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Fundamental Rights and European Private Law

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Introduction

Questioning the place of fundamental rights in *private law* is *en vogue*. There is hardly a serious study of private law nowadays that does not refer to the thinning of the public/private law divide and more specifically to the paradoxical relationship between a branch of law dominated by individual autonomy and economic freedom, on the one hand, and the duties of equal concern and due respect generated by fundamental rights in all areas of human life, on the other.[1] The decreasing role of the State and the corresponding privatization of those entities owing services to the public has increased the power some individuals[2] have over others, thus enhancing the possibility of fundamental rights' violations in horizontal and intersubjective relationships which have traditionally been regulated according to the principle of equality before the law and cut off from constitutional law and the protection of fundamental rights.[3] The mere vertical effect of fundamental rights in a vertical relationship between the State and its citizens no longer suffices to protect these very citizens from private violations of their fundamental rights. Hence the idea of the horizontal or third-party effect ('*Drittwirkung*', '*effet horizontal*') of fundamental rights in private relationships, whether direct or indirect, or at least that of the State's positive duties of protection of fundamental rights among individuals. While all horizontal relationships among individuals potentially concern these more or less direct horizontal effects of fundamental rights, the impact is particularly clear and unprecedented in private law. It is difficult to find an area of private law that has been left untouched by fundamental rights; this may be ascertained in areas as diverse as contract law, commercial law, family law or even property law.

1. See e.g. Besson, Egalité horizontale; Besson, Discrimination; Barak.

2. The term 'individuals' is understood in a broad sense to refer to physical, as well as to legal persons. See on legal persons' duties stemming from international human rights law, Alston; Reinisch; and De Schutter.

3. See Friedmann/Barak-Erez, 1.

Of course, the issue is far from being entirely new in Europe. Fundamental rights' effects in private law have been discussed in Germany[4] and Switzerland[5] since the 1970s. More recently, the adoption of the Human Rights Act (HRA) in the United Kingdom has drawn attention to the quasi-constitutional nature of fundamental rights and to the question of their potential horizontal effect in private relationships, an issue which previously had hardly been addressed in English law.[6] The potential horizontal effect of fundamental rights guarantees has also long been an object of controversy in international law, although with very little success in practice until recently.[7] It is the emergence and development of positive duties of protection of fundamental rights in the European Court of Human Rights' (ECtHR) case-law in the early 1990s that launched the current Europe-wide debate on the relationship between European fundamental rights and national private law.[8] The European Convention on Human Rights (ECHR) is an international instrument that only binds States[9] and as such, for a long time, it did not have any impact whatsoever on intersubjective relationships and private law in particular. The Court's development of States' positive duties as an alternative to the lacking third-party effect of the ECHR is, however, currently reshaping the private law landscape in Europe. This has been discussed in numerous recent studies on the impact of the ECHR in private law.[10]

It should come as no surprise, therefore, that the question also arises with renewed intensity in the context of the development of what is now commonly referred to as *European private law*, that is to say, private law norms that result from the comparison of national legal orders in Europe or from European Union (EU) law *stricto sensu*.[11] In fact, the issue emerges with even more acuity in a European legal context that gives rise not only to norms that provide greater protection (e.g. four freedoms and the principles of Article 3 of the European Community Treaty (ECT)) and scope for private exchanges and

4. See Scheuner, 253; Starck, 97.

5. See Egli; Besson, Egalité horizontale, 982.

6. See Hunt, Horizontal Effect; Phillipson; Leigh; Wade; Buxton; Beale/Pittam; Bamforth; Hunt, Moving; Beyleveld/Pattinson. For the situation before the HRA, see Mitchell.

7. See Clapham, Private law; Hangartner. See, however, on the international legal duties and responsibility of non-state actors, Alston; Reinisch; and De Schutter.

8. Cf. Sudre. See more generally, Wildhaber/Breitenmoser, passim; Frowein/Peukert, passim; Harris/O'Boyle/Warbrick, 19.

9. See e.g. De Schutter.

10. See e.g. the essays in Werro and Ziegler.

11. In the present chapter, the terms 'European law' or 'EU law' refer to the law of the Treaties on the European Union, including the law of the European Community.

transnational economic efficiency (e.g. European directives in the field of company law,[12] product liability law[13] and consumer protection law[14]), but also to norms that ensure greater protection of fundamental rights in national legal orders (e.g. European Charter of Fundamental Rights [ECFR] or Equality directives[15]). This increases, therefore, the possibility of clashes between European private law and national fundamental rights, between national private law and European fundamental rights and, finally, between European private law and European fundamental rights. Moreover, the Europeanization of private law has triggered a reaction on the part of national public law that is gradually reduced to being the only sovereign area of national law, thus giving rise to a renewed interest for the relationship between public and private law[16] and for the impact of fundamental rights on private law. This reaction may be compared to that of the German and Italian constitutional courts in the 1970s[17] and explains how the national and European agendas on fundamental rights are suddenly quite unified on the importance of the impact of fundamental rights on European private law, even if they diverge on the modalities, as we will see.

Finally, this increase in potential violations of fundamental rights through private law norms in Europe also means that, due to the multi-level institutional arrangement in Europe, different jurisdictions might give different answers based on the same fundamental rights regarding the invalidity of the same private law norms. Thus, while national legal orders and jurisdictions

12. See e.g. Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours (OJ L 158 23/06/1990 p. 59); Directive 2004/25/EC of 21 April 2004 on takeover bids (OJ L 142 30/04/2004 p. 12).

13. See e.g. Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ L 076, 22/03/1991 p. 0035-0041).

14. See e.g. Directive 2002/58/EC of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201 31/07/2002 p. 37); Directive 2000/13/EC of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs (OJ L 109 06/05/2000 p. 29).

15. See Directive 2000/78/EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation and Directive 2000/43/EC of 29 June 2000, implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. See Coester-Waltjen on the impact of these directives in German private law.

16. See e.g. Caruso.

17. See e.g. the German decisions BVerfGE 37, 271—*Solange I*, BVerfGE 73, 339—*Solange II*, and BVerfGE 89, 155—*Brunner*.

have addressed the ways to reconcile the often conflicting requirements of national private law and national fundamental rights each in their own way since the 1970s, the European Court of Justice (ECJ) now needs to have a clear line on third-party effect and so do all the national and European jurisdictions currently contributing to the development of European private law. Besides providing grounds to examine an old issue in the new light of European law, the impact of fundamental rights on European private law also reveals therefore the pluralist and multi-level nature of the European fundamental rights protection framework. I will argue that this in turn constitutes an argument for fostering a pluralistic European private law developed at different levels and in different jurisdictions, rather than as a codified state-like private law.

Just like the older issue of the horizontal effect of fundamental rights in national private law, the impact of fundamental rights on European private law has found its share of academic interest[18] and has even led to a revival of interest in third-party effect issues that had long been neglected in some countries.[19] However, few of these studies and publications look at the issue from a constitutional perspective, and most of them focus on the private law dimension of the question with the dangers this presents.[20] Of course, this article's scope precludes addressing every detail of the constitutional dimension. I shall focus, therefore, on the *conceptual* delineations of the different ways in which fundamental rights may influence private law in Europe, rather than on a case study of the occurrences of the problem in Europe. Scope also precludes exploring the way in which the issue is addressed in all European countries.[21] A choice had to be made therefore with respect to the *legal examples*; the conceptual delineation of the impact of fundamental rights on European private law will consider cases where (a) *fundamental rights* stemming from the ECHR and EU law, as well as from Swiss, German and English law conflict with (b) *European private law* understood *qua* Europeanized private law of European countries such as Switzerland, Germany and the United Kingdom.

The present chapter is structured as follows: its first section defines the key concepts in its title and delineates the boundaries of the chapter's topic (1.).

18. See e.g. http://www.fundamentalrights.uni-bremen.de/.

19. See e.g. Coester-Waltjen on the renewed interest for those issues in Germany that was triggered by the new Equality directives.

20. See e.g. Hesselink; Brüggemeier; Joerges, Challenges; Joerges, Process; Joerges, Conflict. See on the dangers of commodification of human rights, Besson, Commodification; Gerstenberg, Constitutions; Besson, Social goods.

21. For national reports, see http://www.fundamentalrights.uni-bremen.de/. See also the essays in Friedmann/Barak-Erez.

In the second section, I argue for the applicability of fundamental rights in private law in general and distinguish the issue from other similar ones (2.). The third section provides a detailed overview of the different modalities of the application of fundamental rights to European private law in different European jurisdictions and of their comparative advantages (3.). Finally, the last section presents the main implications of the growing impact of fundamental rights in European private law for the development of a form of constitutional patriotism in Europe and the future of the Europeanization of private law (4.).

1. Some Delimitations

Before turning to the question of the application of fundamental rights in European private law and to its different modalities, it is important to set the scene and define the scope of three relevant concepts besides the two basic concepts of Private Law and Fundamental Rights (see 1.1): European private law (see 1.2), European fundamental rights (see 1.3), and European jurisdictional control (see 1.4). As we will see, the different components of these three elements may indeed be combined to produce a variety of conflicting cases between European private law and fundamental rights.

1.1. Two Basic Concepts

The two concepts of private law and fundamental rights interlinked in the present chapter's title call for a brief clarification, before we look at their European counterparts.

1.1.1. Private Law

Private law is a distinct legal domain whose norms govern horizontal relationships among individuals.[22] It entails sub-domains like property law, family law, contract law and tort law. Besides this descriptive definition of private law, there is also a more historical or almost ideological one that relies on the *laissez-faire* conception of private law *qua* area of law that is completely free from public intervention and regulation and that puts private autonomy first.[23]

22. The tie-break element lies therefore in the nature of the norms applied, rather than in the private nature of the actors (who may be bound by public law norms and hence for self-evident reasons by fundamental rights). On the difficulties raised by the definition of non-state actors in the human rights context, see Alston.

23. See Hesselink, n. 3.

Private law has traditionally been a national issue, as confirmed by the development of private international law in case of conflicts of private laws. With the development of trade and, in particular, of the European Economic Community, private law has quickly become an object of legal harmonization and most recently of potential unification. The four basic freedoms, together with the other principles related to the establishment of the European common market, have contributed to create a reinforced European core of private law principles.

1.1.2. Fundamental Rights

Although fundamental rights constitute an incontestable part of contemporary law and politics, their positive guarantees are largely general and vague and their exact nature and consequences remain as a result largely controversial. In a nutshell, fundamental rights are rights human beings have simply by virtue of being humans. As such, they are rights which protect fundamental universal and general interests. This definition explains why the term 'human rights' is often used interchangeably with that of 'fundamental rights'.

Strictly speaking, 'human rights' are often said to have a larger scope than 'fundamental rights'. This has to do, first of all, with the *prima facie moral* nature of human rights as opposed to the alleged *legal* nature of fundamental rights. This distinction has no real grounding in moral theory, however, since all legal rights are also generally moral rights. A second alleged reason is that human rights have usually been regarded as those basic rights guaranteed in *international* instruments, whereas fundamental rights were regarded as national basic rights whether guaranteed in constitution or legislation. This distinction too has become moot due to the development of international human rights guarantees and their increasing reception in national legal orders, as exemplified, for instance, by the place of the ECHR in national law. Moreover, the development of 'fundamental rights' in the EU, which gather fundamental rights stemming from national constitutional traditions and human rights from the ECHR, has also led to the growing irrelevance of the distinction between international human rights and national fundamental rights. In this chapter, it is accordingly the concept of fundamental rights that will be preferred.

1.2. European Private Law

European private law encompasses private law norms from European national legal orders, but also private law norms from the European legal order *stricto sensu*. Given that the rest of the book is dedicated to drawing the boundaries of European private law, I will be brief in my exposition.

1.2.1. National Private Law

National private laws constitute together the first constitutive element of European private law. Their convergences and divergences are best captured through comparative private law and their inescapable conflicts due to the Europeanization of private exchanges and relationships are solved through a branch of international private law dedicated to European conflicts of laws.[24]

1.2.2. European Private Law Stricto Sensu

European private law *stricto sensu* currently encompasses incremental and piecemeal private law norms (1.2.2.1.), but a systematization of European private law has been discussed for some time now (1.2.2.2.).

1.2.2.1. Sector-Specific European Private Law

Current European private law norms are piecemeal and are specific to sectors of private law, such as contract law, product liability law, and consumer protection law. The full measure of the diversity of the areas concerned may be drawn from the table of contents of the present commentary. European private law, moreover, has the specificity of consisting mostly in directives and as such is to be implemented through national private law. European private law *stricto sensu* in its current state is therefore integrated into national private law. In this chapter, I shall focus on the first sense of European private law *qua* ensemble of national private laws integrated through transnational norms of private law.

1.2.2.2. Systematic European Private Law

Ever since the beginning of the Europeanization of private law, there have been discussions in academic circles, but also since the late 1980s in the European Parliament[25] and since 2001 in the European Commission, of the possibility of drafting a European civil code that would codify the patchwork of existing sector-specific norms of European private law.[26]

This project of unification of European private law has taken different shapes. Some academic circles have suggested a common core of European

24. On these two constitutive elements of European private law, see Joerges, Challenges.
25. 1989 OJ (C 158) 400; 1994 OJ (C 205) 518.
26. See e.g. Kötz.

legal principles,[27] while others have proposed a full-blown European civil code either as a traditional continental civil code[28] or as a new kind of socially oriented code.[29] In 2001, the European Commission published a Communication on the future of European contract law and reaffirmed its call for coherence in European contract law in its 2003 Action Plan.[30] This project of codification and research of a common core of European legal principles and rules is not entirely uncontested, however. Most critiques rely on the elusive divide between public and private law and on the intensifying links between private law and other areas in *national law*, as well as on the diversity of national private law traditions, on the one hand.[31] They also focus, on the other hand, on the *sui generis* and multi-level nature of the Europeanization of law and of the legitimation mechanisms of European law, as well as on the constitutional dimension of the new *European* private law.[32]

1.3. Fundamental Rights in Europe

Fundamental rights in Europe are those fundamental rights protected by European national legal orders, by the ECHR and by EU law. For reasons of clarity and scope, I am excluding the further international layer of fundamental rights applying to private actors,[33] although it also applies to European private law.[34]

1.3.1. National Fundamental Rights

Fundamental rights are regarded as more fundamental than other legal rights because they often also protect common goods and not only individual interests. Besides, even when they protect fundamental interests, they do so in a way that pays more attention to people's fundamental status and in-

27. See the Common Core of European Private Law, University of Trento, http://www.jus.unitn.it/dsg/common-core/home.html. See also the Lando Commission's European Principles of Contract Law (Lando/Beale).
28. See Von Bar. See also the work of the Study Group on a European Civil Code, www.sgecc.net and most recently the edited Principles of European Law, Brussels/Oxford/Stämpfli 2005.
29. See Mattei. See also the Social Justice Group in ELJ.
30. Communication on the Future of European Contract Law, COM(01)398 final and A More Coherent European Contract Law—An Action Plan, COM(03)68 final.
31. See e.g. Hesselink.
32. See e.g. Joerges, Challenges; Joerges, Process; Gerstenberg, European private law.
33. On the horizontal effect of international human rights, see Clapham, Private law. See also most recently, Alston; and Reinisch.
34. See e.g. De Schutter.

violability than ordinary legal rights. National fundamental rights are therefore usually entrenched and protected from ordinary legislative revisions through constitutional protection or at least through higher forms of legislation.[35] Thus, they usually differ both *formally* and *substantively* from ordinary legal rights.

1.3.2. European Fundamental Rights

European fundamental rights are all the rights protected by the European Convention on Human Rights that entered into force in 1950. Most of these rights are already formally guaranteed as national fundamental rights, but the ECHR makes a difference with its specific Protocols and, most importantly, the ECtHR's case-law.

There are a number of questions to assess before getting to the issue of the impact of the ECHR in private law: these questions pertain to the effect, rank and scope of the rights protected by the ECHR. Primarily, the ECHR can only have a direct horizontal effect in private law, if its *immediate validity* is recognized in national law in the first place, whether *per se* like in Switzerland or France, or by incorporation in dualist countries like the UK or Germany.[36] Secondly, the ECHR's *rank* over national law should also be examined if it is to take priority over national private law; in some countries, the ECHR has legislative rank and takes priority only over prior laws like in Germany,[37] while in others it has quasi-constitutional or constitutional rank and takes priority over all laws whether prior or ulterior like in Switzerland.[38] There is a favour clause in Article 53 ECHR, however, that tempers the ECHR's primacy and limits its application to cases where it protects fundamental rights better than national guarantees. Finally, the *scope* of ECHR rights extends in principle to the entirety of national law whether public or private. As such, ECHR rights could pre-empt any norms of European private law.

1.3.3. EU Fundamental Rights

Besides fundamental freedoms whose aim is the creation of the European internal market, EU law also protects fundamental rights. True, this was not the

35. This is the case, for instance, in French law where fundamental rights are to be found in the Preamble to the 1958 Constitution and in organic laws. Similarly, the British 1998 Human Rights Act does not technically have constitutional rank in the a-constitutional English legal system.

36. See Ellger, 163–164.

37. See Ellger, 164–165.

38. See ATF 125 II 417.

case from the beginning of European integration.[39] Fundamental rights were first recognized by the ECJ's case-law as unwritten general principles of EU law,[40] but are now mentioned in the Treaties through Article 6 of the European Union Treaty (EUT). They encompass those rights stemming from national constitutional traditions and from the ECHR, as well as further rights and principles.[41] In 2000, the European Charter of Fundamental Rights was adopted in Nice, guaranteeing all the rights previously recognized by the ECJ as well as others. The Charter remains non-binding, although it is readily used by General Advocates and the Tribunal of First Instance in Luxembourg.[42] In 2007, the Charter was included in the Lisbon Treaty that, if adopted, would make it binding. It now shares, however, the same uncertainty as to its future fate as the Treaty itself. EU fundamental rights remain, however, binding as general principles of EU law and through Article 6 EUT. In the present chapter, European fundamental rights refer therefore to all the fundamental rights guaranteed in national constitutional law, the ECHR and the Charter, as well as the general principles of EU law.

As with the ECHR, there are a number of questions to assess before getting to the question of the impact of the ECHR in private law: these questions pertain to the general effect, rank and scope of the rights protected by EU law. With respect to the *effect* of EU fundamental rights, they clearly benefit from the same effect as the rest of EU law, which is ensured either directly in monist countries or through incorporation as in the case of the UK. The *direct effect* of EU fundamental rights is given when those provisions are sufficiently clear and precise like for the rest of EU law. While the Charter is considered as soft law and as such cannot have direct effect,[43] EU fundamental rights *qua* general principles of EU law and through Article 6 EUT belong to primary EU law and have direct effect when they are sufficiently clear and precise. As to the *rank* of EU fundamental rights, it follows from the principle of the primacy of EU law that those rights should in principle take priority over national ones. It was the whole gist of the ECJ's case-law on fundamental rights to take up the challenge of the German Federal Constitutional Court and to ensure the primacy of EU law in protecting fundamental rights to the same

39. On their relationship, see ECJ, Case C-112/00 *Schmidberger* [2003] ECR I-5659.

40. See e.g. ECJ, Case 29/69, *Stauder* [1969] ECR 419.

41. See ECJ, Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125 and ECJ, Case 36/75 *Rutili* [1975] ECR 1291.

42. See TFI, Case 54/99 *Max. Mobil* [2001] ECR II-313; Tizzano AG in Case 173/99 *BECTU* [2001] ECR I-4881; Mischo AG in Cases 122P&125/99P *D v. Council* [2000] ECR I-4319.

43. See ECJ, Case 322/88 *Grimaldi* [1989] ECR 4707.

extent as national constitutional law. As such, EU fundamental rights take clear priority over national constitutions and national fundamental rights.[44] If one refers to the Charter's horizontal clauses, and Article 53 in particular, however, it is clear that EU fundamental rights are not meant to diminish European fundamental rights protection overall; these articles establish a principle of favour in cases where national or ECHR rights are more extensive than EU fundamental rights. Finally, the *scope* of EU fundamental rights extends to all activities covered by EU law, whether at the level of EU law *stricto sensu* or in national law provided they are activities where national law implements or derogates to EU law.[45] This is clearly the case of European private law, since national private law is Europeanized through implementing European private law directives.

1.4. Jurisdictional Control in Europe

A third layer of the question of the impact of fundamental rights on European private law and of its modalities is given by the institutional level at which this impact is judged in Europe[46] and whether it is the competence of national jurisdictions, of the ECtHR or of the ECJ. Not only is the horizontal effect of fundamental rights in European private law a difficult question *per se* because of the diversity of norms of European private law and of fundamental rights in Europe, but it is made even more difficult by the diversity of views of the institutions in charge of settling this question.

1.4.1. National Jurisdictions

National jurisdictions are all those in charge of judging the violation of fundamental rights in private law and the means to guarantee a certain effect of those rights in private law. In countries where the jurisdiction is divided between private and public law, they encompass mostly private law courts, but when the horizontal effect of fundamental rights and positive duties are granted in a certain legal order, the issue may also be addressed by constitutional courts. National jurisdictions apply national fundamental rights and the ECHR, but

44. See ECJ, Case *Internationale Handelsgesellschaft* [1970] ECR 1125.

45. See e.g. ECJ, Case 5/88 *Wachauf* [1989] ECR 2609; ECJ, Case 260/89 *ERT* [1991] ECR I-2925.

46. This does not exclude legislative and executive positive duties of protection of fundamental rights in private law (see below), but simply shows that European jurisdictions often have the final word on *how* this horizontal effect is implemented.

also EU fundamental rights when they have to review national decisions implementing or derogating to EU law, as it is the case with European private law.

1.4.2. The European Court of Human Rights

As I hinted earlier, the ECtHR has been developing a new approach to the impact of fundamental rights in private law aiming at palliating the lack of horizontal effect of the rights guaranteed in the ECHR: European States' positive duties of protection of fundamental rights. The ECtHR's case-law has been applying these duties to private law in an increasing number of cases, thus leading to fundamental changes in European private law. Decisions of the ECtHR take priority over national decisions, whether they have applied national, ECHR or EU fundamental rights.[47]

1.4.3. The European Court of Justice

Finally, having recognized the existence of fundamental rights *qua* general principles of European law, the ECJ has considerably extended the scope of its control over European institutions' violations of fundamental rights in private law, but also—and most importantly—over those of national institutions in the context of the implementation of or derogation to EU law. This is clearly the case of European private law, where national private law is Europeanized through implementing European private law directives. Because EU fundamental rights encompass the ECtHR, the ECJ may sometimes constitute a second layer of control of the impact of the same fundamental rights over European private law. This makes the diversity of views regarding the horizontal effect of fundamental rights in European jurisdictional control even more disturbing. While ECJ decisions on fundamental rights are now considered as having primacy over national ones,[48] their status vis-à-vis ECtHR decisions is not entirely clear and this puts national jurisdictions in a difficult situation.[49]

47. See, however, on the authority of its case law, the recent German decision, BVerfGE, 2 BvR 1481/04 [14/10/2004]. This decision was rendered as a countermeasure to the European Court of Human Rights decision, ECtHR, Case 59320/00 *Hannover v. Germany* [24/06/2004].

48. This is not entirely clear to all national courts, however. See e.g. *Bananenurteil* BVerfGE 102, 147, 2 BvR 1/97 [07/06/2000] and most recently BVerfGE, 2 BvR 2236/04 [18/07/2005].

49. Both courts regard themselves as independent; see e.g. the ECJ, Case 17/98 *Emesa Sugar and Aruba* [2000] ECR I-665 and the ECtHR, Case 24833/94 *Matthews v. UK* [18/02/1999].

Recent decisions, however, reveal an intensification of the coordination between courts.[50]

2. The Applicability of Fundamental Rights in Private Law in General

Before looking into the modalities of the impact of fundamental rights over European private law, it is important to isolate the problem set by the horizontal effect of fundamental rights in private law *per se* (see 2.1), present different justifications for this effect (see 2.2) and, finally, distinguish it from other kinds of effects of fundamental rights in private law (see 2.3).

2.1. The Problem

The problem with the horizontal effect of fundamental rights in private relationships, and private law in particular, lies in the conflict between traditional private law values of autonomy and freedom whether from state intervention or any other individuals' intervention, on the one hand, and the protection of certain other values that are deemed superior to these values, i.e. fundamental rights and the duties they give rise to on the part of the State but also of individuals, on the other. True, private relationships may be the source of growing violations of fundamental rights, but these relationships are allegedly governed by equality before the law as unique principle of distribution and non-legal imbalances of power are not regarded as anomalies.[51]

This approach to private law is not entirely flawless, however. To start with, the *laissez-faire* approach to private law is not uncontroversial and might not have always been there historically.[52] Moreover, the public/private law divide is currently collapsing with increasing delegations of public duties to the private sphere and, hence, growing private power.[53] This evolution is even more striking in the case of European private law that is characterized by new models of regulation and legitimation.[54] The Europeanization of private law is indeed piecemeal and based on types of regulation inspired by public law regulation. This inclusive approach to the fundamental market freedoms in EU law has been confirmed in the ECJ's recent case-law and in particular in the *Schmidberger* case, where the Court not only accepted fundamental rights-based restrictions to fundamental freedoms, but emphasized the need for the weighing and balancing of the interests at stake on both sides.[55]

50. See e.g. the ECJ, Case 94/00 *Roquette Frères* [2002] ECR I-9011 and the ECtHR decision, Case 45036/98 *Bosphorus v. Ireland* [30/06/2005].
51. See Friedmann/Barak-Erez, 1.
52. See e.g. Besson, Egalité horizontale; Müller, Kunst.
53. See e.g. Besson, Egalité horizontale; Besson, Discrimination.
54. See e.g. Hesselink; Joerges, Challenges; Joerges, Process.

2.2. Some Justifications

Besides the shortcomings of the *laissez-faire* approach to private law, there are important positive arguments for an effect of fundamental rights in the entire legal order and hence also in private law. Scope precludes, however, providing a complete justification of horizontal effect.[56] It suffices to refer to the material primacy of constitutional law in the whole legal order, and accordingly to the fundamental role of human rights.[57] Once the role of fundamental rights is acknowledged, this also implies seeing them as an objective value order that underlies, like a thin red line, all legal domains and in particular private law. These domains are indeed concretizations of fundamental rights in different social contexts, where different interests and values are balanced against one another. It is crucial, therefore, to bear in mind the image of private law under the umbrella of constitutional law whenever private law is to be interpreted and applied.[58] Private law should be interpreted and applied so as to accommodate the values which underlie it, such as human dignity or moral autonomy. It would be a mistake to think that private law can be kept alive artificially on the basis of the sole basic values it expressly guarantees such as personality rights or '*bonnes moeurs*'.[59] Rather than undermining private law's specificities, such a coherent approach to shared values and fundamental rights underlying the whole legal order will, on the contrary, reinforce the deontological basis of private autonomy.[60]

The role of fundamental rights in the whole legal order is even clearer at the European level. Built as a form of externalization of human rights duties and

55. See ECJ, C-112/00 *Schmidberger* [2003] ECR I-5659.
56. See Barak, 14.
57. This is what follows, for instance, from Article 1 par. 3 of the German Constitution, and has now penetrated other constitutional traditions in Europe, as, for instance, Article 35 par. 1 of the Swiss Constitution. See Müller, Allgemeine, §39, 30.
58. See Besson, Commodification.
59. See, however, the Swiss case: ATF 129 III 35, 40, cons. 5.2.
60. See Gerstenberg, European private law, 767; Tushnet, Judicial review.

responsibilities to all Europeans across national borders, the EU, and the Member States through the EU also have further global human rights duties to non-Europeans,[61] which European national states do not yet have *per se*.[62] As such, its internal fundamental rights agenda cannot but adapt to these external duties and become more inclusive of individuals and situations.[63] This means, in turn, that fundamental rights are even more closely linked to other areas of law in the EU than at the national level. Moreover, the multi-level institutional framework of governance and legitimation of EU law makes it the case that fundamental rights penetrate private law even deeper through the different levels of control. Finally, the EU law principle of coherence ensures unity in diversity in the Europeanization of law through a normative use of comparative constitutional law and this leads to a certain levelling-up effect.[64] This has recently been illustrated in the context of EU fundamental rights by the *Omega* case, where the ECJ has recognized as a EU fundamental right a principle of human dignity equivalent to that guaranteed by the German Basic Law, thus gradually levelling up European fundamental rights protection in all Member States while also respecting the diversity of national fundamental rights traditions.[65] This levelling-up effect can only reinforce the position of fundamental rights in European private law.

2.3. Delimitations

Not all European constitutional traditions recognize the same horizontal effect of fundamental rights. Before distinguishing between these different conceptions, the horizontal effect of fundamental rights needs to be distinguished from other effects of fundamental rights with which it might be conflated: fundamental rights' purely vertical effect and their half-way vertical-horizontal effect.

2.3.1. Vertical Effect and Its Impact on Private Law

The horizontal effect of fundamental rights in private relationships must be distinguished from the traditional vertical effect of fundamental rights between the State and its legal subjects.

61. See e.g. De Schutter on multinational corporations' duties in the context of ACP-EC association agreements.

62. See Nicolaïdis/Lacroix; Besson.

63. See Alston/Weiler; Williams.

64. See Besson, Integrity; Besson.

65. See ECJ, Case 36/02, *Omega Spielhallen-und Automatenaufstellungs-GmbH* [2004]. See also the dialogue between Besselink and Weiler.

Things are not always that clear, however. This vertical effect may also have consequences in private law. For instance, the relationship between individuals and State organs in family law has to be addressed by private law in a way that respects the vertical effect of fundamental rights. It is important, however, on the one hand, to distinguish this vertical effect in private law-making from fundamental rights' *horizontal effect* in private law. An example of the latter may be given in private relationships regulated by private law in family matters such as the relationship between a natural child and his father. On the other hand, the negative dimension of the vertical effect of fundamental rights in private law should not be conflated with *positive duties* of protection of the State to implement fundamental rights through private law, although there are obvious links between the two, as we will see.

2.3.2. Vertical-Horizontal Effect and Its Impact on Private Law

Another important distinction is that between the horizontal effect of fundamental rights in private law and their vertical-horizontal effect. The latter concerns cases where it is not the State that ought to respect fundamental rights, but private entities acting in its place through a delegation of public duties. This effect may not, therefore, be deemed purely vertical. The effect of fundamental rights on the relationship between these entities and individuals is not purely horizontal either—these entities, even if they are private, do not act as individuals. They have to respect fundamental rights just as the State would have to in the same situation.[66]

3. The Modalities of Application of Fundamental Rights in European Private Law

Even though most European jurisdictions now accept a certain horizontal effect of fundamental rights, they diverge as to its extent. Given the diversity of sources of fundamental rights in Europe and of jurisdictions controlling their respect, the diversity of forms of horizontal effect should come as no surprise. For reasons of space, I have decided against taking up a complete *horizontal* analysis of the variety of cases of horizontal effect of different types of fundamental rights in different types of European private law and in different

66. See e.g. Article 35 par. 2 of the Swiss Constitution which assimilates the State and private entities acting in its place in their duties to respect fundamental rights. See Schefer, Schutzpflichten, 113; Häner, 1144; Müller, Allgemeine, n. 34-35.

types of European jurisdiction.[67] What I propose to do in this section is rather to take up *vertically* the different conceptual categories of horizontal effect one encounters in practice, linking them in each case to the different fundamental rights instruments *and* jurisdictions I have mentioned before.[68] The increasing connections between fundamental rights jurisdictions in Europe makes it the case indeed that their views on the issue of horizontal effect will inescapably reflect each other[69] or at least, as it is this chapter's argument, should do so to ensure a greater coherence in fundamental rights protection in Europe.[70] In what follows, I shall distinguish between two groups of horizontal effect according to the *addressee* of the duties at stake and more precisely between the positive and negative duties of individuals (see 3.1) and the positive duties of the State (see 3.2).[71]

3.1. Individual Negative and Positive Duties

Individuals may be given both negative and positive duties as a result of the horizontal effect of negative and positive fundamental rights in private law. Among these negative and positive duties, one should distinguish between those that give fundamental rights a direct horizontal effect and those that only recognize their indirect horizontal effect.

3.1.1. Direct Horizontal Effect

Fundamental rights' direct horizontal effect implies that individuals may directly invoke their rights against other individuals without having to wait for an interpretation of private law that conforms with fundamental rights. This direct horizontal effect may be general (3.1.1.1.) or specific (3.1.1.2.).

67. Scope precludes going beyond a brief reminder. For further details, see Barak, 14; Tushnet, State action.

68. Fundamental rights' horizontal effect is indeed a product of *both* fundamental rights guarantees themselves (see e.g. Article 35 of the Swiss Constitution) and the jurisdictions applying them (e.g. a national jurisdiction granting ECHR rights a horizontal effect the ECtHR cannot grant to them).

69. See Clapham, Private law, 347; Frowein, 302.

70. See on the importance of coherence in EU law, Besson, Integrity.

71. For obvious reasons, States' duties that may have a horizontal effect can only be positive.

3.1.1.1. General Direct Horizontal Effect

Fundamental rights' direct horizontal effect is general when it depends neither on a specific context nor on a specific right. It may be granted by fundamental rights guarantees or a general jurisprudential principle.

Very few national *fundamental rights' instruments* recognize a general direct horizontal effect in private law. Article 35 of the Swiss Constitution acknowledges such a general direct horizontal effect, but qualifies this acknowledgement by adding that this only applies to those rights which are such that they can apply to inter-individual relationships. This form of horizontal effect relies therefore on the assessment of the authorities in charge of the control of the private measures at stake. The ECHR does not recognize a general direct horizontal effect to fundamental rights either. This is a consequence of its conventional nature and the fact that it only binds States as this is confirmed by Article 1 ECHR. In fact, Article 34 ECHR emphasizes the procedural impossibility of making an ECHR claim against an individual. Nor do, finally, EU fundamental rights expressly foresee a general direct horizontal effect; their addressees are mainly EU institutions (Article 6 EUT) and Member States in the context of the implementation of or derogation to EU law. This is confirmed by Article 51 of the Charter which does not mention individuals in the list of potential perpetrators of Charter's violations.

In the absence of a legal provision stipulating fundamental rights' general direct horizontal effect, the latter may derive all the same from a *jurisprudential principle*. Most national jurisdictions exclude the general direct horizontal effect of fundamental rights.[72] As to the ECtHR, the State-oriented scope of its jurisdiction intrinsically limits the list of those it can regard as responsible of a fundamental rights' violation. This has raised an important controversy among internationalists. Whereas a minority of authors defend the possibility of granting horizontal effect to ECHR rights jurisprudentially, the majority and the Court itself do not share that opinion.[73] Of course, a direct horizontal effect may be given to ECHR rights by national jurisdictions if they recognize such an effect to national fundamental rights guarantees.

72. See in Switzerland: ATF 118 Ia 46 *Scientology*; and in Germany: BVerfGE 7, 198 — *Lüth*.

73. See Alkema, 36; Drzemczewski; Kohl; Eissen, Droits; Eissen, Obligations; De Fontbressin; Hahne. See also Clapham, Drittwirkung; Clapham, Private law, 163; Besson, Discrimination, 1045; Spielmann.

The situation is not as negative in the EU case-law, however. True, the direct horizontal effect of EU fundamental rights is still largely an open question. There are, however, important areas of EU primary law whose purpose is to have a direct horizontal effect in private relationships and hence in private law. It suffices to think, for instance, of *fundamental freedoms*, such as the free movement of workers. Article 39 ECT can indeed be opposed to private associations[74] or even to contractual price agreements.[75] Recently, its direct horizontal effect has even been extended to all private labour relationships.[76] This has been illustrated in the field of the prohibition of discrimination, for instance.[77] The case-law has, however, left some questions open such as that of the horizontal effect vis-à-vis restrictions to the free movement of workers and not only the freedom itself or that of the justifications individuals may produce to excuse an inter-individual restriction to Article 39 ECT given that Article 39 par. 3 and 4 ECT foresee state-oriented justifications only. There are exceptions, of course, among fundamental freedoms. This is the case of the free movement of goods and of Article 28 ECT whose direct horizontal effect has clearly been rejected by the ECJ.[78] The problem lies in the potential conflict between EU competition law, whose function is precisely to settle private conflicts, and direct horizontal effect. It remains, however, that the increasing convergence of fundamental freedoms[79] and the development of the direct horizontal effect of Article 39 ECT may justify extending this horizontal effect to all fundamental freedoms.[80]

Given the increasing number of cases where the direct horizontal effect of fundamental freedoms is acknowledged, it would be surprising not to extend this effect to EU *fundamental rights* themselves.[81] The question has, however,

74. See ECJ, Case 36/74 *Walrave* [1974] ECR 1405; ECJ, Case 415/93 *Bosman* [1995] ECR I-4921.

75. See ECJ, Case 15/96 *Kalliope Schöning-Kougebetopoulou* [1998] ECR I-47.

76. See ECJ, Case 281/98 *Angonese* [2000] ECR I-4139.

77. See ECJ, Case 36/74 *Walrave* [1974] ECR 1405; ECJ, Case 13/76 *Donà* [1976] ECR 1333. See also Besson, Droit communautaire.

78. See ECJ, Case 249/81 *Commission v. Ireland* [1982] ECR 4005.

79. See Steinberg.

80. See e.g. Canaris; Ganten.

81. One may also argue that the direct horizontal effect of fundamental freedoms merely increases individuals' freedom and autonomy and cannot therefore be considered an argument for a horizontal effect of fundamental rights which may precisely restrict that freedom. The problem with this argument is that, besides not seeing the justifications for horizontal effect *per se*, it draws boundaries among fundamental rights and freedoms which cannot be drawn in such a clear way given their mutual reinforcement.

always been left open by the ECJ's case-law. Fundamental rights are clearly capable of being invoked in legal disputes between individuals. This would also be the case of the rights guaranteed in the Charter, when it becomes binding.[82] True, Article 51 of the Charter foresees a list of potential violators of fundamental rights that excludes individuals. It would not, however, be the first time individuals fall outside the scope of application of fundamental rights provisions, although these rights are then recognized a direct horizontal effect. Finally, a direct horizontal effect could in any case be granted to EU fundamental rights by national jurisdictions if they recognize such an effect to national fundamental rights guarantees.

3.1.1.2. Specific Direct Horizontal Effect

Specific direct horizontal effect can be recognized in the case of a specific right or in a specific context. This may derive from fundamental rights' guarantees themselves or from the case-law. Very few national *fundamental rights' instruments* foresee a specific direct horizontal effect. There are exceptions, however. This is the case, for instance, of Article 8 par. 3 of the Swiss Constitution, which guarantees the equality of remuneration between men and women. For the reasons evoked before, this is impossible, however, in the context of the ECHR's guarantees and case-law, although this may be done through national case-law. In the EU, on the contrary, a case of specific direct horizontal effect may be found: that of the equality of remuneration between men and women according to Article 141 par. 1 EUT.[83] The 2000 Equality Directives mentioned previously also foresee the direct horizontal effect of the equality principle in private relationships.[84] Some have even proposed to extend this specific direct horizontal effect to the general anti-discrimination clause of Article 12 EUT through the ECJ's *case-law*.[85]

3.1.2. Indirect Horizontal Effect

The horizontal effect of fundamental rights may also be ensured indirectly when it happens through the mediation of private law and hence through the intervention of an authority. Individuals remain the addressees of these fundamental duties, but their horizontal effect is *indirect* because it only takes

82. See Curtin/Van Ooik, 112.

83. See ECJ, Case 43/75 *Defrenne II* [1976] ECR 455; ECJ, Case 381/99 *Brunner* [2001] ECR I-4961; ECJ, Case 320/00 *AG Lawrence* [2002] ECR I-7325.

84. See Coester-Waltjen.

85. See Bieber/Epiney/Haag, §6, 68.

place once the case is examined by an authority which creates or interprets private law so as to grant fundamental rights a horizontal effect. As such, fundamental rights' indirect horizontal effect and the duties they give rise to for individuals should not be confused with the State's positive duties to protect those rights. Of course, as we will see, before indirect horizontal effect can be granted, there will usually be a positive duty for the legislator or the judge to make sure fundamental rights are protected even among individuals.

Because indirect horizontal effect is only granted through the creation or interpretation of private law, it is generally accepted more easily; it does not threaten private autonomy and freedom directly and as such is deemed to respect the values of private law.[86] It is recognized as a jurisprudential principle in most European countries, as in Germany[87] and Switzerland.[88] It is also applied to ECHR rights by national jurisdictions applying them, when they grant the same effect to national fundamental rights as in Switzerland or Germany.[89] Finally, it is a principle one finds in the ECJ's case-law as well as in national decisions applying EU law.[90] One distinguishes between moderate indirect horizontal effect (3.1.2.1.) and reinforced indirect horizontal effect (3.1.2.2.).

3.1.2.1. Moderate Indirect Horizontal Effect

Moderate indirect horizontal effect is very limited and implies at the most the diffusion of constitutional values in private law. It is useful to distinguish between fundamental rights' mere radiation in the whole legal order (3.1.2.1.1.) and their stronger effect through general private law clauses (3.1.2.1.2.).

3.1.2.1.1. Fundamental Rights' Radiation in Private Law

If fundamental rights constitute an objective value order that underlies the whole legal order, their radiation in that legal order implies granting them an indirect horizontal effect in private law. This can be done, for instance, by creating and interpreting private law norms in conformity with fundamental rights. This is something which all European legal orders recognize either expressly or tacitly. Article 35 par. 1 of the Swiss Constitution foresees this radiation expressly, while it has long been recognized as a jurisprudential principle in German law.[91] This first form of indirect horizontal effect is also granted to ECHR rights when they are applied by national jurisdictions.

86. See Barak.
87. See e.g. 1 BvR 1962/01 vom 7/3/2002; BVerfGE 86, 122—*Brokdorf*.
88. See e.g. ATF 123 IV 211 *Rinderwahnsinn*; ATF 61 II 95.
89. See Ellger, 167. See also BVerfGE 74, 370.
90. See ECJ, Case 333/94P *Tetra Pak* [1996] ECR I-5951; ECJ, Case 62/86 *Akzo* [1991] ECR I-3359; ECJ, Case 6-7/73 *Commercial Solvents* [1974] ECR 223; ECJ, Case 260/89 *ERT* [1991] ECR I-2925.

3.1.2.1.2. General Private Law Clauses

A stronger form of indirect horizontal effect is granted through the application and interpretation of general private law clauses such as the good faith principle or the '*bonnes mœurs*'. These principles are indeed interpreted so as to ensure the respect of fundamental rights in private law.[92]

This is something which all European legal orders recognize either expressly or tacitly. It is the case, for instance, of Article 28 of the Swiss Civil Code that protects personality rights in private law.[93] Another typical example is provided by Article 138 of the German Civil Code which protects individuals against immoral actions on the part of others ('*Sittenwidrigkeit*') and has been used by the German Federal Constitutional Court to declare invalid the extensive personal securities provided for the debts of close relatives.[94] A further example may be found in Articles 1366, 1374 and 1375 of the Italian Civil Code which protect the good faith principle and have been said to translate the constitutional obligation of solidarity ('*solidarietà sociale*') in horizontal relationships.[95] National jurisdictions also recognize this effect to ECHR and EU fundamental rights through general private law clauses.

3.1.2.2. Reinforced Indirect Horizontal Effect

Fundamental rights' indirect horizontal effect may also be reinforced in granting a horizontal effect with respect to specific private law norms themselves and not only to general clauses.[96] This reinforced horizontal effect remains indirect, however, in that it requires the intervention of an authority. There are two kinds of reinforced indirect horizontal effect: conform interpretation of private law and revision of private law.

3.1.2.2.1. Conform Interpretation of Private Law

The interpretation of specific private law norms in conformity to fundamental rights ensures their indirect horizontal effect. It is recognized in almost

91. BVerfGE 7, 198—*Lüth*.
92. See Besson, Egalité horizontale.
93. See ATF 129 III 35, 42, cons. 6.
94. BVerfGE 89, 214—*Bürgschaftsbeschluss*. See Heldrich/Rehm.
95. See Cass., 20/04/1994, 3775, Corr. giur. 1994, 566.
96. See Barak, 28.

all European legal orders either expressly or tacitly. This is, for instance, what Article 35 par. 3 of the Swiss Constitution foresees expressly. It is also what was established by the German jurisprudential principle developed in the famous *Lüth* case in the 1950s.[97] Although ECHR rights cannot be granted an indirect horizontal effect by the ECtHR, they may be given one in national decisions. Similarly, EU fundamental rights may be given an indirect horizontal effect in the interpretation of European private law norms by national jurisdictions and the ECJ.

3.1.2.2.2. Revision of Private Law

A final degree of reinforced indirect horizontal effect may be reached when private law norms are not only interpreted so as to conform to fundamental rights, but are actually revised accordingly. This is a very incisive model of indirect horizontal effect that is recommended by some authors like Judge Aharon Barak.[98] It is not, however, recognized by national jurisdictions nor by the ECJ, whether they apply national, ECHR or EU fundamental rights.

3.2. State Positive Duties

Besides the horizontal effect granted to some individual positive and negative fundamental duties in private law, fundamental rights may also have an impact in private law through the positive duties of States to protect fundamental rights. After a short introduction to the notion, I will present different types of positive duties depending on their addressees.

3.2.1. Notion

In view of the difficulties of granting fundamental rights a horizontal effect in private law, which are due mainly to the resistance of traditional private law values such as private autonomy and freedom, an alternative has been developed to grant these rights a certain effect in private relationships: positive duties of protection of fundamental rights in the public sphere, but also in the private sphere and among individuals. These duties are States' duties unlike those that derive from the indirect horizontal effect of fundamental rights, even if the latter are mediated by an authority's intervention and interpretation of private law and are usually based on that authority's positive

97. BVerfGE 7, 198—*Lüth*.

98. See Barak, 29, 31.

duties.[99] Positive duties correspond, in other words, to the *vertical* effect of fundamental rights, but are *positive* and require as such more than the mere abstention of the State and an intervention in the private sphere.

Positive duties to protect fundamental rights in the private sphere have been known within national jurisdictions for a long time. It is, however, their emergence in the case-law of the ECtHR, whose only instrument of horizontal effect it is, that has reinforced the role of positive duties for the horizontal effect of fundamental rights in Europe.[100] Positive duties first appeared in the ECtHR's case-law in the *Marckx*[101] case in 1979, but have been strongly developed since the 1990s.[102] Finally, positive duties are also known to EU law. The ECJ has long recognized the existence of positive duties of protection of fundamental rights. These duties may actually be derived from Article 10 ECT. As in the context of the ECHR positive duties,[103] positive duties based on EU fundamental rights leave a large scope of appreciation to Member States.[104] In fact, some authors claim the horizontal effect of EU fundamental freedoms should in fact be ensured through positive duties and not through a direct horizontal effect.[105] *A fortiori*, therefore, this would make the argument for a direct horizontal effect of EU fundamental rights I alluded to earlier even thinner.

Positive duties complement all fundamental rights, whether positive or negative. They may have many objects.[106] They can be duties to ensure certain material positive services, duties to provide certain procedural and institutional instruments of protection of fundamental rights, duties to adopt certain legal norms and especially criminal laws to protect fundamental rights[107] or, finally, duties to take concrete measures to guarantee individuals' security

99. Contra: dissenting opinion of Judge Kriegler in the South African Constitutional Court's decision *Du Plessis v. De Klerk*, (1996) 3 S.A. 850, 914H-915D, who regards positive duties as an indirect horizontal effect of fundamental rights. See also Hunt, Horizontal effect, 438. Contra: Phillipson, 830–831; Leigh, 840.

100. See Besson, Obligations positives, 49.

101. ECtHR, Case 6833/74 *Marckx v. Belgium* [13/06/1979].

102. See ECtHR, Case 23452/94 *Osman v. UK*, [28/10/1998]; ECtHR, Case 16798/90 *López Ostra v. Spain*, [9/12/1994]; ECtHR, Case 14967/89 *Guerra and others v. Italy*, [19/02/1998].

103. See e.g. ECtHR Case 44306/98 *Appleby and others v. United Kingdom*, 2003-VI [06/05/2003].

104. See ECJ, Case C-265/95 *Commission v. France* [1997] ECR I-6959. See also the *Schmidberger* case.

105. See Bieber/Epiney/Haag.

106. See Schefer, Kerngehalte, 276; Besson, Obligations positives, 73.

107. See ECtHR, Case 8978/80 *X. et Y. v. The Netherlands*, [26/03/1985]; see also BVerfGE 39, 1—*Schwangerschaftsabbruch I* and BVerfGE 88, 203—*Schwangerschaftsabbruch II*.

against risks generated by third parties or even natural risks. In all jurisdictions which recognize positive duties, they are deemed to give rise to *subjective and justiciable claims* to positive protection on the part of all authorities.[108] Given the increasing scope and importance of these duties, authors and judges are more and more divided about their legal justifications, their implementation modalities or their restriction criteria.[109] Scope precludes, however, addressing these difficulties here.

3.2.2. Types of Positive Duties

Positive duties of protection of fundamental rights differ not only in content and scope, but also with respect to the *institutions* they oblige. Most legal orders foresee positive duties for all State's institutions. This is the case, for instance, of Article 35 par. 3 of the Swiss Constitution which establishes a duty for all authorities as far as possible to ensure the respect of fundamental rights among individuals.[110] The same applies to ECHR rights which bind all national authorities,[111] and even all EU authorities through the intermediary of EU fundamental rights. Finally, Article 10 ECT also foresees positive duties of implementation of EU law for all national and EU authorities in charge of the latter. Some legal orders, however, only recognize some institutions' positive duties, usually judicial positive duties. One should distinguish therefore between judicial, legislative and executive positive duties.

3.2.2.1. Judicial Positive Duties

The judge is clearly the primary addressee of positive obligations of protection of fundamental rights among individuals. She is indeed the first to interpret and apply positive law in such a way as to protect individuals' fundamental rights against others. In fact, fundamental rights' indirect horizontal effect necessarily implies respecting judicial positive duties.[112] Even though indirect horizontal effect creates individual as opposed to institutional duties, it requires the judge's active participation. The reverse is not necessarily true, however: a judge's positive duties to protect fundamental rights do not necessarily give rise to giving the latter an indirect horizontal effect.

108. See in German law, Unruh, 58; Bleckmann, 219; Hesse, 350. See in Swiss law, Schefer, Kerngehalte, 266. See in the ECHR context, Wildhaber/Breitenmoser, 74; Frowein/Peukert, Articles 8, 9.

109. See Besson, Obligations positives; Schefer, Kerngehalte, Ch. C.

110. See ATF 126 II 300.

111. See the ECtHR, Case 23452/94 *Osman v. UK* [28/10/1998].

112. See Unruh, 71.

In fact, in some legal orders, judicial positive duties are the only positive duties one may think of, as in the United States or in Canada, whereas in most European countries, these duties complement other institutions' positive duties. It is useful in this respect to distinguish between vertical and horizontal judicial duties.

3.2.2.1.1. Vertical Judicial Duties

In the United States and in Canada, the effect of fundamental rights in private law is only recognized in presence of a '*state action*'.[113] While a purely private relationship in which a fundamental rights' violation takes place may not be submitted to fundamental rights' protection, the judge's intervention in this private law matter suffices to constitute a state action and hence to be submitted to the respect of fundamental rights. This effect is purely *vertical* as its addressee is a judge and no horizontal albeit indirect effect of fundamental rights in private law may be derived from it.[114]

3.2.2.1.2. Horizontal Judicial Duties

In most European legal orders, judicial positive duties almost always imply giving fundamental rights' indirect horizontal effect in private law. The judge's positive duty usually consists indeed in interpreting and implementing private law in conformity with fundamental rights.

Judicial positive duties usually complement legislative and executive positive duties. There may be cases, however, where horizontal judicial duties stand on their own independently of a violation of legislative or executive positive duties. This is the case in the ECtHR's recent decision *Pla* which states that, even in the absence of a violation of legislative or executive duties, a certain indirect horizontal effect may be granted to the ECHR in private law through the judge's positive duty to interpret private law in the light of the ECHR.[115]

3.2.2.2. Legislative Positive Duties

In most European legal orders, and in the context of the ECHR, positive duties also extend to the legislature which has the obligation to protect fun-

113. See the American Supreme Court decision *Shelley v. Kraemer* 334 US 1 (1948) and the Canadian Supreme Court decision *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd*, [1986] 2 S.C.R, 573 revised in 2002 by *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 S.C.C. 8. See also Nowak/Rotunda, Ch. 12; Tribe, 246.

114. See on recent evolutions, Tushnet, State action; Sunstein.

115. ECtHR, Case 69498/01 *Pla and Puncernau v. Andorra* [13 juillet 2004], §59.

damental rights in private relationships in drafting private laws which concretize the latter.[116]

It is important not to conflate legislative positive duties with the legislator's negative duties in virtue of fundamental rights' afore-mentioned *vertical* effect. Although these two types of duties are distinct, there could be cases where the legislator's vertical duties have an effect in private law. Moreover, legislative positive duties should be distinguished from fundamental rights' *indirect horizontal effect*. True, the latter may imply drafting new private legislation or revising the latter to extend fundamental rights' protection to individuals. Even though this indirect horizontal effect primarily aims at creating individual obligations, it implies the existence of positive duties for the legislator to make sure this indirect horizontal effect can take place through legislation.[117] The reverse is not necessarily true, however: legislative positive duties may not necessarily give rise to an indirect horizontal effect.

3.2.2.3. Executive Positive Duties

In most European legal orders, and in the context of the ECHR, positive duties also extend to the executive who has the duty to take all necessary measures to protect fundamental rights among individuals. In fact, most of the case-law concerns the implementation of executive positive duties, such as insufficient police measures or environment protection measures.[118]

3.3. Comparative Advantages

After this presentation of the different types of horizontal effects of fundamental rights in private law one encounters in Europe, depending on the origins of these rights and on the jurisdictions in charge of implementing them, it is important to assess their advantages and disadvantages. One should note, before doing so, that very often the type of horizontal effect chosen does not only depend on its substantive merit, but also on the historical, social and political context behind a legal order,[119] as well as other legal constraints such as the absence of judicial review of legislation or the respect of the margin of appreciation of national courts at European level, etc.[120] This has clearly been illustrated by the diversity of views on the subject in Europe depending on whether we are looking at the horizontal effect of fundamental rights in European private law from a national perspective, from that of the ECtHR or of the European Court of Justice. Some comparative advantages may be usefully delineated, however, even though scope precludes mentioning all the dimensions in which the implications of horizontal effect may be criticized and improved.[121]

To start with fundamental rights' *direct horizontal effect*, it is clearly the most contested form of horizontal effect. This has to do primarily with its impact on private law and the principle of private autonomy.[122] Provided, however, by reference to the argument I made earlier, that this traditional approach to private law is abandoned and fundamental rights are given the place they deserve at the heart of private law norms, this critique is no longer valid. On the contrary, direct horizontal effect presents the advantage of being an uncompromised recognition of individual fundamental duties in private law.[123] Moreover, direct horizontal effect avoids translating fundamental rights into private law, either through blanket norms or in concrete norms, and hence circumvents the dangers of commodification that are linked to the privatization of fundamental rights.[124] These dangers may occur, for instance, through the type of legal reasoning used in private law, the justifications one may oppose to a restriction in private law and, finally, the type of proportionality test used in private law.[125] Finally, direct horizontal effect does not overburden authorities with the mediation of fundamental rights' horizontal effect, either indirectly like in the case of indirect horizontal effect or directly as in the case of positive duties.

It is precisely the difficulty often encountered with *indirect horizontal effect* that it submits individual duties to the intervention of an authority, most usually the judge, but also the legislator in the case of reinforced indirect horizontal effect. This gives rise in turn to a further difficulty, that of a breach of the separation of powers in that it is usually the judge who grants indirect horizontal effect. The latter problem is in fact solved by *positive duties* which apply across the board to all institutions. As such, positive duties limit judicial

116. See Besson, Integrity.

117. See Tushnet, Judicial review.

118. See ECtHR, Case 23452/94 *Osman v. UK*, [28/10/1998]; ECtHR, Case 16798/90 *López Ostra v. Spain*, [9/12/1994]; ECtHR, Case 14967/89 *Guerra and others v. Italy*, [19/02/1998].

119. See Tushnet, State action, 84. See in Germany, Starck, 111.

120. See Besson, Obligations positives.

121. See Besson, Commodification. See also Barak.

122. See Bleckmann, 220–221.

123. See Barak, 15.

124. See Besson, Commodification; Besson, Social goods. See also Somek, Antidiscrimination; Tushnet, Judicial review.

125. See e.g. Ellger, 175–178.

power[126] and maintain a certain institutional balance.[127] Moreover, positive duties emphasize the importance of measures of implementation and concretization of general and abstract fundamental rights. The problem remains, however, that of the mediation of the horizontal effect, with addressees of positive duties being institutions only. Moreover, as I hinted earlier, positive duties generate as yet unsolved implementation problems. For instance, since positive duties can only be violated by omission, the margin of appreciation of authorities is broad and a justification for restrictions is easy to provide. Another problem lies in the type of economic justifications that may be put forward to account for the non-respect of a positive duty. Finally, the test of proportionality applied to restrictions to positive duties does not abide by the strict standards that apply to the violation of other fundamental rights. In sum, therefore, the solution seems to lie in the combination of direct horizontal effect and positive duties, which both present advantages and can complement each other effectively.

4. Implications for the Respect of Fundamental Rights in European Private Law

The complexity of these different approaches to the effect of fundamental rights in European private law has many implications, and in particular, first of all, implications for the future reinforcement of a *sui generis* regime of fundamental rights protection in Europe (see 4.1) and, second, implications for the future of the Europeanization of private law (see 4.2).

4.1. Towards European Constitutional Patriotism

What the presentation of the different types of horizontal effect of fundamental rights in European private law has shown is that there is a diversity of approaches to the same problem depending on the origins of the fundamental rights and the jurisdictions concerned. This diversity of approaches, together with the growing number of sources of fundamental rights and private law norms that may conflict in Europe, increases the risk of diverging solutions to the same cases when some of these jurisdictions function as appellate jurisdictions, but also over different cases. This calls for a more coherent approach to the issue of horizontal effect in Europe. As I have explained elsewhere, coherence is a central principle to European integration; it ensures unity in diversity through dialogue, mutual learning and a constant levelling-up of guarantees in Europe, rather than through uniformisation *stricto sensu*.[128]

126. See on the importance of separation of powers in the constitutionalization of private law, Tushnet, State action, 98.

127. See Besson, Integrity, 63–64.

This very *dialogue* among jurisdictions as to what this horizontal effect should be, is already at work in an embryonic form in the different forms of horizontal effect I have presented. For a long time, the multitude of jurisdictions and hence of views about horizontal effect led to a levelling-down of the overall fundamental rights protection potential in Europe.[129] Each national court decided on horizontal effect without any regard for other European jurisdictions' approaches. Recently, national decisions have started to borrow models of horizontal effect from other legal orders.[130] Similarly, the ECtHR's position respected, as an international court applying an international convention,[131] the national margin of appreciation in matters of horizontal effect. Its recent case-law over positive duties has shown, however, the potential for a real dialogue and levelling-up in fundamental rights protection in Europe.[132] This tendency is also confirmed by the ECJ's recent case-law on fundamental rights and in particular by the *Omega* case, where the ECJ recognized the German principle of human dignity as a EU fundamental right, thus gradually levelling up European fundamental rights protection despite respecting the diversity of national fundamental rights traditions.[133] Finally, the relationship between the ECtHR and the ECJ is as before deeply uncertain. There are signs, however, of a growing willingness to collaborate in the protection of shared values.[134] One may therefore have faith in the development of a European '*constitutional patriotism*' to borrow Jürgen Habermas' expression,[135] which has since then been used by Oliver Gerstenberg in the European fundamental rights context.[136]

Of course, the EU needs to have a clearer line on third-party effect, especially when applied to fundamental rights and not only to fundamental freedoms. This European dialogue over fundamental rights should therefore be

128. See Besson, Integrity.

129. See Clapham, Private law, 347; Frowein, 302.

130. See ATF 126 II 300 for a comparative approach.

131. See Clapham, Private law, 343.

132. See, however, Besson, Reception; Gerstenberg, Constitutions, for some reservations on the *Appleby* case.

133. See the *Omega* case. See the dialogue between Besselink and Weiler, 1999.

134. See the ECHR decision *Bosphorus* and the ECJ decision *Emesa Sugar*.

135. See Habermas, 156.

136. See Gerstenberg, Constitutions.

reinforced. This could occur through an increased use of comparative constitutional law across Europe.[137] One may also suggest adopting a clear constitutional arrangement on horizontal effect of fundamental rights in Europe.[138] This could be done through a revision of Article 51 of the Charter for fundamental rights, although this is very unlikely, given that the Charter was not at all revised before being inserted in the Lisbon Treaty in 2007.

4.2. Future Europeanization of Private Law

Besides providing new hopes for constitutional patriotism in Europe, the issue of the impact of fundamental rights on European private law has revealed the pluralist and multi-level nature of the European legal order. This constitutes an argument for fostering a pluralistic European private law developing at different levels and in different jurisdictions through dialogue and mutual learning, rather than as a codified state-like private law imposed from above.

Moreover, if fundamental rights are to be understood, as I have argued before, as even more central to European law than to national law, European private law cannot afford to develop without reference to them.[139] Since EU fundamental rights are clearly developing in a pluralistic way, it would be counterproductive to isolate European private law from them in a way even national private law no longer is, given the penetration of multi-level fundamental rights protection in national law. In fact, this would be even more counterproductive as national and European fundamental rights agendas with regard to private law seem to have come in line with one another, as was illustrated in the Charter drafting process. This tendency may also be explained by reference to the loss of sovereignty that goes together with the Europeanization of private law.[140] We might therefore soon be watching a replica of the *Solange I* and *II* challenge, if the ECJ does not find a clear line on issues pertaining to the Europeanization of private law and the impact of fundamental rights on the latter. In sum, the way fundamental rights impact on European private law may be said to plead against a unified European civil

137. See on the authority of comparative constitutional law in Europe, Besson/Pfersmann. See also Möllers, 41; Gerstenberg, Constitutions.

138. See at the national level, Barak, 42.

139. See e.g. Hesselink; Joerges, Challenges; Gerstenberg, European private law; Joerges, Conflict.

140. See Caruso.

code. All this confirms, albeit on other grounds, the very conclusion others have reached on the basis of the failure of the European Constitutional Treaty.[141]

Conclusions

The now well-known question of the horizontal effect of fundamental rights has recently re-arisen with a renewed intensity in the context of the development of European private law. Rather than pouring old wine into new casks, the issue emerges with more acuity in a European legal context. Not only does EU law give rise to norms that provide greater scope for private exchanges and transnational economic efficiency, but it also generate norms that ensure greater protection of fundamental rights in national legal orders. This increases, as this chapter has demonstrated, the possibility of clashes between European private law and national fundamental rights, between national private law and European fundamental rights and, finally, between European private law and European fundamental rights. Moreover, this increase in potential violations of fundamental rights through private law norms in Europe also explains how, combined with the multi-level institutional arrangement, different jurisdictions develop the different approaches to the horizontal effect of fundamental rights in European private law this chapter has presented and how they may therefore give different answers, albeit based on the same fundamental rights, to the question of the invalidity of the same private law norms. Thus, while national jurisdictions have addressed this issue each in their own way since the 1970s and the ECtHR has too often resisted imposing a European levelling-up out of respect for the national margin of appreciation, the ECJ now needs to have a clear line on third-party effect in European private law and so do the ECtHR and all the national jurisdictions currently contributing to the development of European private law.

Besides providing grounds to examine an old issue in the new light of European law and to propose coherent solutions to a common question across Europe, the impact of fundamental rights on European private law has also revealed the pluralist and multi-level nature of the European fundamental rights protection framework and emphasized the need for the development of a true constitutional patriotism in Europe. Finally, the diversity of horizontal effects in Europe provides an argument for fostering a pluralistic European

141. See Joerges, Conflict; Gerstenberg, European private law, 786.

private law developing at different levels and in different jurisdictions, rather than as a codified state-like private law. At a time when national public law is gradually being reduced by the Europeanization of private law to being the only sovereign area of national law left, thus giving rise to a renewed interest for the relationship between public and private law and for the impact of fundamental rights on private law across Europe, it would be counterproductive to suppress the very means we have to develop a living European private law based on the fundamental values shared by all Europeans.

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