all, the home—is far from immune to violations of fundamental rights.[114] State-centric fundamental rights have important deficiencies in respect of effective enforcement for some groups of potential claimants, such as those who are mainly homebound (for instance homemakers, children or the elderly), and people in conditions of displacement (such as irregular migrants or the homeless), who often have few avenues to report fundamental rights violations.[115] Furthermore, the state-centric approach to rights presents important problems, if we come to accept as fundamental rights a broader set of rights to basic goods, which are 'essential to a minimally worthwhile human life'.[116] Today, we can hardly avoid dealing with other private parties, such as an employer, an Internet search engine, a private hospital or an electricity provider. These entities can have an undeniable impact on our access to basic rights, such as pay, privacy, health care or safe housing.[117]

As such, a discussion of the horizontal effect of 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 values are those of a *laissez-faire* market economy concerned primarily with advancing the interests of its participants, then horizontal effect is perhaps unwarranted in the fundamental rights context. As I have indicated in earlier sections, the case law does not reflect a clear stance on this matter.[118] At the same time though, it is also important to recognise that, from early on, EU fundamental rights have had a radical, inclusionary impact, affecting individuals not otherwise engaged in cross-border activities.[119] A concern for basic entitlements, and an acknowledgement of the role of private actors in bringing them about, have also been important in regulating the Union's market-centric public sphere and have secured a degree of substantive equality therein, manifested most clearly in the affirmation of the rights of women,[120] pregnant workers[121] and carers.[122]

---

[114] Knox, n 19 *supra*, 19; See in particular, 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* (August 1995), available at http://www.wwda.org.au/hrwgolbalrept1.pdf, accessed 03/03/2013.

[115] See C. MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989), at 163.

[116] T. Pogge, 'The Health Impact Fund and Its Justification by Appeal to Human Rights', (2009) 40 *Journal of Social Philosophy* 542, 553; see also V. Mantouvalou, 'In Support of Legalisation', in C. Gearty and V. Mantouvalou (eds), *Debating Social Rights* (Hart Publishing, 2011), at 85. See, more generally, H. Shue, *Basic Rights: Subsistence, Affluence, And U.S. Foreign Policy* (Princeton University Press, 1996), at 52.

[117] Several provisions concerning all of these basic rights are included in the Charter.

[118] The judgments in *Viking*, n 14 *supra* and *Laval* (Case C-341/05, *Laval un Partneri* [2007] ECR I-1767) demonstrate, for example, that a market-oriented horizontality doctrine can be utilised to lower standards of fundamental rights protection.

[119] A. Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press, 2004), at 53.

[120] Most clearly, see *Defrenne*, n 7 *supra*.

[121] 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 Bhalf of Brandt-Nielsen* [2001] ECR I-06693.

[122] Case C-303/06 *Coleman v. Attridge* [2008] ECR I-05603.

Thus, while the broader impact of horizontal fundamental rights has routinely been left outside of the EU discourse, the possibility of invoking rights horizontally in the EU is, in fact, particularly well placed in terms of institutionally protecting claimants in precarious situations. To some extent, these issues can be located within EU law already. Equal treatment and working conditions have been traditional forums for the application of horizontal effect, in both its direct and its indirect manifestations. Other rights, such as the rights of children,[123] families[124] and the elderly[125] may be newer features of EU law, traceable more clearly in the Charter, but they confirm that the position of these groups within society needs to be taken into account in applying fundamental rights in the EU in the future. Indeed, considerations pertaining to structural inequalities, capability creation and social justice are embedded in the Charter, which unusually incorporates rights to education, work, access to social security and social assistance, health care and many more.[126]

In assessing the horizontal effect of the Charter's provisions, it is possible to look back and to emphasise the socially awakening aspect of fundamental rights in EU law.[127] Although this may not be the only justification for horizontal effect, it is a prominent consideration, which has not been accounted for duly in recent years. After all, in determining whether horizontal obligations should be imposed, as well as who should be bound by them, it is important not to lose sight of what these claims can mean for people's lives: seeing one's child, being able to work free from discrimination and 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 particular 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.

b) When Should Rights Apply Horizontally?

It does not suffice merely to acknowledge that a degree of horizontality is needed in order to accommodate fundamental rights in a modern social setting. Important choices will also need to be made as to what standards we apply to *penalise* private breaches of fundamental rights and what kind of private actions give rise to such breaches in the first place. This exercise goes to the heart of a renewed commitment to horizontal effect, especially in the EU, where the imposition of obligations has not, so far, followed clear standards as regards the attribution of responsibility. 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?[128] Or is

[123] Articles 24 and 32.
[124] Articles 7, 9 and 33.
[125] Article 25.
[126] Respectively, these are: Articles 14, 15, 34, 35.
[127] As noted at n 118 *supra*, alternative narratives indeed exist. The judgments in *Viking* and *Laval* providing a clear indication to the effect that market-oriented forms of horizontality can be utilised to lower standards of fundamental rights protection. Coherently developing the horizontal effect of fundamental rights requires clarification as to which of these uses of horizontal effect are compatible with the EU's priorities in this field.
[128] Brysk, n 106 *supra*, 24. See, for an argument in this regard: D Leczykiewicz, 'Horizontal Application of the Charter of Fundamental Rights', (2013) 38 *European Law Review* 479, 492–494.

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?[129]

The conceptual limits of horizontality open a long debate, but it is a foundational one. As noted earlier, 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-based and directive-based rights. However, a proper application of horizontal effect is in itself imbued with some limits: not all individuals are, at all times, capable of prejudicing the fundamental rights of others. In particular, while indirect forms of horizontality can be envisaged for virtually all fundamental rights (and principles), private parties may not always be in a position to violate the fundamental rights of all other private parties directly. When the dispute is one *between* right-holders, discussing the aggregate impact of horizontal effect on the fundamental rights of the parties concerned by balancing them against one another is necessary in order to ensure that the enabling, positive liberty-enhancing properties of horizontality for the party claiming the right do not in fact result in an undue abridgment of the liberty and effective enjoyment of the rights of the party on whom the obligation is imposed.[130]

It follows that, even if the limits to horizontal effect are not quite as clear as a distinction between different sources of EU law, the application of a set of rights to which a number of private parties can lay claim prevents it from devolving into boundlessness. This is not to say that horizontality is easy to quantify or to nail down as a finite thing. Ultimately, the question of where it should stop will remain a difficult one, with which EU law is likely to struggle for some time. But once a preoccupation with its underlying justifications enters the EU horizontality discourse, its proper limits can be discussed by reference to clearer reasoning that addresses the role of different forms of private responsibility within the constitutional-order organisational framework set out in the Charter.

VI Conclusion

This article has argued that horizontal effect cannot be excluded from the Charter's scope, both because this would not follow from the Charter's text as well as because it would be incompatible with the ability of EU law to produce horizontal effects in the sphere of fundamental rights, prior to the Charter's entry into force. Yet, despite the strength of the *Defrenne* legacy, the Court's subsequent application of different forms of horizontal effect has not reflected principled decisions as to how fundamental rights should enter private relations. Rather, it has relied on a mechanical process, whereby the default position was an attribution either of direct horizontality or, failing that, an application of indirect effect or state liability, without a discussion of the merits of each of these tools. Developing the Charter's horizontality now involves

[129] Clapham, n 107 *supra*, 533–34. See also n 68 *supra*, regarding the references to these principles in the Charter's Preamble. It is not suggested that private power and dignity necessarily stand in opposition to one another.

[130] Frantziou 'Right to be Forgotten', n 91 *supra*, 768–769; See also: T. Scanlon, 'Adjusting Rights and Balancing Values', (2004) 74 *Fordham Law Review* 1477, 1478–1481; R. Alexy, 'Constitutional Rights, Balancing, and Rationality', (2003) 16 *Ratio Juris* 131, 135–139.

some directional questions: is it desirable to 'horizontalise' rights frameworks traditionally applicable to states and, if so, why, and under what conditions?

To the extent that 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. Although the presence of horizontality in prior case law provides an incentive for the Court to delve into such an assessment in respect of the Charter, this is not in itself sufficient in order to discuss the Charter's horizontal effect in depth. That would involve, in part, a rediscovery of the reasons for horizontality available—if sparingly—in the Court's early case law, such as the correction of inequalities,[131] and an evaluation of how the principles of effectiveness, primacy and uniformity, which can be identified in EU horizontal effect broadly, can be used to serve fundamental rights particularly. It is also a question of combining this re-reading of EU law with a fresh discussion of the functions and merits of horizontal effect and its role in advancing fundamental rights in a changing world.

Of course, the application of fundamental rights to private parties can differ depending on the manner in which the obligation enters private relations (direct, indirect or through the state). It should also not be assumed that the same set of reasons can justify the application of the Charter to all private parties, without more closely looking at its specific provisions or the circumstances of the particular private relationship. Nonetheless, focusing the debate on the central question of the desirability of a horizontal protection of Charter rights should make it easier to establish a workable system of horizontal effect overtime. Once this basic question is addressed, it will then be necessary to situate the discussion of its more technical aspects anew. Could it be, for example, that the controversies regarding the Charter's horizontality concern not *any* kind of horizontal effect but, rather, direct horizontal effect more specifically? If this is the case, how could this be addressed constructively? Could we reach some form of EU-wide consensus about the use of indirect horizontality employed by the EU judiciary, together with a broad conception of positive obligations, rather than focusing the discussion on direct horizontality or the lack thereof? Thinking about these different alternatives 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 post-national context) with real opportunities for an effective protection of rights within the Charter framework.

There is no denying that establishing a fully fledged and well-functioning horizontal rights system at the EU level will be challenging. However, embarking on an analysis of horizontal effect is necessary in the EU today. Questions regarding the horizontal effect of Charter provisions continue to reach the Court, despite its unwillingness openly to discuss them in its case law.[132] Further, national courts are already being faced with cases regarding the horizontal effect of the Charter's provisions, so that

[131] See most illustratively, *Defrenne*, n 7 *supra*, para 39; *Kücükdeveci*, n 49 *supra*, para 53; *Angonese,* n 47 *supra*, para 53.

[132] See most recently: Case C-351/14, *Rodríguez Sanchez* (application lodged on 12 September 2014), pending.

settling this issue at the Court of Justice level is required in order to avoid different interpretations of the Charter across the EU.[133] Ultimately though, developing horizontal effect in respect of the Charter also likely to contribute to the setting in motion of a long-overdue, broader debate, regarding the social and political framework in which this new fundamental rights list is intended to operate. As Leczykiewicz puts it, this relates 'not only to the appropriate reach of EU law in national legal orders, but also to the appropriate balance between liberalism and public intervention, free market and social justice'.[134]

First submission: November 2014
Final draft accepted: February 2015

[133] See *Benkharbouche*, n 100 *supra*.
[134] Leczykiewicz, n 128 *supra*, 483.

