

**THE RISE OF PRIVATE POLICY IN THE DIGITAL MARKET:
CONSEQUENCES FOR FUNDAMENTAL RIGHTS
AND THE RULE OF LAW**

Róisín Áine Costello

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ABSTRACT

The work which follows examines the process by which private actors in the digital market are redefining fundamental rights through their contractual terms and practical operation. The argument is allied to works which consider ‘digital constitutionalism,’ the idea that private actors in the digital market are increasingly displaying constitutional features through their contractual terms and documents. Unlike a majority of work in the area of digital constitutionalism the work does not argue that private actors setting rights based standards represents a positive development. Rather, the work argues that private actors, through their re-definition of public, normative standards are generating a body of rules and practices which have displaced democratically decided rights standards with negative consequences for individual autonomy and the Rule of Law.

The work argues that this process has been enabled by three features of EU law and policy. The first is an approach of functional equivalence to laws governing the digital market. In accordance with this approach the digital market has been treated as equivalent to traditional markets and its participants are viewed as requiring no additional or supplementary protections or regulations. Of particular significance in functionally equivalent attitudes to the digital market is the Union’s deference to freedom of contract as part of an ordoliberal attitude to market regulation. While this attitude is now beginning to erode (to some extent) in the context of data protection it remains the dominant regulatory approach of the European Union in the digital market.

The second feature, not unrelated to the first, is the Union’s preference for economic rather than socially orientated standards and protections in its policies as well as its secondary laws. As part of this preference, when fundamental rights cross the Rubicon from vertically enforced constitutional protections to horizontally enforceable legislative ones their content is transmuted in a manner which favours their economic over socially oriented aspects. The third feature, is what is referred to within the work as the Union’s brittle constitutionalism – that is the Union’s hesitant and incomplete articulation of and commitment to rights enforcement. This feature is the result in part of the Union’s ambiguous and at times hostile attitude to the development of fundamental rights policy.

The work examines the impact of these trends and the rise of private policy they have generated on the rights to privacy and property under the Charter of Fundamental Rights.

The Law as stated is correct as of 17th of May 2020

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CHAPTER ONE

PRIVATE ACTORS, PUBLIC STANDARDS AND THE DIGITAL MARKET

‘We shape our tools and, afterwards, our tools shape us’¹

1.1 Introduction

This work examines how private actors in the digital market control the enforcement and limits of fundamental rights in the European Union through their contractual terms and practical operation. This pattern can be considered, to a limited extent, an ideological legacy of the internet’s development, and the applications which have developed to run on it, the most prominent of which is the web. Throughout their development, these technologies were exposed to relatively comprehensive (though not uncontroversial) infrastructural regulation without a parallel concern as to the need for normative regulation of the content created and distributed through them.

Initially conceived as a public project, beginning with the US Department of Defence funded ARPANET, the Internet was a public project. However, the infrastructure created by this public project was rapidly colonised by private actors and its international proliferation rendered it both practically and politically challenging to subject the Internet to national, public regulatory standards. By the late 1990s the Internet was dominated by private, rather than State actors² and, as it was commercialised, the potential of default fundamental rights protections premised on the Internet’s operation as a publicly controlled utility or space fell away, replaced by a deference to systems of private ordering. As a result, the early digital market occupied a liminal regulatory space considered neither fully public nor wholly private, a legacy which continues to trouble the digital environment to this day.

During the course of this research, and after a prolonged period of academic and political neglect, public awareness of the capacity of private actors in the digital market to impact fundamental rights standards has increased. Yet while the awareness of such impacts is recent, the power of private actors to effect such impacts on public, normative standards is not new. Indeed, there has been consistent engagement for some time with the capacity of private actors to negatively impact fundamental rights.³

¹ Marshall McLuhan, *Understanding Media* (McGraw Hill 1964).

² See, Tim Wu and Jack Goldsmith, *Who Controls the Internet?: Illusions of a Borderless World* (Oxford University Press 2006)

³ See generally, Philip Alston eds, *Non-State Actors and Human Rights* (Oxford University Press, 2005); Kamminga, ‘Holding Multinational Corporations Accountable for Human Rights Abuses’ in Philip Alston eds, *The EU and Fundamental Rights* (Oxford University Press 1999); Andrew Clapham, *Human Rights*

In the work which follows I draw together the existing, but disparate, narratives and research concerning: fundamental rights law and policy in the European Union, the influence of private actors on individual rights and the capacity of digital actors to impact democratic processes. In as much as the work considers the interplay between fundamental rights as protected in national and international constitutional documents this work could be considered adjacent to ‘digital constitutionalism’ which argues that the contractual terms of private actors exemplify constitutional features.⁴

Contrary to that school of scholarship, however, this work does not view the normative standard setting undertaken by private actors (in part through their contractual provisions) as a positive development. While contractual terms used by private actors may display a superficial allegiance to rights norms, their content is neither formulated nor applied in a manner which evidences the normative consistency or equality of application necessary to justify the label of constitutionalism.⁵

More fundamentally, in as much as such private actors seek to co-opt constitutional language and principles they have done so in a manner which conceptually re-defines the protective scope of the rights and principles at issue and the limits of their enforcement. In doing so, I argue, these private actors are displacing State actors as the sources and protectors of the public, normative standards and principles – generating a ‘private policy’ which reshapes the content and scope of the fundamental rights which individuals enjoy in digital spaces.

The research question which the work which follows seeks to answer first, by what mechanisms private policy has become ascendant in the Union and secondly, by what means can its negative impacts for individual rights and the rule of law be ameliorated.

1.2 Scope and Methodology

The questions which the work which follows seeks to answer is, having identified the trends which have enabled privacy policy, what solution, in law, can be identified to circumscribe its deleterious

Obligations of Non-State Actors (Oxford University Press, 2006); Jean d’Aspremont eds, *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge, 2011); Guenther Tuebner, ‘The Anonymous Matrix: Human Rights Violations by Private Transnational Actors’ 92(2006) 69 *Modern Law Review* 327.

⁴ Nicolas Suzor, ‘Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms’ (2018) *Social Media and Society* 1; Dennis Redeker Lex Gill, and Urs Gasser, *Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights* (Berkman Klein Center for Internet & Society Research Publication 2015-15, 2015); Edoardo Celeste, *Digital constitutionalism: Mapping the constitutional response to digital technology’s challenges* (HIIG 2018).

⁵ There is, moreover, an argument that in so far as any normative allegiance is evident in the terms of service of private actors in the digital environment such an allegiance is characterised by a marked allegiance to US constitutional values, and not to those of the European Union examined here. This is, however, beyond the scope of the present work.

effects for fundamental rights. The research situates this examination within EU law, and specifically analyses the questions raised by reference to the Union's constitutional documents in the form of the Charter of Fundamental rights and the Treaties. In discussing rights the research is concerned with those rights protected under the Charter but also considers the manner in which those rights have been granted additional protection through the Union's secondary law and policy documents developed and promulgated under the auspices of those primary constitutional documents in the context of the two rights examined – that is, the right to privacy and the right to property under the Charter.

These rights were chosen due to their centrality to fundamental conceptions of individual autonomy and thus to the constitution of the democratic discourse necessary for the health of the liberal democratic state. As such, both rights illustrate the simultaneous capacity of rights infringements to impact not only the immediately harmed individual but also, cumulatively, democratic society.

The work necessarily adopts a textual analysis rather than quantitative or qualitative methodologies. Beginning with a literature review of the extant primary constitutional documents and the relevant secondary materials related to them the research in its substantive stages employed a primarily deductive design theory, proceeding from the central question to substantiate claims by reference to primary texts and judicial decisions. This deductive methodology used was preferable for its reduction of epistemic uncertainty as well as its centrality in a work which seeks to establish the nature of fundamental rights within the Union's constitutional architecture as against the Union's historical context, thus to establish the extent of the horizontal as well as vertical application of fundamental rights in EU law and therefore to clarify the mechanisms by which such rights can be effectively asserted in the digital market.

While the activities of private actors examined by this work have implications for competition law within the EU such arguments have been examined elsewhere as part of the predominant focus in practice and scholarship on market-based harms and solutions to the harms produced by private actors in the digital market.⁶ The work which follows therefore limits itself to an examination of the social (rights-based) harms and social, rather than market, oriented solutions to those harms.⁷

⁶ See, Ariel Ezrachi and Maurice E Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (Harvard University Press 2016); Kevin Coates, *Competition Law and Regulation of Technology Markets* (Oxford University Press 2011); Yves-Alexandre de Montjoye and Heike Schweitzer Jacques Crémer, *Competition policy for the digital era*, 2019); Francisco Costa-Cabari and Orla Lynskey, 'Family ties: the intersection between data protection and competition in EU law' (2017) 54 *Common Market Law Review* 11; Maria C Wasastjerna, 'The Implications of Big Data and Privacy on Competition Analysis in Merger Control and the Controversial Competition-Data Protection Interface' (2019) 30 *European Business Law Review* 337 *ibid*.

⁷ This work understands fundamental rights as encompassing the guarantees offered by the Charter of the Fundamental Rights, and the ECHR pursuant to Article 52. The work recognises the accepted differentiation

Finally, the digital market is understood in this work as referring to the commercial activities covered by the Union's Digital Single Market strategy (DSM) but also as encompassing the full range of contractual relationships between consumers, producers and providers of goods and services in the online environment.⁸ In its reference to private actors in the digital market the work focuses on the undertakings formerly referred to as the 'GAFA' but now more appropriately termed the 'AAFA' – Alphabet (including its subsidiary company Google), Amazon, Facebook (including its subsidiary companies WhatsApp and Instagram) and Apple during the period January 2016 to January 2020. The contractual practices of these undertakings are illustrative of broader patterns within the digital market over which these four undertakings enjoy significant influence due to their large market shares and the associated formal and informal influence which they exercise over market practices.

1.3 What Is Private Policy?

The last fifteen years have seen the rise to prominence of a small number of private actors who mediate a disproportionate share of online interactions. In doing so these private actors dictate the goods and services available to consumers, and the terms on which they are available, by structuring conditions and terms of market access. Legal understanding of the extent to which the Internet is dominated by these concentrations of power remains under-developed.

In a North American context, and speaking specifically to the regulation of free speech Jack Balkin⁹ and Kate Klonick have argued that private online platforms have emerged as 'new governors' of speech rights.¹⁰ More recently, Rory von Loo has argued that private actors in the digital environment are increasingly acting as 'gatekeepers' for public policy enforcement in North America – creating 'an expansive area of unaccountable authority' within modern regulatory states.¹¹ Notably, the vast majority of this work on private actors in the digital environment as rights standard setters have been, first, North American in their focus and secondly, concerned with rights

of the label 'human rights' in the European Union as implying an exclusively international remit which is not representative of the scope of this work. See, Neil MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth* (Oxford University Press 1999); Gerald L Neuman, 'Human Rights and Constitutions in a Complex World' (2013) 50 *The Irish Jurist* 1.

⁸ European Commission, 'A Digital Single Market Strategy for Europe' COM(2015) 192.

⁹ Jack Balkin, 'Free Speech is a Triangle' (2018) 118 *Columbia Law Review* 1.

¹⁰ Kate Klonick, 'The New Governors: The People, Rules and Processes Governing Online Speech' (2018) 131 *Harvard Law Review* 1598. Some have gone still further alleging that social media actors in particular display the characteristics of state actors, see Orit Fischman-Afori, 'Online Rulers as Hybrid Bodies: The Case of Infringing Content Monitoring' (2020) 23 *University of Pennsylvania Journal of Constitutional Law* 3 and David Kaye, *The Republic of Facebook* (2020).

¹¹ Rory Van Loo, 'The New Gatekeepers: Private Firms as Public Enforcers' (2020) 106 *Virginia Law Review* 467.

of speech rather than the impacts on rights more broadly. This work thus turns the focus to the European Union, and fundamental rights more broadly.

More broadly, there have been calls for the introduction of alternative regulatory models with the aim of ensuring that the digital market and the private actors within it are required to recognise the fundamental rights of individuals. Sir Tim Berners-Lee has called for a ‘Magna Carta for the Web’¹² a call echoed by the W3C’s ‘Web We Want’ initiative which in turn builds on the Internet Rights & Principles Coalition’s¹³ Charter and the work started by the Global Network Initiative’s principles.¹⁴ These efforts all call for the adoption and implementation of measures to ensure classical liberal values; decentralized power, autonomy guarantees and fundamental rights are reflected in the digital market through various decentralised and soft law mechanisms.¹⁵

Others have called for constitutional standards to be extended to digital platforms where digital platforms act as quasi-public fora¹⁶ while some commentators have suggested that recent governance approaches constitute an attempt to ‘constitutionalise’ the digital market.¹⁷ This is based largely on the deployment of constitutional language and the incorporation of terms which seek to mirror normative standards. In this vein Facebook has labelled its terms of use a ‘Statement of Rights and Responsibilities’ which ‘derives from the Facebook Principles’ an expression that echoes the language of national constitutional texts but which, as this work argues, offer only a superficial allegiance to public normative standards.¹⁸ Facebook with its introduction of its

¹² Jemima Kiss, 'An online Magna Carta: Berners-Lee calls for bill of rights for web.' *The Guardian* (<<https://www.theguardian.com/technology/2014/mar/12/online-magna-carta-berners-lee-web>>) accessed 22 January 2019.

¹³ Internet Rights and Principles Coalition, 'Charter of human rights and principles for the Internet' (2014) .

¹⁴ Kiss, 'An online Magna Carta: Berners-Lee calls for bill of rights for web.'

¹⁵ Lex Gill, *Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights*; Nicolas Suzor, 'Lawless: the secret rules that govern our digital lives'(<<https://osf.io/tnhj3/>>) accessed 7 March 2020.

¹⁶ Jack Balkin, 'Virtual liberty: Freedom. to design and freedom to play in virtual worlds' (2004) 90 *Virginia Law Review* 2043; Neil W Netanel, 'Cyberspace self-governance: A skeptical view from liberal democratic theory' (2000) 88 *California Law Review* 395; Dawn C Nunziatoo, 'The Death of the public form in Cyberspace' (2005) 20 *Berkeley Technology Law Journal* 1115

¹⁷ Edoardo Celeste, 'Terms of service and bills of rights: new mechanisms of constitutionalisation in the social media environment?' (2018) 1 *International Review of Law, Computers and Technology* 1; Anne Peters, 'Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures' (2006) 19 *Leiden Journal of International Law* 597, 582; Nicholas P Suzor, 'The responsibilities of platforms: A new constitutionalism to promote the legitimacy of decentralised governance' (Association of Internet Researchers Annual Conference).

¹⁸ In 2009, Facebook changed its Terms of Service without consulting its community resulting in significant backlash. Mark Zuckerberg pledged that going forward Facebook users would enjoy a direct input on the site’s Terms stating ‘our terms aren’t just a document that protect our rights; it’s the governing document for how the service is used by everyone across the world. Given its importance, we need to make sure the terms reflect the principles and values of the people using the service. Since this will be the governing document that we’ll all live by, Facebook users will have a lot of input in crafting these terms.’ As a result, Facebook renamed its ‘Terms of Use,’ labelling them a ‘Statement of Rights and Responsibilities.’ The company also included a mechanism which would permit Facebook’s users to vote on proposed changes to the Terms of Service. Such a vote would bind Facebook users in circumstances where more than 30% of the platform’s active userbase participated. However, when Facebook later introduced changes to its privacy policy, 88% of

“Supreme Court” appeals mechanism which will oversee removals of content otherwise subject to freedom of expression guarantees has displayed a renewed desire to reinforce perceptions of this constitutionalising approach.¹⁹

This is not to say that there is not a constitutionalising element to the activities of the contractual terms and practical operation of private actors in the digital market. To the contrary, the argument of this work is that such an element is present. However, contrary to arguments of digital constitutionalism I argue that the adoption of constitutional language by private actors has been a ‘legal talisman’²⁰ which conveniently appropriates superficial constitutional form while simultaneously re-defining, and eroding, the normative standards publicly promulgated by State actors.²¹ The argument made by this paper is thus not unrelated to the argument made by Teubner who has suggested that, contemporaneously, private actors are empowered to perpetrate lasting, irrecoverable damage to social values.²²

Despite the heralded rise of digital constitutionalism and a more general awareness, in a European context, the predominant focus has been on infrastructural regulation, the impacts of digitally enhanced state surveillance on fundamental rights²³ and, in particular, the dominance of private actors in online markets as a competition law issue.²⁴ Tentative steps toward a more holistic understanding of the rights impacts are discernible in Lynskey’s examination of the ‘data power’ of digital undertakings and her suggestion that the impact of that power on individual rights provides the normative foundation for the imposition of a ‘special responsibility’ on private actors in the digital market.²⁵ However, a more wide ranging understanding of the relationship between

the 668,872 users who voted (a proportion which amounts to less than 1% of some 1 billion registered users of the platform) at the time. At the end of 2012, Facebook reversed its commitment to binding votes and in 2014, Zuckerberg’s earlier comments from the Facebook blog were attributed not to the CEO but to a former employee who had left the firm in 2010. Suzor, ‘Lawless: the secret rules that govern our digital lives’; Suzor, ‘Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms’; Facebook, *Our site governance vote* (2012).

¹⁹ Facebook, *Global Feedback & Input on the Facebook Oversight Board for Content Decisions*, (2019); Celeste, *Digital constitutionalism*

Mapping the constitutional response to digital technology’s challenges.

²⁰ Kendra Albert, ‘Beyond Legal Talismans’ (Berkman Klein Centre for Internet and Society).

²¹ Celeste, ‘Terms of service and bills of rights: new mechanisms of constitutionalisation in the social media environment?’; *ibid*; Jon Pincus, ‘Social Network Users’ Bill of Rights’ (2010) ; Kurt Opsahl (Electronic Frontier Foundation), ‘A Bill of Privacy Rights for Social Network Users’ (*Electronic Frontier Foundation*, 2010) <Bills of Privacy Rights for Social Network Users> accessed 22 January 2019); Ello, ‘Bill of Rights for Social Network Users’ (2015) <<https://www.bill-of-rights.ello.com>> accessed 22 January 2019.

²² Teubner, ‘The Anonymous Matrix: Human Rights Violations by ‘Private’ Transnational Actors’ *ibid*

²³ See, Chapter 2 at page 50.

²⁴ Bundeskartellamt, *Bundeskartellamt prohibits Facebook from combining user data from different sources* (2019). See also, Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy*; Angela Daly, *Private Power, Online Information Flows and EU Law, Mind the Gap*, vol 15 (Hart Studies in Competition Law, Hart 2016); Coates, *Competition Law and Regulation of Technology Markets*.

²⁵ Orla Lynskey, ‘Grappling with “Data Power”: Normative Nudges from Data Protection and Privacy’ (2019) 20 *Theoretical Inquiries in Law* 189. This is mirrored by similar arguments concerning the potential of the designation of private actors as ‘information fiduciaries’ forwarded by Balkin, see Jack M Balkin,

private actors, contractual practice and fundamental rights remains absent.²⁶ In particular there seems to be little awareness that private actors mediate not only the economic but also the social relationships of individuals in a manner which should attract greater scrutiny of how they are setting public, normative standards through private mechanisms.

1.3.1 *The Digital Market as a Space Beyond Public Policy?*

This privatisation of the Internet and its underlying technologies has endured as a defining characteristic of the publicly available internet - a reality which sits uncomfortably with early regulatory understandings of the digital market as a venue for activity and information liberated from institutional control.²⁷ This understanding of the internet as an area not subject to traditional governmental or regulatory control is the cyber-libertarian approach to the regulation of the digital market.

Cyber-libertarianism viewed, and continues to view the Internet as an area beyond traditionally Westphalian regulation and as fundamentally self-governing. Most prominently articulated by John Perry Barlow,²⁸ more substantive accounts of cyber-libertarianism have subsequently been offered by Post and Johnson²⁹ who suggest that regulatory intervention from state or other traditional regulatory actors is unnecessary in the digital market because, while private actors have been free to impose their own rules on users, the ability of users to choose which sites to visit, and which to avoid, obviate the emergence of an anti-competitive environment or other adverse effects on individuals.

The rejection of state-based regulation espoused by cyber-libertarianism was most dominant at the emergence of the public internet and has subsequently faced considerable criticism. Yet its legacy is still discernible in modern regulatory attitudes to the digital market which afford a significant deference to the capacity of market mechanisms and private law and which view the Westphalian restrictions of fundamental rights as unnecessary or undesirable.³⁰ Even as the Internet became

'Information Fiduciaries and the First Amendment' (2016) 49 UC Davies Law Review 1183. On the limitations of information fiduciaries see, Lina Khan and David Pozen, 'A Skeptical View of Information Fiduciaries' (2019) 133 Harvard Law Review .

²⁶ See, Jonas Andersson Schwarz, 'Platform Logic: An Interdisciplinary Approach to the Platform-Based Economy' (2017) 9 Policy & Internet 374; L Solum, 'Models of Internet Governance' in LA Bygrace and T Michaelsen (ed), *Internet Governance: Infrastructure and Institutions* (Oxford University Press 2009) 48.

²⁷ See, most famously John Perry Barlow, *Declaration of the Independence of Cyberspace* (1996); Jean-Marie Chenou, 'From Cyber-Libertarianism to Neoliberalism: Internet Exceptionalism, Multi-stakeholderism, and the Institutionalisation of Internet Governance in the 1990s' (2014) 11 Globalisations 205 Graham Greenleaf, 'An Endnote on Regulating Cyberspace: Architecture vs Law?' (1998) 21 University of New South Wales Law Journal 593.

²⁸ Barlow, *Declaration of the Independence of Cyberspace*.

²⁹ David Post and David Johnson, 'How Shall the Net be Governed' in Brian Kahin and James H Keller (ed), *Co-ordinating the Internet* (MIT Press 1997).

³⁰ See, Solum, 'Models of Internet Governance' 48, 75.

more widely available and transnational theories of regulation began to gain favour, the underlying premise of the cyberlibertarian argument remained. Modern transnational theories agree with the cyberlibertarian premise that the internet transcends national boundaries and thus a regulatory approach premised on Westphalianism but contend that this does not immunise the Internet from regulation but rather makes it amenable to regulation by transnational actors or international organisations.³¹

Transnational regulatory actors have largely employed regulatory approaches which broadly congrue with the code and architecture regulatory theories popularised by Lessig,³² alternatively referred to as the layers theory.³³ These regulatory approaches accept, to an extent, the cyberlibertarian premise that the distributed nature of the internet challenges traditional notions of territorial sovereignty but contends that code itself can function alongside more traditional regulatory mechanisms to secure regulatory ends.³⁴ The argument that code, or infrastructural layers can act as regulatory mechanisms is reinforced, in the accounts offered by the code and architecture approaches, by the internet's essentially neutral nature.³⁵

This alleged neutrality of the Internet, and the reduced relevance of nation states as regulatory actors in the digital landscape has been challenged more recently by the rise of State lead regulatory attempts – as part of a regulatory trend referred to as digital realism.³⁶ Digital realism objects to claims of internet exceptionalism, such as those propounded by cyberlibertarians, and contends that the Internet as with other infrastructural or communication mediums can be controlled by State actors through legislation and statutory regulation.³⁷

³¹ Henry Perritt, 'The Internet as a Threat to Sovereignty? Thoughts on the Internet's Role in Strengthening National and Global Governance' (1998) 5 *Indiana Journal of Global Legal Studies* 423.

³² See, Lawrence Lessig, *Code 2.0* (1999).

³³ The Internet Society (ISOC) and the Internet Engineering Task Force (IETF), advocate regulatory theories premised on engineering standards, protocols and software imposed limits Lawrence B Solum and Minn Chung, 'The Layers Principle: Internet Architecture and the Law' (2004) 79 *Notre Dame Law Review* 815.

³⁴ Lessig, *Code 2.0*.

³⁵ Increasingly academics are challenging this narrative of neutrality which forms part of this 'informational idealism' see, Frank Pasquale, 'Platform Neutrality: Enhancing Freedom of Expression in Spheres of Private Power' (2016) 17 *Theoretical Inquiries in Law* 487; José van Dijck, 'Datafication, dataism and dataveillance' (2014) 12 *Surveillance and Society* 197.

³⁶ David John Harvey, *Collisions in the Digital Paradigm* (Hart 2017), Chapter 4.

³⁷ This approach is encapsulated by Judge Frank Easterbrook's argument that there is no more a law of cyberspace than there is a law of the horse. Easterbrook argued for the treatment of the Internet and the activity it facilitated as aspects and iterations of existing and regulated areas of activity. As part of his analogy, while cases might deal with the sale of horses, injury by horses or the licensing and racing of horses this would not justify a course on the law of the horse which overlooked the operation of unifying principles of law. Similarly, he argues there is no need to develop a cyber-specific understanding of law or an exceptionalist view of regulation in a digital context. Frank H Easterbrook, *Cyberspace and the Law of the Horse* (University of Chicago 1996).

Despite this apparent regulatory epiphany, and the further complications which nationalised regulation of international infrastructures raises,³⁸ there has been a failure to challenge the second aspect of the cyberlibertarian view that as well as being a space of regulatory exceptionalism in terms of infrastructure the internet is also an area largely beyond the control of normative standards dictated by State actors.³⁹

While there has been a gradual recognition that the potential, and desirability, of imposing normative as well as infrastructural standards on actors in the digital market, there continues to be a marked deference to private actors in shaping and enforcing such values in the digital market.⁴⁰ Calls for ‘privacy by design,’ and the structural limitations of content use imposed by digital rights management (DRM) tools which build normative protections into digital interactions through standards determined by private actors⁴¹ are examples of this deference in practice. The trend is more pervasive than these isolated examples however.

It is the same deference to private policy which enables Facebook to act as an arbiter of permissible speech through its ‘supreme court,’ which allows Google to exercise a *de facto* enforcement monopoly on the right to be forgotten⁴² and which permits Twitter to decide what counts as political speech.⁴³ This capacity of private actors to effectively define the limits of normative standards online supports an understanding that, far from being an area characterised by freedom, as cyberlibertarian contend, the digital market is an environment permeated by layered private controls.⁴⁴

1.3.2 *The Distinction Between Private and Public Policy*

³⁸ The most evident being the imposition of State controlled internet infrastructures as has been the case in China, though this is less a matter of concern in the context of this work.

³⁹ The coherence, or lack of coherence of such approaches and the resulting impacts on the integrity of the law are examined in Chapter 6.

⁴⁰ Harvey, *Collisions in the Digital Paradigm*; Chenou, 'From Cyber-Libertarianism to Neoliberalism: Internet Exceptionalism, Multi-stakeholderism, and the Institutionalisation of Internet Governance in the 1990s'; Viktor Mayer Schonenberg and David Lazer, *Governance and Information Technology* (MIT Press 2007); Roger Brownsword, *Law, Technology and Society: Re-imagining the Regulatory Environment* (Routledge 2019), 8. Marc Langheinrich, *Privacy by Design - Principles of Privacy-Aware Ubiquitous Systems*; Anna Cavoukian, 'Privacy by Design' (2010) 3 *Identity in the Information Society* 247.

⁴¹ See, chapter 3, page 99.

⁴² See, page 24. See, Mark Leiser, 'Private jurisprudence and the right to be forgotten' (2019) Forthcoming ;

⁴³ Shannon C McGregor, 'Why Twitter's ban on political ads isn't as good as it sounds' *The Guardian* (<<https://www.theguardian.com/commentisfree/2019/nov/04/twitters-political-ads-ban>> accessed 27 November 2019).

⁴⁴ Information Commissioner's Office, *Investigation into the use of data analytics in political campaigns*, 2018); Ryan Mac, 'Literally just a big list of Facebook's 2018 scandals' *BuzzFeed* (<<https://www.buzzfeednews.com/article/ryanmac/literally-just-a-big-list-of-facebooks-2018-scandals>> accessed 12 February 2019).

It is important to distinguish what precisely distinguishes private policy from its counterpart – public policy. Public policy, in its most conservative understanding refers to a course of government action (or inaction) in response to conflicts or matters affecting the public or public goods.⁴⁵ In this sense Goodin et al articulate public policy as a mechanism of asserting State power⁴⁶ which is associated not only with formally approved legal standards such as legislation, statutory regulation and procedural rules but also with the less formal practices and implementing behaviour of the State and State actors.⁴⁷

From its origins public policy has been understood as part of the ‘sciences of democracy ... directed towards knowledge to improve the practice of democracy.’⁴⁸ Harold D Lasswell, who is generally recognised as having developed the field of public policy from the early 1950s onwards specifically articulated public policy as seeking to provide the practical and legal standards which would integrate into public action, the social values on which the realisation of interpersonal relations and human capacities rely.⁴⁹

Public policy, even where it is an incentive based or economically oriented thus has as its ultimate aim the advancement of democratic governance, and securing the public good through integrating social values into the decision making structures, conduct, standards, rules and regulatory and legal principles which govern the activity of State actors. Significantly, public policy also extends its reach to private actors through statutory regulation and legislation which are formulated in accordance with national constitutional and European fundamental rights standards. Public policy thus extends the reach of the social values on which the realisation of interpersonal relations and human capacities rely to engage private actors where their activities threaten those values and recognises the importance of same.

Private policy, in contrast to its public counterpart, is neither publicly promulgated by State actors nor concerned with democratic ends. Rather, private policy refers to the response of private actors (in this work, within the digital market) to conflicts or matters affecting their private interests. As with public policy, it includes not only formal contractual standards and rules governing entitlements, duties, decisions and appeals but also the practical behaviour and operation of the private actors involved.

⁴⁵ Michael E Kraft, ‘Public Policy: Politics, Analysis and Alternatives’ (CQ Press, 2017), 4.

⁴⁶ Martin Tein and Michael Moran Robert E Goodin, ‘The Public and its Policies’ in Martin Rein and Robert E Goodin Michael Moran (ed), *The Oxford Handbook of Public Policy* (Oxford University Press 2006), 3.

⁴⁷ *Ibid*, 4.

⁴⁸ Harold D Lasswell, ‘The Policy Orientation’ in Daniel Lerner and Harold D Lasswell (ed), *The Policy Sciences* (Stanford University Press 1951), 1.

⁴⁹ Harold D Lasswell and Abraham Kaplan, *Power and Society* (Yale University Press 1950), 15.

Most importantly, private policy is not concerned with securing social values as defined in public policy but in maximising private interests and integrating their achievement into formal and informal practices and standards. As this work examines, within the digital market, private actors through their own formal standards, and practical operation have operated in a manner which actively reduces the public goods and democratic outcomes public policy seeks (including in situations in which such measures are horizontally applicable). In fact, through private policy, private actors as chapters two and three examine, are effectively redefining the content and scope of public normative values – as embodied in fundamental rights. Private policy is thus, no less than public policy, a mechanism of asserting power – and perhaps a more successful one given the absence of accountability, or constitutionally imposed restraints of its exercise.

1.3.3 *The Problem With Private Policy*

Before turning to consider the features which have enabled this rise of private policy it is necessary to outline the reason why it is problematic. Private actors, after all, have historically, and continue to, influence the conditions of public life through their control of goods and services, through their power as investors and employers and their attempts to influence the formulation of law and public policy in addition to situations in which they are delegated certain functions by State actors.⁵⁰

The fundamental objection to private actors setting normative standards is that in doing so they are permitted to condition the relationship between individuals and the State. When a private actor, through its terms or practices withdraws or limits individual rights guaranteed by the State they are displacing the legal institutions and normative authority of that State.⁵¹ The relationship between individuals and the State is traditionally conditioned by consent based theories of social contract which underwrite constitutional constraints.⁵² These constraints operate to protect zones of individual liberty (in the form of fundamental rights protections), condition the exercise of State powers on respect for the observance of such zones and other procedural and normative guarantees and require (in functioning Western liberal orders) that the authority granted to the State to exercise its powers is periodically renewed by popular consent. These powers, zones of individual liberty

⁵⁰ On private influence in the policy process see, Paul A Shotton and Paul G Nixon (ed), *Lobbying the European Union: Changing Minds, Changing Times* (Ashgate 2015); David Coen and Jeremy Richardson, *Lobbying in the European Union: Institutions, Actors and Issues* (Oxford University Press 2009) and in a digital context see, Jockum Hilden, 'Whose Privacy? Lobbying for the Free Flow of European Personal Data' (The 17th Annual Conference of the Association of Internet Researchers); Ece Ozlem Atikcan and Adam William Chalmers, 'Choosing lobbying sides: The General Data Protection Regulation of the European Union' (2018) 1 *Journal of Public Policy and Marketing* 1.

⁵¹ This is also noted by Radin in her work on the impacts of boilerplate contractual clauses in the United States. See, Margaret Radin, *Boilerplate: the fine print, vanishing rights and the rule of law* (Princeton University Press 2012), 33.

⁵² Chapter 6, page 189.

and procedural and normative guarantees are public, normative standards, exercised by and against the State and its emanations as public actors to condition their interaction with individuals

While private policy does not intervene directly in the relationship between the State and individuals it does interfere with the terms of the relationship by permitting State actors to bypass constitutional restraints.⁵³ Private actors can also interfere, indirectly, in the relationship by capitalising on their capacity to set normative standards in order to subvert or influence the attention, information and activity of individuals in ways which have implications for the democratic process.

Indeed, the process of privately setting normative standards is itself inherently anti-democratic. It is now well documented that private standards, and the systems which impose them in the digital environment are designed predominantly by affluent, male, Western (and largely North American) actors whose preferences and biases, whether conscious or not, influence the standards which they subsequently develop.⁵⁴ Added to this context is the complicating factor that a majority of those involved in the formulation of these standards are unaware, or apathetic regarding, the normative, legal implications of their decisions and designs.⁵⁵ The result is a private policy whose design has little regard to, or conception of, a public good and which reflects the preferences of a non-representative group.

This group through its design and business model choices effectively creates what Leiser refers to as 'private jurisprudence'⁵⁶ - a parallel, privatised system of rights enforcement which lacks accountability or transparency. This is problematic not only on the basis that it is undemocratic, and potentially encodes personal bias but also because the development of a parallel, private articulation of publicly agreed normative standards itself dilutes the power of those standards in the public setting.

⁵³ Ibid.

⁵⁴ American Society of Mechanical Engineers, 'Understanding Bias in Algorithmic Design' *Medium* (<<https://medium.com/impact-engineered/understanding-bias-in-algorithmic-design-db9847103b6e>> accessed 27 November 2019; Jeff Larson Julia Angwin, Surya Mattu and Lauren Kirchner, 'Machine Bias' *ProPublica* (<<https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>> accessed 27 November 2019; Batya Friedman and Helen Nissenbaum, 'Bias in Computer Systems' (1996) 14 *ACM Transactions on Information Systems* 330; Paul Resnik and Genie Barton Nicol Turner Lee, *Algorithmic bias detection and mitigation*, 2019; Vauhini Vara, *Pandora and the White Male* (2014); Blanca Myers, 'Women and minorities in tech, by the numbers' *WIRED* (<<https://www.wired.com/story/computer-science-graduates-diversity/>> accessed 27 November 2019; Engin Bozdogan, 'Bias in algorithmic filtering and personalisation' (2013) 15 *Ethics and Information Technology* 209; Caroline Criado Perez, *Invisible Women: Exposing Data Bias in a World Designed for Men* (Penguin Random House 2019).

⁵⁵ Ibid.

⁵⁶ Leiser, 'Private jurisprudence and the right to be forgotten'

As chapter five examines such privatisation is also contrary to the very nature of rights under the Rule of Law which requires that laws should be publicly promulgated, equally and predictably applied and subject to judicial review. In contrast, private policy, operates according to internally settled and undisclosed or partially disclosed standards and lacks a predictability and equality of application consistent with even minimally prescriptive, formal Rule of Law theories. For example, it is not clear the extent to which, or whether these standards are formulated with regard to rights balancing, or any other parallel public standards. Nor is it evident the extent to which, if at all, such standards are consistently applied, and whether, or what factors are considered relevant in making assessments on the imposition of such standards. In addition, it is not clear to what extent, if any, judicial review could be exercised in respect of perceived or actual shortcomings in such private processes.

The decisions made by Google concerning the right to be forgotten can be appealed to data protection authorities, whose decision as a public actor is, in turn, subject to judicial review, and legislation concerning data protection can be used to review the activities of those to whom it is addressed. However, for those rights lacking such a regulatory schema it is not clear on what basis such a review would be premised. The inclusion of mandatory arbitration clauses in contractual term governing relationship between private actors and individuals further obscures the operation of these standards and limits judicial review in a manner incompatible with the Rule of Law.⁵⁷

Private policy thus undermines the distinction between private and public ordering, leading to a degradation of the democratic political order in so far as it relies on the idea of distinct normative controls on public versus private ordering. While the distinction drawn between private and public ordering has been criticized its endurance is both an institutional and democratic necessity. Public, normative standards are determined and enforced by public ordering as determined by State actors, while individuals may choose to exchange or abrogate parts of such standards as applied to them through a system of private ordering such exchanges are permissible only where the polity has underwritten them through the promulgation of distinct laws.

Excessive deference to private actors in determining the terms of exchange, and how public standards can be rearticulated within them displaces this public control of normative standards and threatens the ideological constructs on which the public private distinction is premised - namely State control of normative protections of individual liberty, and the Rule of law.⁵⁸

⁵⁷ Radin has discussed the impacts of such mandatory relegation of judicial review in preference to systems of private adjudication of rights in Radin, *Boilerplate: the fine print, vanishing rights and the rule of law*.

⁵⁸ Commenting on the deployment of standard contractual clauses to limitation of individual rights Radin has remarked that private actors are deploying contract against itself, using its foundation in individual autonomy to erode the very same value. See, *ibid*, 35-6.

More fundamentally, systems of private ordering – including the law of contract, necessarily draw their legitimacy from the public realm.⁵⁹ It must thus be the case that it is the public aspect of this Janus – public policy - which controls the content and conduct of private transactions. Radin notes that even those ardent anti-positivists who believe the details of the system of property and contract are ‘conceptually or metaphysically delineated without any admixture of evolving cultural commitments and positive law’ it remains the case that systems of private ordering rely for their existence on State enforcement since the State sustains and polices the boundaries of private ordering.⁶⁰

Despite this, in the context of the digital market, the system of public ordering has deferred, with limited exceptions, to private policy permitting private actors to draw the terms of abrogation and enforcement of public normative standards in the form of fundamental rights. Within the European Union, this trend has been occasioned by three features namely; a regulatory attitude of functional equivalence, a preference for market over socially oriented legislation and the Union’s brittle constitutionalism. These features are now considered in turn.

1.4 The Tripartite Trends which have Generated Private Policy

This rise of privacy policy has not been achieved simply through contractual terms. Rather, I argue in this work that it has been generated by a combination of three features of EU law. The first is an approach of functional equivalence to laws governing the digital market, and thus the actors within it. In accordance with this approach the digital market has been treated as equivalent to the traditional “offline” market and its participants are viewed as requiring no additional or supplementary protections or regulations. This trend is evidenced both in the Unions legislative, and in certain cases its judicial activity which view additional informational and consent requirements parallel to those imposed in the traditional market as sufficient regulatory interventions in the digital market.

The second feature, not unrelated to the first, is the European Union’s ordoliberal policy preferences which manifest most evidently in a tendency towards the enumeration for economic or market oriented rather than socially orientated secondary laws and regulatory standards. As part of this

⁵⁹ Robert H Mnookin, 'The Public/Private Dichotomy: Political Disagreement and Academic Repudiation' (1982) 130 *University of Pennsylvania Law Review* 1429; Margaret Jane Radin and R Polk Wagner, 'The Myth of Private ordering: Rediscovering Legal Realism in Cyberspace' (1998) 73 *Chicago Kent Law Review* 1295; Peer Zumbansen, 'Private Ordering in a Globalising World: Still Searching for the Basis of Contract' (2007) 14 *Indiana Journal of Global Legal Studies* 181; Steven L Schwarcz, 'Private Ordering' (2002) 97 *Northwestern University Law Review* 319.

⁶⁰ Radin, *Boilerplate: the fine print, vanishing rights and the rule of law*, 36-7.

preference, when fundamental rights cross the Rubicon from vertically enforced constitutional protections to horizontally enforceable legislative ones their content is transmuted in a manner which favours their market and neglects their social functions and effects.⁶¹ The work lays a particular emphasis on the fact that this trend, despite its location within the “legislative” competence of the Commission and European Parliament, is not lead solely by those institutions but is also evident in the interpretation of fundamental rights under the Charter and EU secondary law by the Court of Justice (CJEU). Thus, the right to property under Article 17 of the Charter has given effect to secondary laws regulating the economic interests vindicated by intellectual property rights but has not seen a similar regulation to protect the social functions of consumers’ capacity to engage with property.

The third feature, is the Unions ‘brittle constitutionalism.’ As part of this feature, the Union’s uncertain commitment to social alongside market features of the constitutional order and the institutions’ unprincipled and unpredictable development of fundamental rights have weakened the protective capacities of fundamental rights. This is seen, once more, in the context of Article 17 and the inconsistent interpretation of the rights’ contents but also in the unprincipled understanding of the distinction and relationship between the rights of data protection and privacy within the CJEU’s jurisprudence as well as in secondary law.

In concert these three features have permitted the development of a legal landscape characterised by deference to freedom of contract and minimal regulatory intervention in the market. In this context private actors have, and continue to, control and define the protective scope and enforcement of fundamental rights in the digital market through their contractual terms and practical operation – as part of a trend which this work articulates as a pattern which constitutes the emergence of private policy.

In advancing this argument the work uses the rights to privacy and property as recognised under the Charter of Fundamental Rights as illustrative of the trends examined. Moreover, the work articulates the erosion of these rights as particularly significant as their reduction implicates consequent reductions in individual autonomy with impacts for individuals’ capacity for democratic participation, and the understanding of the Rule of Law endorsed by the European Union’s constitutional order.

⁶¹ Though this trend is evidenced in the areas in which the Union has competences – the argument made is specific to those areas in which the Union has a competence and does not extend its analysis to areas of hypothetical competence such as freedom of expression.

1.4.1 *Functional Equivalence in Regulatory Approaches to the Digital Market*

The Union's regulatory approach to the digital market has, thus far, been characterised by a view that the digital and traditional markets are functionally equivalent. In accordance with this approach the traditional rules of contract and consumer protection have been extended to the digital market without consideration of whether any re-orientation is required to successfully achieve similar market conditions to those in the offline environment.

This approach is not uniquely European. The earliest efforts to regulate transactions in the digital market such as UNCITRAL Model Law on Electronic Commerce, were motivated by a desire to remove legal obstacles and increase predictability in electronic commerce in an effort to provide equal treatment to paper-based and electronic information.⁶² The view was that the existing, traditional, market provided the tools and mechanisms necessary to assure the correct functioning of the market and therefore a transmutation of offline principles to an online context was not only logical but preferable.

A similar motivation underpinned early European measures⁶³ which sought to remove uncertainty about the legal status of online transactions by providing laws which imposed on the digital market, regulatory standards equivalent to those which characterised traditional ones.⁶⁴ Indeed, the underlying motivation of the Digital Single Market Strategy is a continuing concern to provide such certainty through the specific promotion of equivalence with a view to promoting economic growth.⁶⁵ Most recently, the Directive for the supply of digital content and digital services⁶⁶ adopts an approach for the regulation of contracts in the digital market which offers an illustration of the continuing endorsement of approaches of functional equivalence within the Union.

The Directive has as its stated aim the promotion of access to digital goods and services and the improvement of consumer protection⁶⁷ yet confines its provisions to requirements for conformity and the modification of digital content or services, not addressing the differences between digital and traditional markets considered later in this work. In its focus on conformity and modification

⁶² UNCITRAL Model Law on Electronic Commerce (1998), 1-2.

⁶³ See, Roger Brownsword and Geraint Howells, 'When Surfers Start to Shop: Internet Commerce and Contract Law' (1999) 19 *Legal Studies* 287.

⁶⁴ Article 9 of the e-commerce Directive 2000/31/EC.

⁶⁵ European Commission, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe COM(2015) 192 final.

⁶⁶ Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services (2019) OJ L 136/1.

⁶⁷ See, *ibid* Recitals 2 and 3.

the Directive mirrors the provisions of the Sale of Goods and Associated Guarantees Directive⁶⁸ as well as the Directive on services in the internal market⁶⁹ which operates alongside national law to require that services conform to their represented nature.⁷⁰

The Union's approach, as this example illustrates and as the proceeding chapters examine in greater detail, reflects the view that online transactions require no special regulatory treatment,⁷¹ an attitude premised on the assumption that online contracts are functionally equivalent to offline ones. The adoption of regulatory approaches based on functional equivalence is hardly surprising. It aligns with the EU's attitude to market regulation more generally which is characterised by a significant deference to an ideal of private ordering achieved through the operation of a free market, as central to individual liberty. Underpinning this model both ideologically and practically is the doctrine of freedom of contract which, in turn, rests on the theory of freely given consent.⁷²

In its thickest or most substantive form consent shapes and allows the individual consenting to shape their interaction with those forces and actors around them and thus constitutes an expression of individual autonomy.⁷³ This is the basis on which systems of private ordering premised on freedom of contract, base their claim to be, fundamentally, systems which seek to maximise the autonomy of individual actors. Against this narrative, paternalistic interventions in the market by State actors must be effected in such a way as to justify limitations on the autonomy which the market ensures.⁷⁴

However, this understanding of consent as an autonomy enhancing mechanism presumes the presence of several conditions in order to be correct as a matter of practice, rather than merely a matter of theory. In particular it requires the presence of voluntariness, capacity and meaningful choice. A market characterised by absolute voluntariness, free from any attempts to influence choice, without a-symmetries of bargaining power in the deployment of contractual terms, and with numerous competing providers of goods and services offering various terms of engagement remains, largely, an ideal. While qualitative and quantitative shortcomings in the conditions for substantive consent are inevitably present in markets, their dominance in the digital market is

⁶⁸ Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees (1999) OJ L171/12. See in particular Recitals 6-12 and Articles 1-5.

⁶⁹ Directive 2006/123/EC on services in the internal market (2006) OJ L 376/36.

⁷⁰ *Ibid*, Recital 50, 51 and Articles 22 and 27(2).

⁷¹ David Post, *In Search of Jefferson's Moose* (Oxford University Press 2009), 186.

⁷² Radin, *Boilerplate: the fine print, vanishing rights and the rule of law*, 19.

⁷³ Tom L Beauchamp, 'Autonomy and Consent' in Franklin Miller and Alan Wertheimer (ed), *The Ethics of Consent: Theory and Practice* (Oxford University Press 2009).

⁷⁴ M Trebilcock, *The Limits of Freedom of Contract* (Harvard University Press 1994). On the rejection of this assertion see, Dori Kimel, 'Neutrality, Autonomy and Freedom of Contract' (2001) 21 *Oxford Journal of Legal Studies* 473.

particularly challenging to the functionally equivalent, consent-based approach adopted by the Union to contractual relationships in the digital market.

1.4.1.1 Quantitative Differences between Traditional and Digital Markets

The primary, and most readily appreciable, difference between digital and offline markets is quantitative, in two ways. The first quantitative difference is the restriction of the number of supply side participants in the digital market. The digital market is characterised by a small number of private actors who due to their dominance effectively operate as standard setters for the business practices and contractual terms used by new entrants as well as among themselves.

In the traditional market, an individual might enter a bookshop and approach the counter to purchase a paperback. On reaching the till they are informed that while they may purchase the paperback, the bookshop owner may at any time retrieve it, without notice. The would be buyer is informed she is also prohibited from lending the book to friends or family, and the seller is entitled to drop by the would be buyer's house at any time to check which parts of the book she has underlined or read most frequently. The seller also tells the buyer that he is entitled to follow her while she is browsing the shop's shelves and to take notes on what she looks at and for how long. The seller will keep a record of the buyer's presumed preferences based on these observations and will tailor his displays to these preferences in future. The seller can also sell a record of those preferences and purchases to sellers of other services or goods to enable them to target her for goods or services which she may be interested in.

These terms evidently interfere with the buyer's privacy and property rights. If she is dissatisfied with these terms she could, however, simply leave the shop and purchase the book from a seller that did not impose such terms. As chapter three examines, in the digital environment individuals who seek to purchase digital content – including eBooks- are obliged to accept just such conditions. Crucially, however, there is no alternative venue for them within the digital market to seek the same content under different, or more convenient terms.

The competition law concerns raised by such concentrations of power among a discrete number of private actors and the resulting lack of choice for individual consumers in the digital market is not addressed by this work though as the final chapters outline, the solution to the concerns raised by this work necessarily include a competition law element. It is sufficient to note that this first, quantitative difference subsists as a feature of the digital market which fundamentally differentiates it from traditional market settings. Crucially, in a market with a small number of actors who employ similar terms, individuals enjoy little or no functional choice as to the terms on which they consent

to contracts, undermining the normative quality of that consent and posing challenges to the autonomy based theory of freedom of contract which relies on it.

The second quantitative difference between digital and offline markets relates to the volume and density of the terms to which individuals are asked to consent, and the linking of those terms to normative standard setting. In a market with few supply side participants or normative constraints private actors can orient their terms to the detriment of consumers to an extent not mirrored in the traditional market. The evidence, considered in depth in chapters two and three, is that consumers are either unaware of the content and implications of the terms to which they are consenting or, aware of the social necessity of participation in the digital market, and in the absence of market alternatives, consent knowing the only alternative is to abstain from participation in the digital market.

In this context the quantitative difference between transactions in the digital and traditional market is two-fold. In transactions taking place in the digital market not only is there too much information for individuals to consent with the requisite understanding there is also too little choice to allow such consent, even where it is made with a fully informed understanding of its results, for such consent to be truly voluntary. While the latter of these quantitative differences requires a solution based in competition law (which to date has failed to counteract such trends) the approach to the former is more appropriately rooted in consumer protection standards which have to date failed to appreciate such quantitative differences.

In response to the quantitative difference in the terms individuals must consent to, Kim (writing in a North American context) has argued that courts should reinvigorate doctrines of reasonable notice to encourage design changes which force consumers to slow down in their interactions online.⁷⁵ Waddams has similarly argued that online environments tend to exacerbate familiar offline problems and that standard forms and unfair terms in consumer contracts in the digital environment can be remedied in similar ways to the traditional market.⁷⁶ Yet the introduction of just such approaches in the form of enhanced notice and consent mechanisms under EU law has had little impact on the ability of individuals to identify and avoid harmful contractual practices.⁷⁷

Notice and consent architectures have characterised market interventions under EU law – the Union’s consumer protection law for examples has been consistently characterised by the

⁷⁵ Nancy S Kim, 'The Duty to Draft Reasonable and Online Contracts' in Larry A Dimatteo et al (ed), *Commercial Contract Law: Transatlantic Perspectives* (Cambridge University Press 2012) 181, 190-200.

⁷⁶ Stephen Waddams, 'Contract Law and the Challenges of Computer Technology' in Eloise Scotford and Karen Yeung Roger Brownsword (ed), *The Oxford Handbook of Law, Regulation and Technology* (Oxford University Press 2016), ch 13.

⁷⁷ See, Chapters 2 and 3 for further discussion.

imposition of information requirements in response to asymmetries in bargaining power, patterns transposed to the digital market⁷⁸ first with the Data Protection Directive⁷⁹ and later with the augmented notice and consent measures included under the GDPR. Indeed that GDPR's central emphasis is on the primacy of consent based on notice in grounding lawful processing of personal data.⁸⁰

The GDPR and parallel legislation applicable in the digital environment considered in the proceeding chapters continues to operate on the basis that the quantitative differences between the conditions for consent in digital and traditional markets do not fundamentally alter the nature or quality of the relationships involved. Yet, as the qualitative differences between interactions in the digital and traditional markets demonstrate, this is not the case.

1.4.1.2 Qualitative Differences between Digital and Traditional Markets

In addition to the quantitative difference between interactions in the digital and traditional markets the nature of interactions in the digital market is also qualitatively different to those in traditional markets. In particular, interactions in the digital market are characterised by a high frequency and extensive use of behavioural targeting and profiling of individuals.⁸¹ Indeed, the digital market is structured not only to permit such profiling but to actively generate it, profiting not only from the goods and services exchanged through the digital marketplace, but from the data each interaction generates and which is, in turn, monetised.

This use of behavioural targeting and profiling in the digital market generates a distinct qualitative difference from traditional markets by manipulating the conditions of consent in a way which deprives consent of its voluntary nature. The key feature of this difference is the design of notice and consent interfaces in a manner which while compliant with the letter of EU law is not reflective of its spirit, and is deliberately hostile to the voluntariness necessary for valid consent. This conscious employment of 'hostile design' or 'dark' patterns creates interfaces which actively seek to influence individuals towards consents and preferences which are contrary to those they would otherwise choose and obscures the consequences of such consents and preferences.⁸²

⁷⁸ See sections 4.4.2 *et seq.* On rights based harms see chapters 2, page 50 and 3, page 98.

⁷⁹ Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281/31.

⁸⁰ David Stilwell and Thore Graepel Michal Kosinski, 'Private traits and attributes are predictable from digital records of human behaviour' (2013) PNAS Early Edition .

⁸¹ See, chapter 2, page 50 and chapter 3, page 98.

⁸² Nancy S Kim, 'Situational Duress and the Aberrance of Electronic Contracts' (2014) 89 Chicago Kent Law Review 265, 265-66.

Cookie walls – which block access to websites unless individuals consent to the surveillance mechanisms being operated by the site,⁸³ the need for repeated consents, consent re-sets to default privacy settings following software updates and changes to terms of service and mandatory or ‘coerced’ consent through hostile design interfaces or deliberately ambiguous terms which obscure opt outs are all examples of active attempts to unilaterally control the conditions of consent in a way which undermines the voluntariness necessary for such consent to be valid.

As chapter two examines the result is that regulatory approaches which presume equivalence between traditional and digital marketplaces misunderstand how the digital market functions but also fail to appreciate that attempts to undermine consent exist not just at the point of entry to the digital market but pervade the structure of the market itself in which individuals are ‘mediated consumers,’ approaching the marketplace through prisms designed by other actors to condition or influence their actions and preferences.⁸⁴ Even presuming these prisms are constructed to and mediate such interactions in a lawful manner (which is not clearly the case), the mediation itself raises concerns over the vulnerabilities of consumers and the exploitation of these vulnerabilities.⁸⁵

Moreover, after consenting to participate in the market individuals experience cumulatively greater behavioural targeting and profiling as the market learns more about them. These mechanisms are then used to progressively and further reduce individual autonomy by seeking to use consumer preferences to leverage choice in an ever more mediated context. The implication is that, the longer individuals participate in the digital market, the less voluntariness is present in their choices and associated consents.

By failing to aver to these qualitative differences EU law fails to appreciate normative consequences which flow from them. Extensions of the notice and consent architecture, and augmented informational requirements do not appreciate these differences, instead offering superficial prompts to action which consumers do not understand or are not empowered to avail of in a market where the alternative is opting not to engage in the digital market at all.

1.4.1.3 The Failure of Functional Equivalence

⁸³ See, page 64.

⁸⁴ Ryan Calo, 'Digital Market Manipulation' (2014) 82 *George Washington Law Review* 995, 1002.

⁸⁵ Frederik Zuiderveen Borgesius and Joost Poort, 'Online Price Discrimination and EU Data Privacy Law' (2017) 40 *Journal of Consumer Policy* 347; Frederik Zuiderveen Borgesius, 'Algorithmic Decision-Making, Price Discrimination, and European Non-discrimination Law' (2019) *Forthcoming European Business Law Review* .

Consent, as an expression of individual autonomy is generally conceived as a voluntary action aimed at authorisation.⁸⁶ Within EU law, as indeed more generally in national private law and in constitutional theory⁸⁷ the primary function of consent is thus to alter the morality of another actor's conduct, by which means otherwise impermissible actions are rendered not only legally, but socially, permissible.⁸⁸

This transformative power and the normative resonance of the autonomy claims which consent possesses make it an obvious and defensible means of delineating regulable behaviour, and presumptively removing certain activities from State oversight.⁸⁹ Indeed, it is on this basis that consent enjoys its central place within the legal architecture governing not only systems of private ordering but systems of public ordering too.

However, using consent as a normatively transformative practice is problematic in the context of the digital market where the preconditions necessary for valid consent – capacity, voluntariness and meaningful choice – are not satisfied. In such circumstances consent cannot fulfil its morally transformative purpose of assessing whether and under what conditions fundamental rights may be limited or abrogated. The consent which does operate in the digital market is far from the substantive or thick version characterised by capacity, voluntariness and meaningful choice. Instead, consent in the digital market operates in a thin, formalist expression, as a superficial process which has little regard to the practical impacts of structural power, individual capacity or market dominance. While consent thus appears as a utile proxy for ensuring justice in the digital market, in practice it operates as an empty standard in a manner which Bietti describes as 'not only normatively futile but also positively harmful.'⁹⁰

Richards and Hartzog contend that consent will be most valid in the digital market when it is infrequent, when the potential harms resulting from that choice are clear and easily understood, and where individuals have the correct incentives to choose consciously and seriously.⁹¹ In contrast to

⁸⁶ Ruth Faden and Tom L Beauchamp, *A History and Theory of Informed Consent* (Oxford University Press 1986), 277.

⁸⁷ See, chapter 5, page 157.

⁸⁸ Heidi M Hurd, 'The Moral Magic of Consent' (1996) 2 *Legal Theory* 121, 123; Elizabeth Edenberg and Meg Leta Jones, 'Analysing the Legal Roots and Moral Core of Digital Consent' (2019) 21 *New Media & Society* 1804; Meg Leta Jones, 'The Development of Consent to Computing' (2019) *IEEE Annals of the History of Computing Governance and Computing* .

⁸⁹ Franklin G Miller and Alan Wertheimer, 'Preface to a theory of consent: beyond valid consent' in Franklin G Miller and Alan Wertheimer (ed), *The ethics of consent: Theory and Practice* (Oxford University Press 2010), 203; John Simmons, *Moral Principles and Political Obligations* (Princeton University Press 1979), 76.

⁹⁰ Elettra Bietti, 'Consent as a Free Pass: Platform Power and the Limits of the Informational Turn' (2019) *Forthcoming Pace Law Review* .

⁹¹ Neil Richards and Woodrow Hartzog, 'The Pathologies of Digital Consent' (2019) *Forthcoming Washington University Law Review* .

these ideals, consent in the digital market is characterised by its frequently being unwitting as individuals are unaware of the terms to which they agree, the manner in which the underlying technology operates and the consequent harms to which they may be subject.⁹²

Consent is often also coerced under the current models of interaction online, in as much as it meets the requirements for legal voluntariness but occurs in circumstances where there is no meaningful choice in the market other than non-participation.⁹³ Finally, Richards and Hartzog note that, in the digital market, consent can also be ‘incapacitated’ as a matter of law, in circumstances where children and other actors whose capacity to consent cannot be adequately gauged interact with the technology.⁹⁴

These views mirror those of other academics working on the contractual aspects of the digital market⁹⁵ though they are not undisputed. Zarksy has argued that in fact the contracts individuals are asked to agree to online are more protective of consumer interests because they make consumers more aware of the terms and conditions imposed by a vendor before proceeding with the purchase⁹⁶ while Lemley has similarly argued that the notice and consent mechanisms in the digital market result in greater not lesser consumer awareness of terms. Yet defences of contractual practice in the digital market bear the weight of academic criticism and practical realities poorly. Indeed, they actively neglect to engage with the shortcomings in voluntariness which result from the lack of meaningful choice in the digital market, reading thin, formalist consent as sufficient.⁹⁷

Given the normative consequences which flow from consents in the digital market such a thin conception is inadequate. Against this backdrop the reliance of European law on notice and consent regulatory models which impose informational requirements functionally equivalent to traditional market mechanisms are insufficient. The model does not acknowledge that consent in the digital

⁹² Ibid, 19.

⁹³ Ibid, 28-29.

⁹⁴ Ibid, 34-35.

⁹⁵ Radin, *Boilerplate: the fine print, vanishing rights and the rule of law*; Neil Richards and Woodrow Hartzog, 'Privacy's Trust Gap' (2017) 126 Yale Law Journal 1180; Daniel J Solove, 'Privacy Self-Management and the Consent Dilemma' (2013) 126 Harvard Law Review 1880; Neil Richards and Woodrow Hartzog, 'Taking Trust Seriously in Privacy Law' (2016) 19 Stanford Technology Law Review 431; Andrea M. Matwyshyn, 'Technoconsen(t)sus' (2007) 85 Washington University Law Review 529; Scott Peppet, 'Unraveling Privacy: The Personal Prospectus & the Threat of a Full Disclosure Future' (2011) 105 Northwestern University Law Review 1153; Scott Peppet, 'Regulating the Internet of Things: First Steps Toward Managing Discrimination, Privacy, Security & Consent' (2014) 93 Texas Law Review 85; Natali Herberger, 'Profiling and Targeting Consumers in the Internet of Things - a new challenge for consumer law' in Reiner Schulze and Dirk Staudenmayer (ed), *Digital Revolution: Challenges for Contract Law in Practice* (Hart 2016) 135, 152.

⁹⁶ Tal Z Zarsky, 'E-Contract Doctrine 2.0: Standard Form Contracting in an Age of Online User Participation' (2008) 14 Michigan Telecoms and Technology Law Review 303; Mark A Lemley, 'Terms of Use' (2006) 91 Minnesota Law Review 459.

⁹⁷ See, Chapters 2, page 50 and 3, page 98.

market is substantively wanting and cannot reasonably be viewed as performing its morally transformative function.

The failure to acknowledge the lack of functional equivalence between interactions in the digital and traditional markets has generated a context in which the conditions of consent are absent but, more concerningly, where freedom of contract and minimal informational interventions in the market permit private actors significant scope to determine the terms of engagement with consumers. Private actors have capitalised on this latitude to formulate contractual terms of the greatest advantage to them but which have the effect of re-defining the constitutive elements and protective scope of public, normative standards.

1.4.2 *Market and Social Preferences*

The second feature which has enabled the rise of private policy in the digital market is the Union's preference for market rather than socially oriented legal and policy standards. In this context 'social' is understood as referring to those measures which determine the normative infrastructure of individual goods underpinning the legal order. In the European Union this normative infrastructure has traditionally been provided by national legal orders, while the Treaties, whose constitutional character is market-based, provide a constitutional footing only to those normative standards which impact the market, notably non-discrimination in Article 19, and data protection in Article 16 TFEU.

This delineation of market and social preferences as fundamentally distinct is a feature of the ordoliberal thought which characterises regulatory attitudes within the Union.⁹⁸ Ordoliberalism envisions a strong role for the State in ensuring the market functions at close to pure efficiency - this is the marked difference between *ordo* and neoliberal thought. The former emphasises that political power rather than restricting itself, or refraining from regulation of the market should regulate to ensure the presence of market based rules to enhance productivity and market efficiency.⁹⁹ In contrast, neoliberal theories advocate minimal, and preferably no, intervention in the market on the basis that non-intervention will lead to the natural operation of the market leading to maximum efficiency.¹⁰⁰

⁹⁸ See, Jotte Mulder, 'Re-conceptualising a Social Market Economy for the EU Internal Market' (2019) 15 *Utrecht Law Review*

⁹⁹ It is notable that Alexander Rüstow, who first articulated neoliberalism in 1938 is himself regarded as an ordoliberal in contemporary analysis. See, Taylor C Boas and Jordan Gans-Morse, 'Neoliberalism: From New Liberal Philosophy to Anti-Liberal Slogan' (2009) 44 *Studies in Comparative International Development* 137.

¹⁰⁰ *Ibid.*

From its origins, in the Treaty of Rome (which has been described, with slight exaggeration, as ‘a triumph for German ordoliberalism’)¹⁰¹ the European Community’s constitutional character has been markedly ordoliberal, prioritising the protection of market freedom and competition driven by technocratic institutions.¹⁰² Indeed, the EU has explicitly grounded its legitimacy on its constitutional commitment to this market focus.¹⁰³

This market focus is the great boon of ordoliberalism in the European context,¹⁰⁴ the Union has (after all) consistently legitimised its own expansion, and competences by reference to the a-political value of market health. In doing so, the Union’s proliferation of new legal and policy standards, while not unchallenged, is rendered palatable to national sovereignty concerns.¹⁰⁵ Max Starke has argued that references to fundamental rights in relation to contract law have generally served to reinforce the prevalent ideas in economic thought rather than to provide a corrective to them. In particular he contends that the CJEU’s adjudication has predominantly favoured a market paradigm as its integrating concept including in those areas where contract law and fundamental rights interact.¹⁰⁶ In particular, he argues that the Court’s endorsement of a classical notion of freedom of contract is paramount in which regulation is permitted only in the case of market failures,¹⁰⁷ the lack of effect of the social rights of Title IV of the Charter,¹⁰⁸ and the restriction of fundamental rights through market freedoms¹⁰⁹ support such a view.

The market emphasis which characterises ordoliberalism, thus necessarily involves the decoupling of the market and social aspects of Union law and policy. Traditionally this was accommodated through the bifurcation of the economically oriented constitutional documents of the Union, which looked to the market, and nationally embedded social law and policy which operated to protect fundamental rights, apart from the

¹⁰¹ Bernard Moss, 'The European Community as Monetarist Construction: A Critique of Moravcsik' (2000) 8 *Journal of European Area Studies* 247, 260.

¹⁰² Christian Joerges, 'What is Left of the European Economic Constitution? A Melancholic Eulogy' (2005) 30 *European Law Review* 461, 462-89.

¹⁰³ Edward N Megay, 'Anti-Pluralist liberalism: The German Neoliberals' (1970) 85 *Political Science Quarterly* 422.

¹⁰⁴ And indeed more broadly- generally welcomed as a “third way” apart from normative or political debates.

¹⁰⁵ David Gerber, 'Ordoliberalism: A New Intellectual Framework for Competition Law' in David Gerber (ed), *Law and Competition in Twentieth-Century Europe* (Oxford University Press 2001), chapter 7.

¹⁰⁶ Max Fabian Starke, 'Fundamental Rights Before the Court of Justice of the European Union: A Social, Market-Functional or Pluralistic Paradigm' in Hugh Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (Intersentia 2017), 100 referring to Duncan Kennedy, 'Three Globalisations of Law and Legal Thought: 1850-2000' in David M Trubek and Alvaro Santos (ed), *The New Law and Economic Development* (Oxford University Press 2006).

¹⁰⁷ Starke, 'Fundamental Rights Before the Court of Justice of the European Union: A Social, Market-Functional or Pluralistic Paradigm', 101 and 106. In this regard Starke draws on the case of Case C-499/04 *Werhof* EU:C:2006:168 in which freedom of contract as a fundamental right was used to argue for limited interpretations of regulatory provisions in the Transfer of Undertakings Directive. A similar classical approach was adopted in Case C-426/11 *Alemo-Herron* EU:C:2013:521.

¹⁰⁸ *Ibid*, 103.

¹⁰⁹ *Ibid*, 105.

Union's legal schema.¹¹⁰ In this system, Union competences to create social policy were limited, while the national social sphere was insulated from the European market order.¹¹¹

Originally, the choice to de-couple market and social was intended as a means of strengthening national welfare states by permitting Member States to draw on the economic benefits that would follow from the establishment of an integrated market and which would in time provide increased economic support for the maintenance of higher social standards at a national level.¹¹²

There is also, however, a more political basis for the de-coupling. Through delineating between the market and social, (with deference afforded to Member States on the latter issues which ideologically appeal more to concepts of national sovereignty) the Union was able to defend its expansion. The Union was, demonstrably, non-federal, deferring to Member States to set those social standards which were implicated in national culture, identity and history, and merely promoting market growth which would enable these national standards to be achieved.

The Union has progressively increased its focus on to social rights following the Lisbon Treaty and the entry into force of the Charter. However, despite this expansion the scope of the Union's fundamental rights policy remains, as has been noted above, limited with social concerns ringfenced as part of a continuing strict bifurcation of market and social concerns. Moreover, the convenient façade that the Union does not interfere with national, social standards is hard to maintain, as conflicts between social and market standards have come before the CJEU with the extension of the interpretative scope of the internal market rules through a series of cases in which the laws of a Member State were characterised as a measure restricting cross-border trade. As the CJEU began to consider national, social measures as obstacles to the internal market from the 1990s onwards there has been a steady 'infiltration' by internal market rules of Member States' socially oriented law and policy with the conflict between social and market aims being resolved consistently by the CJEU to the cost of the social.¹¹³

¹¹⁰ Manfred E Sreit and Wener Mussler, 'The Economic Constitution of the European Community: From Rome to Maastricht' (1994) 5 *Constitutional and Political Economy* 319; Joerges, 'What is Left of the European Economic Constitution? A Melancholic Eulogy'; Wolf Sauter, 'The Economic Constitution of the European Union' (1998) 4 *Columbia Journal of European Law* 27; Stefano Giubboni, *Social Rights and Market Freedom in the European Constitution* (Cambridge University Press 2006), 15-29.

¹¹¹ Mark Dawson, *New Governance and the Transformation of European Law: Co-ordinating EU Social Law and Policy* (Cambridge University Press 2011), 39-40.

¹¹² Francesco Costamagna, 'The Internal Market and the Welfare State: Anything New After Lisbon' in Martin Trybus and Luca Rubini (ed), *The Treaty of Lisbon and the Future of European Law and Policy* (Edward Elgar 2012).

¹¹³ On the pattern of infiltration (specifically in the context of labour law) see, Gerard Lyon-Caen, 'L'infiltration du droit du travail par le droit de la concurrence' (1992) 525 *Droit Ouvrier* 313; This pattern of the CJEU favouring market rather than social aims in its decisions has been traced by Augustin Menéndez to the decision in Case C-120/78 *Cassis de Dijon* EU:C:1979:42 in Augustin Menéndez, 'United they Diverge? From Conflicts to Constitutional Theory? Critical Remarks on Joerges' (RECON WP 2011/6), 24. The pattern is also in evidence in other decisions see, Case C-67/96, *Albany* EU:C:1999:430; Case C-160/91 *Poucet and*

Moreover, despite the inclusion of social standards in the Union's constitutional framework through the Charter following the Lisbon Treaty, the Union's legislative and policy output has demonstrated a continued preferencing of market oriented standards. This is particularly evident in the development of the Union's digital policy agenda from the latter half of the 1990s. The first European attempt at articulating a digital policy, the 1997 European Initiative in Electronic Commerce, sought to encourage the growth of e-commerce as part of an expressed desire on the part of the Commission to create a coherent regulatory framework building on existing Single Market legislation. The framework did not consider social aspects of the digital market and by seeking to articulate the digital space as a market created a context in which national regulation for the achievement of social objectives was significantly curtailed as conflicting with EU law by imposing barriers to trade.¹¹⁴

The 1997 Initiative was followed by the Lisbon Declaration and the e-Europe Initiative, which sought to place Europe at the forefront of efforts to generate a digital knowledge based economy¹¹⁵ while the Union's Digital Agenda for Europe¹¹⁶ and the 2015 Digital Single Market Strategy¹¹⁷ continued to emphasise market rather than social justifications for, and aims in, the development and regulation of the digital market placing the policy focus on consumer engagement, market efficiency and economic growth.

Parallel attempts to ensure a similar development of socially oriented policy governing the digital market have been absent while extensions of rights standards to private actors in the digital environment through secondary law have, as chapters two and three examine, favoured the market rather than socially oriented aspects of those rights. The failure to understand the harms identified by this work as social concerns as well as market issues is further exacerbated by the reduction of the consumer under EU law and policy to a one-dimensional market actor, and the dominant institutional view that the normative challenges raised by the digital market can be solved through increasing market competition.¹¹⁸

Pistre EU:C:1993:63; Case C-218/00, *Cisal and INAIL* EU:C:2002:36; Case C-264/01, C-306/01, C-354/01 and C-355/01 *AOK Bundesverband* EU:C:2004:150; Case C-355/00 *Freskot* EU:C:2003:298.

¹¹⁴ European Commission, *A European Initiative in Electronic Commerce, Communication to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions* (1997).

¹¹⁵ Communication from the European Commission, *E-Europe: An Information Society for All COM(1999)687* (1999), repeated in the conclusion of the Stockholm European Council in March 2001.

¹¹⁶ Communication from the Commission, *A Digital Agenda for Europe COM(2010)245* (2010).

¹¹⁷ Communication from the Commission, *A Digital Single Market Strategy for Europe COM(2015)192* (2015).

¹¹⁸ KJ Cseres, 'Towards a European model of economic justice: the role of competition law' in Hans Micklitz (ed), *The Many Concepts of Social Justice in European Private Law* (Edward Elgar 2011), 405.

This ordoliberal decoupling of the market and the social is not new or peculiar to the European Union. Indeed, it can be considered merely a modern manifestation of an enduring liberal tendency to champion market and neglect social aims. Polanyi attributed the uncoupling of market aims from social ones to the emergence of classical liberalism in the eighteenth century.¹¹⁹ Prior to this period, it was regarded as natural, and indeed desirable, that economic aims be absorbed (or ‘embedded’) as part of a system of social ordering and highly developed market economies were predominantly located in jurisdictions which integrated economic aims as part of a highly regulated social state, ‘[r]egulation and markets in effect grew up together.’¹²⁰ The ordoliberal deployment of the terminology of the social market economy in the European Union despite its superficial marrying of the language of social and market aims is, in practice, the unambiguous inheritor of this liberal preference.

European preferences for ordoliberal approaches which privilege vigorous competition have a historical basis in post-war suspicions of the political power which economic concentration can result in, and the distortion of democratic processes which can follow where private, economic actors can influence democratic processes. These roots have been well documented in pre-war Europe, as noted by Crane and Jeffreys in their examinations of the contribution of market monopolies to the rise of fascism in 1930s Germany.¹²¹

Ironically, in the context of the digital market the ordoliberal market oriented preferences which have resulted from this inheritance have, as the following chapters examine, permitted precisely the aggregation of market power, and thus political influence, which ordoliberalism seeks to prevent. While this result has been generated, in part, by failures to apply competition law to the activities of private actors in the digital market, it also results from the systemic elevation of market oriented over socially oriented legislative and policy approaches. As the proceeding chapters examine, the result is a system in which private actors, in the digital market, are effectively redefining normative

¹¹⁹ Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (2nd edn, Beacon Press 2001), 173. Julie Cohen has recently deployed Polanyi’s work in her analysis of how technological processes in their integration with market processes have developed to the detriment of individuals, and argues that any process that extracts and commodifies aspects of who we are objectionably interferes with our human and social selves by subjecting us to abstract and foreign logics. See, Julie E Cohen, ‘Law for the Platform Economy’ (2017) 51 UC Davies Law Review 133; Julie E Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (Oxford University Press 2019).

¹²⁰ Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, 71.

¹²¹ Robert Brady, *Business as a System of Power* (Routledge 2017); Diarmuid Jeffreys, *Hell’s Cartel: IG Farben and the Making of Hitler’s War Machine* (Henry Holt & Co 2010); Edwin Black, *IBM and the Holocaust: The Strategic Alliance between Nazi Germany and America’s Most Powerful Corporation* (Random House 2001); Daniel A Cane, *Antitrust and Democracy: A Case Study from German Fascism* (University of Michigan Law School 2018).

standards through their interpretation of, and minimal compliance with the market oriented aspects of rights, and their capacity to disregard the normative core of the values which are at stake.

1.4.3 *The Brittle Constitutional Character of Fundamental Rights in the European Union*

The final feature which has contributed to the development of private policy is the Union's 'brittle constitutionalism.' The European Union possesses a constitutional schema which is broadly economic in character and which has consistently characterised the process of integration as one lead by market oriented aims, in particular following the decision in *Van Gend en Loos*.¹²²

The process of constitutionalisation seeks to subject State actors (and in this case the Union) to the structures, processes, principles and values of a constitution. Locating this constitution in a Union context is challenging. Not least as a result of the Union's own undecided attitude to fundamental rights as part of its post-Lisbon vision of constitutionalism.

In the context of EU law, this can be understood as resulting in part from the structural limitations imposed by the Treaties, and the restricted scope of the Charter which have constrained the development of a coherent architecture of fundamental rights protection. In particular, Treaty limitations on the development of a broad fundamental rights policy permeate not only the capacity of primary law to protect fundamental rights against private actors, but also the development of secondary law mechanisms to do so.¹²³ The result is that, though the Union portrays itself as a staunch defender of rights in its external relations, and indeed as part of its own narrative of shared values it lacks the capacity to develop a coherent internal fundamental rights policy or, indeed, a coherent understanding of fundamental rights.

1.4.3.1 *The Ambiguous Attitude of the European Union to Fundamental Rights*

The understanding of a discrete set of individual rights, exercisable against the State, achieved enduring, intellectual prominence following the North American and, subsequently the French, declarations of rights.¹²⁴ Yet, individual rights did not enjoy an uninterrupted period of flourishing

¹²² Case C-26/62 *Van Gend en Loos* EU:C:1963:1. Norms of the EEC Treaty which are sufficiently concrete apply directly in the Member States. Since these norms apply directly, they must take precedence over national law. This applies in particular to the fundamental economic freedoms which can be asserted by Europe's market citizens before the European Court of Justice, countering relevant national legislation. This Court safeguards the uniformity of European law. That is why its interpretation must be binding.

¹²³ A Williams, 'Human Rights in the EU' in A Arnall and D Chalmers (ed), *Oxford Handbook on European Union Law* (Oxford University Press 2015), 249.

¹²⁴ See, Lynn Hunt, *Inventing Human Rights* (W W Norton 2008), 15-27.

following 1789. Indeed, the period following the French Declaration until the decade following the Second World War is characterised by sporadic, *ad hoc* progress in the recognition of discrete fundamental rights, interspersed with extended periods of enforced hibernation.¹²⁵

Parallel, but unconnected to the development of the idea of individual rights, proposals for a European community as a functional remedy for Europe's cyclical periods of conflict and despotism had long been mooted, first by William Penn¹²⁶ and subsequently by John Bellers¹²⁷ and Rousseau, the latter building on the work of Abbé St Pierre.¹²⁸ Yet none of these thinkers drew a necessary or desirable connection between their imagined European alliances and the protection of individual rights.

Against this backdrop, the reorientation of European states following the Second World War towards support for binding individual rights obligations, first in the United Nations Declaration on Human Rights (UNDHR), may seem jarring. It is a transition that owes no small debt to the legal tradition of the United States¹²⁹ though this should not be interpreted as a minimisation the impact of the legal inheritance of the European states themselves which, founded in Roman law¹³⁰ and beholden, at a romantic level, to the ideals of the French Declaration¹³¹ were not unaccustomed to the concept of states constrained by individual rights.

Despite this legacy and a more general 'European' adoption of human rights guarantees through the European Convention on Human Rights (ECHR), the founding documents of the European

¹²⁵ Charles Leben, 'Is there a European Approach to Human Rights?' in Mara Bustelo and James Heenan Philip Alston (ed), *The EU and Fundamental Rights* (Oxford University Press 1999); *ibid*; Hunt, *Inventing Human Rights*, 176 -184. On the Westphalian and limited understanding of human rights prior to the late twentieth century see, Samuel Moyn, *Human Rights and the Uses of History* (2 edn, Verso 2017), 85-90.

¹²⁶ William Penn, 'an essay toward the present and future peace of Europe' (1693) Section IV, 406 at (<<http://www.fredsakademiet.dk/library/penn.pdf>>) accessed 1 February 2019 in which the author envisions the creation of a European parliament.

¹²⁷ John Bellers, *Some Reasons for a European State*, (1710) in which the author argues for a model based on Swiss cantonal system.

¹²⁸ Jean-Jacques Rousseau, 'Extrait du projet de paix perpétuelle de Monsieur Abbé Saint Pierre' in Jean-Jacques Rousseau (ed), *Ouvres complètes III - Du Contrat Social - Écrits politiques* (La Pléiade, Éditions Gallimard 1964).

¹²⁹ See, Micheline R Ishay, *The History of Human Rights: From Ancient Times to the Globalisation Era* (University of California Press 2008) 179-180. On the realist, ideational and liberal institutional theories of the formation and timing of the ECHR see, Andrew Moravcsik, 'The Origins of Human Rights Regimes: Democratic Delegation in Post-war Europe' 54(2) (2000) *International Organisation* 217, 230; Lawrence Helfer and Anne Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' 107(2) (1997) *Yale Law Journal* 273.

¹³⁰ See, Charles de Visscher, 'Human Rights in Roman Law Countries' (1946) 243 *The Annals of the American Academy of Political and Social Science: Essential Human Rights* 53.

¹³¹ On the legacy of the French Declaration see, Stephen P Marks, 'From the Single Confused Page to the Decalogue for Six Billion Persons: The Roots of the Universal Declaration of Human Rights in the French Revolution' (1998) 20 *Human Rights Quarterly* 459; Susan Waltz, 'Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights' (2001) 23 *Human Rights Quarterly* 44.

Community make no mention of fundamental rights. Though the question was considered by both the *Comité d'Études sur une Constitution Européenne* and the Ad Hoc Assembly between 1951 and 1952¹³² the rights inclusive constitutional texts produced by both groups were abandoned in favour of texts whose emphasis in achieving integration was on economic rather than social standards.¹³³

Ultimately, the emergence of fundamental rights as a feature of Community law and part of the European integration agenda was prompted only by the activism of the CJEU (and its predecessors) following a series of legal challenges brought by German appellants to Community regulations which restricted economic liberties provided under a German law though beginning with the decision in *Stork*¹³⁴ and the subsequent judgments in *Geitling*¹³⁵ and *Sgarlata*¹³⁶ the Court initially resisted attempts by litigants to invoke fundamental rights claims.

However, the economic character of the Community integration agenda did not prevent the CJEU from subsequently finding in *Stauder*¹³⁷ that the 'general principles' of Community law included the protection of fundamental rights.¹³⁸ While the decision can be read as a delayed recognition of the need to accommodate social as well as market concerns within the European project, the motivations of the Court in recognising fundamental rights as a general principle of European law has been queried.

The decision in *Stauder* followed a period of intense discussion within the Union's institutions on the status of European law. The shift occasioned by the decision in that case has been attributed to the Court's expectation that, following the enumeration of the principles of primacy and direct effect in *Costa*¹³⁹ and *Van Gend En Loos*,¹⁴⁰ the Community would encounter opposition if it sought to require states to accept those principles in circumstances where the Community's own legal order did not itself respect fundamental rights, and instead subordinated them to market concerns.¹⁴¹

¹³² Johan van Haersolte and Jan-Kees Wiebenga, 'The Role of the European Parliament in the Fundamental Rights Architecture of the European Union' in Ben Vermeulen Marjolein van Roosmalen, Fien Van Hoof and Marten Oosting (ed), *Fundamental Rights and Principles* (Intersentia 2013) 155 – 157.

¹³³ Allan Rosas and Lorna Armati, *EU Constitutional Law: An Introduction* (3rd edn edn, Hart 2018).

¹³⁴ Case C-1/58 *Stork v High Authority* EU:C:1959:4.

¹³⁵ Cases 36, 37, 38 and 40/59 *Geitling v High Authority* EU:C:1960:36.

¹³⁶ Case 40/64 *Scarlatia and Others v Commission of the EEC* EU:C:1965:36.

¹³⁷ Case C-26/69 *Stauder v City of Ulm*, [7].

¹³⁸ The significance of the general principles to the current scheme of fundamental rights within the European Union is examined in the preceding section, see Chapters 5 at page 157 and 6 at page 197.

¹³⁹ Case C-6/64 *Costa v ENEL* EU:C:1964:66.

¹⁴⁰ *Ibid.*

¹⁴¹ Paul Craig and Grainne De Burca, *EU Law: Text, Cases, and Materials* (6th edn edn, Oxford University Press 2015) at 383; Jan Weiler, *The Constitution of Europe: 'Do the Clothes have an Emperor' and Other Essays on European Integration* (Cambridge University Press 1999) 107-8; Allan Rosas, 'The European Court of Justice and Fundamental Right: Yet another case of judicial activism?' in C Baudenbacher and H Bull (ed), *European Integration Through Interaction of Legal Regimes* (Oslo Universitetsforlaget 2007) 33, 36-39.

This motivation finds support in the Courts' dicta in *Siragusa*¹⁴² and *Hernandez*¹⁴³ to the effect that the reason for requiring fundamental rights review of Member State action within the scope of EU law is the same as the original reason for requiring fundamental rights review of EU action in *Handelsgesellschaft* – to ensure the supremacy of EU law.¹⁴⁴

As a result, while it is tempting to classify *Stauder* as representative of a sea-change it is more likely that a practical concern with promoting further economic integration was the motivation behind the decision.¹⁴⁵ The delay following *Stauder*, of the emergence of any institutional recognition of fundamental rights within the Union further supports this position – indeed it was not until the 1990s that fundamental rights received institutional recognition in European law.¹⁴⁶ It was not until the Charter of Fundamental Rights achieved binding status in 2009 that the Union's commitment to fundamental rights was articulated as an enumerated list of protections. However, even following the introduction of the Charter, the Union's development of a fundamental rights policy remains restricted.

1.4.3.2 *The Charter's Capacity to Ground a Coherent Vision and Enforcement of Fundamental Rights*

The most significant feature of the Charter, in the context of imposing fundamental rights obligations on private actors, is its inclusion not only of negative rights but of positive obligations.¹⁴⁷ Tridimas has argued this feature of the Charter reflects a departure from a neoliberal philosophy and an endorsement of the ideals of social democracy encompassing within its seven chapters guarantees of dignity, freedom, equality, solidarity, citizens' rights and justice and aiming to increase the visibility of fundamental rights for the benefit of the citizen.¹⁴⁸

Yet the degree of certainty and indeed the degree of protection afforded by the Charter is limited by its ill-defined scope and the ordoliberal policy preferences of the Union more generally. While Tridimas is certainly correct that a contextual reading of the Charter's text supports a social

¹⁴² Case C-206/13 *Siragusa* EU:C:2014:126. See also, Case C-40/11 *Ilida* EU:C:2016:691; Case C-87/12 *Ymeraga* EU:C:2013:291.

¹⁴³ Case C-198/13 *Julian Hernandez* EU:C:2014:2055.

¹⁴⁴ Case C-7/14 *Handelsgesellschaft* EU:C:2015:205.

¹⁴⁵ Manfred A Dausies, 'The Protection of Fundamental Rights in the Community Legal Order' (1985) 10 *European Law Review* 398.

¹⁴⁶ The Convention had previously been described by the Court in *Loizidou v Turkey* (Preliminary Objections) Application 15318/99 (ECHR, 28 July 1996) as 'a constitutional instrument of European public order' and had been treated by the CJEU as a 'special source of inspiration' for fundamental rights. See Francis G Jacobs, *The Sovereignty of Law* JWF Allison, *The English Historical Constitution* (Cambridge University Press 2007) 54.

¹⁴⁷ Commission Communication on the Legal Nature of the Charter of Fundamental Rights of the European Union COM (2000) 644, Brussels, [2].

¹⁴⁸ Takis Tridimas, *The General Principles of EU Law* (2 edn, Oxford University Press 2006), 357, 359.

democratic character, in practice such a reading has been inconsistently translated in the practical application of fundamental rights through judicial interpretation and legislative guarantees. Moreover, the limited scope of the Charter has restricted the capacity of the Charter to ground a fundamental rights policy capable of regulating the activity of private actors.

The scope of the Charter remains under-explored, with the EU Agency for Fundamental Rights (FRA) in its 2018 report noting that where the Charter has been used, national courts have, with limited exceptions, largely declined to analyse the scope of its application.¹⁴⁹ The report goes on to note that an analysis of the decisions of Member States' courts from 2012 to 2016 shows a majority of judicial and administrative references to the Charter are limited and superficial with few policies having been implemented to promote the Charter despite the obligation to do so under Article 51.¹⁵⁰ This failure to articulate in detail the scope of the Charter is hardly surprising in light of the ambiguities raised by the text itself.

The most significant distinction which goes to the document's scope is the differentiation, if any, which is to be drawn between rights and principles in the text. The importance of understanding this distinction lies in the explanation in the Charter's accompanying Explanatory Memorandum which notes that, pursuant to Article 51, Charter rights are to be respected, and will generate direct claims to positive action, while principles are to be observed and may be relied upon only where otherwise provided for through legislation.¹⁵¹

Problematically, it is not explained in the text of the Charter how the distinction between rights and principles is to be drawn. Though the Explanatory Memorandum provides a list of Charter principles including Articles 25,¹⁵² 26¹⁵³ and 37,¹⁵⁴ it does not specify whether the list is exhaustive. Nor is it clear whether principles are recognised by reference to their correspondence with previously recognised general principles. Though some of those listed clearly correspond to previously recognised general principles, others do not. Nor does there seem to be any other unifying factor. Further complicating the matter is the statement in the Explanatory Memorandum

¹⁴⁹ European Union Agency for Fundamental Rights, *Fundamental Rights Report 2018*, (2018), 39.

¹⁵⁰ *Ibid*, 46.

¹⁵¹ See, 2007/C 303/02 'Explanatory Memorandum to the Charter of Fundamental Rights of the European Union' (2007) Official Journal of the European Union, 35.

¹⁵² Providing the Union shall recognise and respect the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

¹⁵³ Providing that the Union with recognise and respect the right of persons with disabilities.

¹⁵⁴ Provides that a high level of environmental protection and the improvement in the quality of environmental protection shall be integrated into the Union's policies.

that ‘an Article of the Charter may contain elements of both a right and of a principle’ citing Articles 23,¹⁵⁵ 33¹⁵⁶ and 34.¹⁵⁷

The principles which are identified in the Explanation cover both market-orientated, and social concerns though they could not be universally said to be socio-economic in nature which might have offered a ready explanation for the requirement that they be enforced through legislation – obviating a criticism based on an institutional separation of powers. Moreover, as the memorandum does not enjoy the status of law, the problem of formulating a means of identifying which provisions are principles on the basis of the text itself remains unresolved absent judicial consideration.

This lack of clarity is compounded by Article 51 which establishes the scope of the Charter’s application and specifies its protections shall apply to the institutions and bodies of the Union and to Member States when they are implementing EU law. This wording accords with the approach previously adopted in relation to the scope of the Treaties¹⁵⁸ and the decisions of the Court in *ERT*,¹⁵⁹ *Wachauf*,¹⁶⁰ and *Familiapress*¹⁶¹ as reaffirmed in *Fransson*¹⁶² though the precise extent of what constitutes a matter within the scope of EU law has been generously drawn in several cases.

Thus, in *Fransson* the Court stated that the provisions of Article 51 merely confirmed the Courts’ established case law to the effect that fundamental rights are applicable in all situations within the scope of EU law.¹⁶³ In that case the Court considered, that the link between the collection of VAT and the availability to the EU budget of corresponding VAT resources was sufficient to bring the disputed matter within the scope of EU law.¹⁶⁴

This seems a tangential basis on which to conclude a matter is within the scope of EU law and, indeed, Advocate General Cruz noted the weakness of this link in her Opinion, opining that the test for whether activity is within the scope of EU law should be whether the Union had a presence in the origin of the public authority exercised.¹⁶⁵ While this approach was seemingly adopted by the

¹⁵⁵ Covering equality between men and women.

¹⁵⁶ Covering family and professional life

¹⁵⁷ Covering social security and social assistance.

¹⁵⁸ Case C-260/89 *ERT* EU:C:1991:254.

¹⁵⁹ *Ibid.*

¹⁶⁰ Case C-5/88 *Wachauf* EU:C:1989:321.

¹⁶¹ Case C-368/95 *Familiapress* EU:C:1997:325.

¹⁶² Case C-617/10 *Akerberg Fransson* EU:C:2013:280.

¹⁶³ Case C-617/10 *Fransson*, [19], [22] referencing Case C-466/11 *Currá and Others* EU:C:2012:465, [26].

¹⁶⁴ Case C-617/10 *Fransson*, [26] citing Case C-539/09 *Commission v Germany* EU:C:2011:733 as well as Article 2.1 of Council Decision 2007/436/EC Euratom on the system of the European Communities resources which provided for harmonised VAT assessment forming part of the Union’s shared resources and found that it followed that the activities of the Swedish tax authorities constituted an implementation of this provision of EU law as well as those articles of the TEU.

¹⁶⁵ Opinion C-617/10 *Fransson* EU:C:2012:340, [33].

Court subsequently in the case of *Magatte Gueye*¹⁶⁶ the substantive basis on which a matter may be considered “within” the scope of EU law remains unclear and the scope the Charter to ground a coherent fundamental rights approach in thus uncertain.

However, the final, and primary, limitation on the scope of the Charter is also contained in Article 51 in subsection (2) which provides that the Charter does not establish any new power or task for the Community or the Union or modify any powers and tasks defined by the Treaties, a limitation mirrored in Article 6 TEU and affirmed by *Opinion 2/2013*.¹⁶⁷

Article 51(2) reflects the principle of ‘conferral’ or ‘attributed powers’ which restricts the EU to activities which fall within the limits of those competences conferred on the Union by Member States in order to achieve its objectives as established in Article 3 TEU codified following the Treaty of Lisbon by Articles 5(2) and 4 TEU.¹⁶⁸ These objectives include the promotion of peace and the Union’s values, the wellbeing of the free movement of the citizens of the Union, the establishment and maintenance of the internal market, the promotion of social justice and protection, territorial cohesion and solidarity among the Member States, the creation and maintenance of the euro, the protection of European cultural inheritance and the protection and promotion of the Union’s values in external relations.

This is reinforced by Article 6 TEU which stipulates that though the Charter ‘shall have the same legal value as the Treaties,’ but provides that the provisions of the Charter do not extend the competences of the Union as defined in the Treaties. The result is that, of those rights protected by the Charter, comprehensive rights protection frameworks can be developed only in respect of the rights to data protection and equality which have been given Treaty standing by Article 16(2) TFEU, and Articles 19 and 157 TFEU respectively.

The Court’s Article 51 jurisprudence, in particular the decisions in *McB*¹⁶⁹ and *Pringle*¹⁷⁰ illustrate the Court’s adherence to, and respect for, these limitations placed on the Charter by Article 6 TEU¹⁷¹ a position reaffirmed in *Opinion 2/94*¹⁷² that ‘no Treaty provision confers on the Community institutions any general power to enact rules on human rights.’¹⁷³ Significantly, however, the Court

¹⁶⁶ Case C-483/09 *Gueye* EU:C:2011:583, [51].

¹⁶⁷ *Opinion 2/13* EU:C:2014:2454.

¹⁶⁸ The Shared and exclusive competences of the Union are listed in Articles 3 to 6 TFEU though in the case of shared competences the list provided is not exhaustive.

¹⁶⁹ Case C-400/10 *McB* EU:C:2010:582.

¹⁷⁰ Case C-370/12 *Pringle* EU:C:2012:756.

¹⁷¹ *Ibid*, [179]

¹⁷² *Opinion 2/94* EU:C:1996:140.

¹⁷³ *Ibid*, [27].

in *Opinion 2/94* stipulated that a power may be expressly provided for in the Treaty or implied therefrom. Several scholars have argued in reliance on this latter addition that *Opinion 2/94*, leaves open the possibility of a competence to protect fundamental rights.¹⁷⁴ However, no reference on which to base a potential inference of a fundamental rights competence under the Article was addressed or acknowledged by the Court in *McB* or *Pringle* - though Advocate General Sharpston argued in *Zambrano* that the CJEU must interpret the scope of application of EU law broadly to ensure that the fundamental rights of EU citizens are effectively protected.¹⁷⁵

The argument that *Opinion 2/94* may ground an implicit extension of the Union's fundamental rights competence though opposed by some as an endorsement of competence creep,¹⁷⁶ has been embraced, on various grounds by several commentators, in the service of effecting a means for the Union to engage in developing a coherent fundamental rights policy. Kosta has argued that a fundamental rights competence may be implied under Article 352 TFEU¹⁷⁷ and argues that Article 352 (which permits the EU to adopt an act necessary to attain those objectives laid down by the treaties when the latter have not provided the powers of action necessary to attain them) functions as a gap-filler in situations in which action by the EU is necessary to attain a Union objective and the Treaty does not provide the necessary powers.¹⁷⁸ On this basis Kosta argues that Article 352 can be read as including recognition of a fundamental rights competence.¹⁷⁹

Alston and Weiler have similarly pointed to Article 352 TFEU as a basis for the protection of fundamental rights through the adoption of certain general measures¹⁸⁰ while Weiler has argued elsewhere with Fries that Article 11, which permits measures to be taken to secure the establishment and functioning of the internal market, might also be used to ground a fundamental rights

¹⁷⁴ JHH Weiler, *A Human Rights Policy for the European Community and Union: The Question of Competences* (Harvard Law School 2000), 17.

¹⁷⁵ Case C-34/09 *Zambrano* EU:C:2011:124, [163].

¹⁷⁶ Stephen Weatherill, 'Competence Creep and Competence Control' (2004) 23 *Yearbook of European Law* 1.

¹⁷⁷ *Ibid*, [31]. See also, Vasilliki Kosta, *Fundamental Rights in EU Internal Market Legislation* (Hart 2015), 54.

¹⁷⁸ Elsewhere Lenaerts and Gutierrez-Fons in an examination of how the CJEU responds to lacunae in EU law argue that general principles of law can have three functions under EU law: as a ground for judicial review an aid to interpretation or, most significantly, as a basis for remedying lacunae in the law in cases involving fundamental rights. See, Koen Lenaerts and Jose A Gutierrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' (2010) 47 *Common Market Law Review* 1629

¹⁷⁹ P Eeckhout, *External Relations of the European Union - Legal and Constitutional Foundations* (Oxford University Press 2004), 86; Vasilliki Kosta, *Fundamental Rights in EU Internal Market Legislation* (Hart 2015).

¹⁸⁰ Philip Alston and J.H.H. Weiler, 'An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights' in Mara Bustelo and James Heenan Philip Alston (ed), *The EU and Fundamental Rights* (Oxford University Press 1999).

competence.¹⁸¹ Weiler and Fries posit, as an example, the right of free movement which triggers a positive institutional duty and drawing on the decisions in *Commission v France*,¹⁸² *Bundesanstalt für Ernährung*¹⁸³ and *Cinétheque*¹⁸⁴ and argue that respect for fundamental rights is an integral, inherent and transverse principle which permeates all the objectives and powers of the Community.¹⁸⁵

This argument echoes the broader argument that the EU enjoys ‘indirect competences,’ to protect fundamental rights when it is exercising its explicit legal powers and Von Bogdandy’s contention that the CJEU has the power to ensure fundamental rights protection in situations where the protection of the essence of fundamental rights of EU citizens is at stake.¹⁸⁶ In a similar analysis, drawing on more recent decisions of the CJEU, Scharpf has claimed that a new generation of ‘expansionist’ fundamental rights cases¹⁸⁷ including *Mangold*, *Schecke*¹⁸⁸ and *Test-Achats*¹⁸⁹ represent the development of a rights-based theory of integration.¹⁹⁰

Finally, the Union’s fundamental rights framework sits alongside and should be interpreted in light of the meaning given by the ECtHR to the European Convention on Human Rights pursuant to Article 52(3) of the Charter. This is part of a more general parallel operation of the fundamental rights instruments adopted by individual Member States under the aegis of the Council of Europe and which include, notably in the context of this work, Convention 108.¹⁹¹ Against this absence of

¹⁸¹ JHH Weiler and Sybilla C Fries, *A Human Rights Policy for the European Community and Union: The Question of Competences* (Jean Monnet Working Paper 4/99 1999).

¹⁸² Case C-265/95 *Commission v France* EU:C:1997:595.

¹⁸³ Case C-68/95 *T Port v Bundesanstalt für Ernährung* EU:C:1996:452.

¹⁸⁴ Case C-60/84 *Cinetheque* EU:C:1985:329, [26]. Fries, *A Human Rights Policy for the European Community and Union: The Question of Competences*, 10. This seems to be the converse approach from that in the US with respect to the commerce clause (the equivalent to Article 114 TFEU) which grants a positive power to promote market integration. On the basis of this positive power the SC imposed a negative obligation on the states not to interfere with interstate commerce – the (judge made) doctrine of the dormant commerce clause as in *Cooley v Board of Wardens of Port of Philadelphia ex rel Society for the Relief of Distressed Pilots* 53 US 299 (1852) 318; *Robbins v Shelby County Taxing District* 120 US 489 (1887) 493; *HP Hood & Sons Inc v Du Mond* 336 US 525 (1949) 532; *Texas Industries Inc v Radcliff Materials Inc* 451 US 630 (1981) 641.

¹⁸⁵ *Ibid.*

¹⁸⁶ Mathias Kottmann Armin Vog Bogdandy, Carlino Antpohler, Johanna Dickschen, Simon Hentrei and Maja Smrkolj, 'Reverse Solange: Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49 *Common Market Law Review* 489.

¹⁸⁷ FW Scharpf, 'Perpetual Momentum: directed and unconstrained?' (2012) 19 *Journal of European Public Policy* 127.

¹⁸⁸ Case C-92/09 *Schecke* EU:C:2010:662.

¹⁸⁹ Case C-236/09 *Test-Achats* EU:C:2011:100.

¹⁹⁰ A Stone Sweet and K Stranz, 'Rights adjudication and constitutional pluralism in Germany and Europe' (2012) 19 *Journal of European Public Policy* 92; Scharpf, 'Perpetual Momentum: directed and unconstrained?'.

¹⁹¹ Crucially, Convention 108 covers those areas in which the EU does not have a competence as it is a creature of international law. This complementarity, and indeed broader read is seemingly recognised in Recital 105 GDPR which cites accession to Convention 108 as a factor to be taken into account in adequacy decisions under the Regulation.

an explicit competence on which to base the development of a coherent and unified fundamental rights policy the emergence of the features which have enabled the rise of private policy within the Union, has left fundamental rights in the EU open to erosion.

Yet both national constitutional orders and the ECHR, while relevant sources of fundamental rights within the Union's legal schema, are only soft law sources of law, while the judicially developed general principles have constitutional status but have been displaced to some extent by the entry into binding force of the Charter.¹⁹² In this context the Treaties are the most stable core of European constitutionalism albeit one which is largely market oriented in character.

The introduction of the Charter and its application to the Union, and those activities within the scope of EU law, was intended to add an additional layer of substantive constitutional values to this market-orientated core through the incorporation of systemic commitments to social aims which would operate in addition to pre-existing market oriented standards.¹⁹³

This intention has not been actualised. Neither the content of the Charter nor its interpretation by the CJEU has led to the development of a substantive fundamental rights policy and the integration of a substantive rights-based element to the Union's constitutional identity. Indeed, by some measures, the Charter has in fact reduced the capacity of fundamental rights as developed through the general principles by formally restricting their scope.¹⁹⁴ Leczykiewicz refers to this disconnect between the distinct spheres of market and rights-based constitutionalism within the Union as indicating an absence of the desired 'deep constitutionalism' and the presence instead of an undesirable 'shallow constitutionalism' due to the Charter's failure to successfully constrain and direct the CJEU or counteract the Court's expansionist and integrationist tendencies, this work however is concerned with an allied but distinct concern.

While this work does not disagree with the trends identified by Leczykiewicz or their importance in the development of a coherent constitutional identity within the Union, this work articulates the true shortcoming within the Union's constitutional schema (in as much as fundamental rights are concerned) as the brittle rather than shallow nature of the European constitutional order. What I refer to by using the label 'brittle' in discussing the Union's constitutionalism is the tendency of what appears as a coherent constitutional whole to fragment into diffuse and often poorly connected components in circumstances where it is comes under social or political pressures.

¹⁹² Dorota Leczykiewicz, 'The Charter of Fundamental Rights and the EU's Shallow Constitutionalism' in M Cahill and R Ekins N Barber (ed), *The Rise and Fall of the European Constitution* (Hart 2019), 141.

¹⁹³ Ibid, 124, 143.

¹⁹⁴ Ibid, 1.

This is evidenced in the context of this work not only in the Union's fundamentally uncertain commitment to the substantive incorporation of fundamental rights into its constitutional identity and a failure to interweave it with the market based aspects of Union constitutionalism, but also the unprincipled approach to the translation of certain rights from vertical to horizontal guarantees, and the judicial unbundling of rights into ever smaller constituent elements. The result is a fragmented constitutional identity in which fundamental rights are neither fully part nor apart from the central economic constitutional aspects of Union constitutionalism and in which the rights-based elements of Union constitutionalism are susceptible to analytical treatments which reduce their structural and normative integrity.

The primary source of such brittleness is the ambiguous constitutional standing of fundamental rights discussed above, of which the shallow constitutionalism averred to by Leczykiewicz is a contributing aspect. The work argues that as a consequence of the controversies over scope and application of the Charter¹⁹⁵ and the overlapping but ambiguous origins of fundamental rights within EU law, a compromised fundamental rights jurisprudence has emerged – one which has proved unable to locate the primary source, and thus the scope and character of the authority of fundamental rights within the Union.

This fundamental lack of clarity on the sources and scope of fundamental rights within EU law is compounded by the easily displaced nature of fundamental rights whose social aims are repeatedly trumped by market oriented constitutional values and the selective elevation of the market-oriented aspects of selected fundamental rights in secondary law. This selective elevation in particular has generated uncertainty surrounding the relationship between what would, at a national level, be considered statutory and constitutional rights.

This is particularly obvious in situations in which market oriented 'statutory' rights operate to effectively describe the scope of 'constitutional' rights enumerated by Charter, rendering it unclear whether such description is a, or the, definitive articulation of the right at issue. This is particularly the case regarding the right of data protection which has been given seemingly exhaustive expression in the GDPR by reference to which its constitutional character under the Charter appears to be defined. This is complicated further by the unresolved relationship between data protection and privacy under Articles 7 and 8 of the Charter and the parallel constitutional source under Article 16 TFEU for the development of market-oriented data protection legislation.

¹⁹⁵ See, on the implications of some of the Charter's ambiguous wording, *ibid*, 143-147. See also, Sionadh Douglas-Scott, 'The Charter of Fundamental Rights as a Constitutional Document' (2004) 1 *European Human Rights Law Review* 37; Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *European Constitutional Law Review* 375.

Given the CJEU's exclusive role in interpreting the Charter and Treaties it would seem that 'statutory' descriptions of rights in EU secondary law should be read as an articulation of the 'constitutional' Charter rights at issue, yet it is not clear that this is the case, the Court having afforded a significant deference to secondary law in its reading of 'constitutional' Charter rights. In the case of data protection in particular the statutory right of data protection could equally be drawn from the competence afforded in the Treaties, rather than the Charter, but is nevertheless being articulated as the definitional control on the enforcement of a constitutional Charter right.

Against this infrastructural background the final element of the brittle constitutional character of fundamental rights within the Union is the tendency of both the CJEU and the legislative actors of the Union to 'unbundle' fundamental rights. By 'unbundling' this work refers to two trends in the jurisprudence of the CJEU, specifically in cases concerning the digital market.

The first is the use of an enumerated fundamental right as an interpretative means of enumerating further, related rights which should more properly be understood as considerations in the assessment of infringements of the central right. This is the case in the relationship between the right to privacy and data protection for example, the latter of which while expressed as a right in reality is a set of principles which can be applied to discern permissible reductions or abrogations of the right to privacy. The second, is the reduction of a fundamental right to its constituent elements which are themselves recognised as individual fundamental rights. This is most clearly evidenced in the relationship between the right to data protection, which has been unbundled to produce various subsidiary rights such as the right to be forgotten.

While rights proliferation, has long been a feature of the CJEU's jurisprudence, unbundling raises several concerns. The first is the inflation of the content of fundamental rights occasioned through unbundling.¹⁹⁶ This is harmful in as much as such inflation may be objectionable on a majoritarian analysis given that it pre-empts the legislative mandate, where it results from judicial action. Such inflation is also objected to, at an international level, as resulting in a normative dilution of the force of rights guarantees, a critique which may be equally applied in the context of European fundamental rights.¹⁹⁷

¹⁹⁶ See, Chapter 7, page 221; Joseph Raz, *Human Rights Without Foundations* (University of Oxford 2007).

¹⁹⁷ Maurice Cranston, 'Human Rights, Real and Supposed' in DD Raphael (ed), *Political Theory and the Rights of Man* (Macmillan 1967); Carl Wellman, *The Proliferation of Rights: Moral Progress or Empty Rhetoric?* (Westview Press 1999); Brian Orend, *Human Rights: Concept and Context* (Broadview Press 2002); James Griffin, *On Human Rights* (Oxford University Press 2008); Dominique Clément, 'Human rights or social justice? the problem of rights inflation' (2017) 22 *International Journal of Human Rights* 155; Matej Avbelji, 'Human rights inflation in the European Union' in Lorenza Violini and Antonia Baraggia (ed), *The Fragmented Landscape of Fundamental Rights Protection in Europe* (Edward Elgar 2018).

The more significant concern prompted by unbundling, in an EU context, is that it is symptomatic of an underlying failure among the institutions to develop a principled understanding of fundamental rights, their protective scope, and their relationship to statutory rights which heralds the development of a jurisprudence of exceptionalism in which new iterations or contexts prompt the CJEU to enumerate *ad hoc* standards elevated to the status of rights. In such circumstances unbundling is merely the by-product of a legal system whose normative guarantees are perceived as lacking the resilience and flexibility to accommodate the challenges raised by events.

The use of unbundling can thus act as a barometer of the integrity of the legal system's interpretation of, and adherence to, its core values. Unbundled rights while applicable in the individual circumstance which they are unbundled to address, are less resilient as a result of the highly specific circumstances of their recognition. The result is not only an inflation in the content of fundamental rights but a diminution of their referent – that is the scope of individuals and activities protected by them.

By unbundling specific rights which are applicable only in discrete circumstances lacunae can emerge in which fundamental rights protection is apparently absent given the reduction of the original right into a series of lesser, and specific guarantees. Within such lacunae both State and private actors are then free to define alternative normative standards. Moreover, where the recognition of new rights is judicially led there is a danger that the enforcement of the right will fall to private actors. This was notably the case in the decision in *Google Spain*¹⁹⁸ which recognised the right to be forgotten, pre-empting a legislative provision, and generating a right which remains enforced almost exclusively by Google without oversight or transparency as to how enforcement decisions are made.¹⁹⁹

The latitude afforded to private actors to operate where there is a lacuna like this, and to define the operation of normative standards within that space through private policy is equally evident in a legislative context. The GDPR and its predecessors as well as the ePrivacy Directive, in seeking to enumerate a discrete, and extensive suite of standards for data protection necessarily generated lacunae in protection due to ambiguity or silence. The result has been that market practices have developed which are technically permissible but are nevertheless normatively problematic.

These ambiguities in the Union's structural understanding of fundamental rights lead to a discontinuity in their normative authority and orientation. Fundamental rights appear to be considered simultaneously as an aspect of the Union's constitutional order – and thus of equal

¹⁹⁸ Case C-131/12 *Google Spain* EU:C:2014:317.

¹⁹⁹ Chapter 7, page 221.

supremacy to the Treaties, and as mutable, malleable standards whose contents can be variously augmented or minimised to facilitate market aims. The result is a constitutional schema which expounds a rhetorical commitment to fundamental rights but lacks the capacity or apparent desire to develop a coherent understanding and application of such normative standards.

The resulting rights landscape is characterised by a 'brittle constitutionalism' in accordance with which the central normative claims and structure of rights are subject proliferation and dilution through unbundling, fragmentation through the selective elevation of their market oriented aspects, and limitation as a result of the ambiguity surrounding their sources and scope. The resulting structural incoherence opens the way for private policy which thrives in the absences or ambiguities created by this landscape and has developed its own mechanisms for definitive normative standards within it.

1.5 The Impacts of and Solutions to the Rise of Public Policy

In the work which follows the manner in which these three trends have manifested and impacted the rights to privacy (chapter two) and property (chapter three) are examined. These rights have been selected in as much as they are illustrative of broader patterns which the rise of privacy policy generates for fundamental rights within the Union and as a result of their particular importance in protecting individual autonomy and facilitating the achievement of a substantive concept of the Rule of Law.

The particular contribution of both the rights examined to autonomy and the conceptualisation of autonomy used within the work is outlined in chapter four which explains the impacts which reductions in, and erosions of, the rights to privacy and property have on individual level. Autonomy is defined within the work in accordance with the view, most recently articulated by Raz, as 'the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.'²⁰⁰ In the context of the choices faced by individuals in the digital market the dilemma for, and risk to, autonomy crystallises in this articulation which requires the presence of meaningful choice free from manipulation, coercion or excessive undue influence.²⁰¹ The work thus understands autonomy as the capacity for socially situated individuals to make choices which result from deliberative action and allow them to shape their private selves.

In particular the chapter draws on the connection between autonomy reductions and the alienation of the individual within a Hegelian understanding, as illustrative of the connection between

²⁰⁰ Joseph Raz, 'Autonomy, toleration and the harm principle' in Susan Mendus (ed), *Justifying toleration: Conceptual and historical perspectives* (Cambridge University Press 1988), 369.

²⁰¹ Paul Bernal, *Internet Privacy Rights* (Cambridge University Press 2014), 24-5.

diminutions in individual autonomy and the capacity for democratic participation. Building on this analysis chapter five then turns to consider how infringements of the rights to privacy and property import broader, societal, impacts by cumulatively eroding the integrity of the substantive model of the Rule of Law endorsed by the European Union.

The reductions of individual autonomy which the rise of private policy facilitates can, as noted above, result in reductions in the capacity for democratic participation. How then does this, implicate harms to the Rule of Law? The work argues that the harms which result for the Rule of Law take three broad forms, the first is harms to individual liberty through erosions of the rights to privacy and property as part of the Union's commitment to a substantive Rule of Law. The reduction of liberty jeopardises the Rule of Law in that liberty is at the heart of the Rule of Law's orienting aims, and by interfering in the relationship between the individual and the State and conditioning the individuals capacity to democratically engage ultimately diminishes the capacity for the development of democratic governance which the Rule of Law seeks to facilitate.

The second, is the capacity of private policy to result in the availability of 'constitutional workarounds' which enable State actors to act through private proxies in the digital environment and in doing so to act in ways not otherwise permitted by constitutional restraints. Finally, the third is the development by private policy of what Leiser has referred to as a 'private jurisprudence' which subjects normative standards to a private system of rights protection and enforcement which lacks the transparency, accountability, predictability or equality of application necessary under the Rule of Law.

1.5.1 *Locating the Solutions to the Harms Identified*

While respect for autonomy should prohibit paternalistic interventions by State actors on the basis that such intervention involves a judgment that individuals are unable to assess how best to pursue their own best interests, the understanding of autonomy adopted by this work is not hostile to regulatory intervention *per se*. Rather, in accordance with Raz's view, the State may in fact play a role in preserving individual autonomy, by taking such positive action as is necessary to enhance the capacity of individuals to exercise and enjoy those rights on which autonomy relies.²⁰² This echoes the view articulated by Polanyi that, as market freedom expands, so too must the mechanisms which ensure the social aims of society are met through the protection of areas of individual autonomy, if necessary by means of regulation – that we must, in effect, move from a brittle to a 'embedded' constitutional identity within the European Union.

²⁰² Raz, 'Autonomy, toleration and the harm principle', 427.

In this respect this work's premise is that the imposition of a regulatory schema to ensure the protection of fundamental rights, and in turn vindicate individual autonomy and liberty is justified in the context of private actors in the digital market which actively utilise coercive and manipulative tactics in circumstances where meaningful alternatives are not present. This raises the potential criticism that, in seeking to reduce the concentration of power among private actors, the solution advocated by this work necessarily increases the power enjoyed by the European Union. In response to this criticism three arguments may be made.

The first, is that fundamental rights act as effective limits on the activities of the European Union through their function as constitutional controls. The EU's power is therefore already restricted from an expansion which would prove threatening to the rights examined here. Relatedly, and given the mechanisms of constitutional avoidance discussed in the following part, limits on private power, can also function as limits on the Union's (and State) power by depriving public actors of 'backdoors' to activities or information which constitutional protections would otherwise prevent them from engaging in or with.

The second argument is that coercion by a State actor to alter or otherwise regulate individual behaviour or activity can be compatible with individual autonomy where the targeted conduct is harmful to others, or threatens fundamental social goods.²⁰³ Autonomy and the Rule of Law satisfy this requirement while, as chapters two and three note, the harms occasioned to individual privacy and property rights also impact third parties who do not assent to the contractual terms and practices described yet nevertheless face adverse impacts as a result of the accession of other individuals to such agreements.

Thirdly, and finally, the solution proposed by this work, and which forms part of a broader suite of measures necessary to redress the impact of private standard setting in the digital environment on public, normative standards, is cognisant of the character of the Union. This work proposes a return to the idea of the consumer as both a social and market actor, and advocates for the adoption of a rights-oriented understanding of consumer protection.

The work does not advocate for the creation of a new European contract law, the imposition of horizontal effect for fundamental rights, or the creation of a new Union competence in the area of fundamental rights. While such measures are ideologically purer than a market-based solution to a social problem they all involve a fundamental change to the character of the Union which would see it gain a degree of control over national social orders and constitutional values which would sit

²⁰³ JS Mill, *On Liberty* (Penguin Classics 2016).

uncomfortably with national sovereignty and the Union's non-federal design. Moreover, the practical contribution of such unrealistic proposals would be questionable.

Locating a solution to these harms is complex, and this work offers a model for solving the harms which should be understood as an aspect of a broader legal and policy approach. The most evident riposte to the emergence of private policy is the horizontal application of fundamental rights to private actors.

Despite the capacity of private actors to produce negative rights impacts, the activities of private actors have traditionally been considered outside the scope of constitutional controls as a result of a reluctance to extend the horizontal effect of fundamental rights. This reluctance is justified largely by reference to established contractarian theories which hold that the State draws its authority, and thus its power, from the consent of individual citizens and may be subject in the exercise of that power to reciprocal restraints, as well as the disproportionate power of the State to subvert the consent of its citizens where such constraints are not present.

In contrast private actors draw their authority from individual, private contracts and should be governed according to a similar deference to the consent of the parties involved. Political and legal theory has thus traditionally considered that as non-parties to the contractual relationship between individuals and the State, private actors are not bound by the restraints which govern that relationship.

However, the capacity to pursue a horizontal application of fundamental rights to private actors in a European context is curtailed in several key respects. The primary limitation is that the contractually situated origins of the harms examined in this work effectively place those harms beyond the reach of a solution which relies on the horizontal application of fundamental rights as the Union does not enjoy a competence in the area of contract law. Even were a coherent model of horizontal application of fundamental rights to private actors to emerge it would remain limited by the Charter's application to those matters 'within the scope of EU law.'

More fundamentally, even were consumer protection used as basis for the horizontal application of fundamental rights to contractual relationships would necessarily implicate a change in the character of the Union in as much as it would necessarily implicate a broad range of traditionally national activities, and interfere in national constitutional ordering by imposing European rights values in such situations. As such, the solution is both legally improbable and politically undesirable.

In addition to these objections, it is not clear that a judicial solution is the optimum means of redressing the concerns raised by private policy, in particular in cases involving the digital market given the CJEU's unprincipled understanding of the structure of fundamental rights and its apparently inadvertent deference to the development of private jurisprudence in cases involving the digital market.

Indeed, there are reasons to actively prefer the legislature as a guarantor of fundamental rights. Aside from the legislature's capacity to ensure a horizontal application of normative standards to private actors, the most pragmatic is the legislature's capacity to apply institutional resources and foresight to attempt to resolve the complexity of the fundamental rights conflicts raised by private policy in the digital market. Moreover, objections to legislative engagement and protection of fundamental rights based on majoritarian concerns and the capacity of the legislature to engage in normative balancing are much reduced in an EU context. What is evident, in the conflicts between fundamental rights and private actors examined by this work, is a need for a unified, and disciplined understanding of fundamental rights within the Union's secondary law.

With a view towards how the rights-harms examined by this work might be accommodated and enforced by legislative action given the constitutional and competence based limitations outlined by this work the final two chapters of this work turn to examine the extent to which it is permissible to limit the contractual activity which permit those harms, given the absence of a European law of contract.

The work contends that a legislative solution to the harms identified in this work is best accomplished through the Union's consumer protection law which operates as a functional limit on freedom of contract within the EU's body of 'spectral contract law' which despite the absence of an EU competence has nonetheless achieved a negative definition through consumer protection. This negatively defined body of contract law is broadly characterisable as falling within the liberal tradition evincing an emphasis on deference to market rather than social concerns.

However, a tendency towards consumer-welfarist attitudes is evident in the Union's Unfair Contract Terms²⁰⁴ and Consumer Sales Directives. In combination with a rhetorical commitment to an apparently rights-based understanding of secondary law evident in the GDPR and proposed e-Privacy Regulation there is evidence to suggest a somewhat counter-intuitive shift towards a more socially oriented understanding of private transactions within the Union's consumer protection law.

²⁰⁴ Directive 99/44/EC.

There is a long, and admittedly not uncontroversial, narrative within EU law considering the inter-relationship between consumer protection and fundamental rights. Much of the attention to date has focused on the modern recognition of consumer protection as a fundamental right itself rather than the complementarities of both areas of law building on the historical development and conception of consumer protection within the Union. This work argues that the solution to the rights-based harms identified in this work lies in a return to the Union's original, social understanding of the consumer as part of the adoption of a rights-oriented model of consumer protection which draws out already emergent trends in the area.

1.6 Conclusion

In the preceding chapters the arguments outlined here are considered in detail, beginning with an outline of how private policy has emerged to redefine the rights to privacy and property in the digital environment before moving to consider the consequences of that erosion for individual autonomy, liberty, democratic participation and the Rule of law. In Part Two the work then turns to examine the solutions to the harms identified, tracing the limits of arguments for the horizontal application of rights guarantees, the challenges to securing fundamental rights in EU law and policy and the potential of consumer protection law to anchor a rights-oriented legislative agenda in EU law.

CHAPTER TWO

THE RIGHT TO PRIVACY & PRIVATE POLICY IN THE DIGITAL MARKET

2.1 Introduction

Igo has speculated that the collision, or collusion, between the disclosure of personal data and the technological capacity to capture, analyse, and harness that data will be the defining feature of the twenty first century privacy landscape. Indeed, while this tension between what can be known and what should be concealed is an enduring one, individuals' ability to exercise control over the boundaries of their private experience has, in the last decade, receded rather than being augmented by technological advancement.¹

This chapter takes up the features already outlined in the previous chapter as contributing to the prevalence of private policy and the associated redefinition of fundamental rights standards by private actors within the European Union in the context of privacy.² In particular the chapter establishes that this rise of private policy has enabled the development of a digital market specifically orientated to enable large scale collection of personal data in circumstances where individuals have a limited understanding of the ways in which that information will be used.

The chapter focuses on the current model of data use and sale in the digital market as representative of broader patterns of privacy reductions occasioned by private policy, though similar patterns of privacy reduction have also been occasioned by facial recognition technologies which have come to greater public attention during the final six months of this work. The chapter argues that over time the market wide collection described causes individuals to experience cumulatively reduced privacy expectations at an individual as well as a societal level in what Peppet terms an 'unravelling'³ of privacy - a dynamic Cohen notes has long persisted in the context of state directed surveillance.⁴ The chapter contextualises these negative impacts as enabling secondary harms for individual autonomy and the Rule of Law which are examined in chapters four and five.

In particular, it should be noted that the issue of private actors redefining the right to privacy in the context of the digital market began to receive increased policy attention during the course of this research, from 2017 to 2020. However, while the matter is now receiving increased attention, the

¹ Sarah E Igo, *The Known Citizen: A History of Privacy in Modern America* (Harvard University Press 2018), 353.

² Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (henceforth GDPR).

³ Scott R Peppet, 'Unraveling Privacy: The Personal Prospectus and the Threat of a Full-Disclosure Future' (2011) 105 *Northwestern University Law Review* 1153.

⁴ Julie E Cohen, 'Irrational Privacy?' (2012) 10 *Journal on Telecommunications and Hightech Law* 241.

capacity of EU law to reassert public standards in the digital market nevertheless faces a challenges identified as contributing to the rise of public policy in chapter one.

The chapter begins by examining the privacy harms which are currently present in the digital market. In part three the chapter then moves to consider how such harms have been occasioned outlining the brittle constitutional character of privacy under the Charter and the lack of clarity over the character and function of privacy rights in EU law. In part four, the chapter then turns to consider how this lack of clarity has enabled the development of a bifurcated legislative ordering in the Union's secondary law which has elevated market-oriented aspects of privacy at the expense of socially-oriented privacy standards. Part five then turns to examine the role of functionally equivalent attitudes to private ordering in propagating private policy in the context of privacy before part six outlines the individual impacts of the private redefinition of the right on individuals.

2.2 The Erosion of Privacy in the Digital Market

The capacity, and desire, to track consumer behaviour is not new. Fontaine in a study of the notebooks of pedlars working in Europe during the fifteenth through eighteenth centuries documented the extensive, personalised notes they kept not only on their customers but on the relatives of those customers who would expect similar deals and their relative demeanour and the standing in their communities.⁵ More modern sellers in traditional markets have engaged in similar attempts to measure and categorise customers and consumer demand, first with simple means such as turnstiles⁶ and later with more sophisticated methods such as barcoding.⁷

Against this background, current technologies used to track consumer behaviour in the digital marketplace are often dismissed on the basis that they are merely the most recent evolution of long-standing market practice. Proponents of this point of view argue that the technologies used to monitor participants in the digital market are functionally equivalent to those used in the traditional market and can operate on a similar consent basis, justified by the market efficiencies they permit and consumer acceptance of any accompanying privacy risks.⁸ Yet this equivalence does not bear the weight of a close analysis well.

To begin with, it is not clear that the efficiency claimed is indeed present,⁹ while indeed a historic overview of market mechanisms tracking customer behaviour indicates that even in the context of

⁵ Laurence Fontaine, *History of Pedlars in Europe* (Duke University Press 1996), 8 *et seq.*

⁶ Joseph Turow, *The Aisles have Eyes: How Retailers Track your Shopping, Strip your Privacy and Define your Power* (Yale University Press 2017), 114.

⁷ *Ibid.*, 80-81.

⁸ Ethan Zuckerman, *The Internet's Original Sin* (2014).

⁹ Leigh Gallagher, 'Ad tech has a problem. Fixing it isn't easy' *Fortune* (<<http://fortune.com/2015/07/14/ad-tech-problems/>>) accessed 4 March 2019.

less sophisticated, contextual¹⁰ surveillance of consumers, concerns abounded about the privacy impacts of such activity.¹¹ More particularly, the scale and integration of current surveillance online is not equivalent to previous mechanisms.

As advertising markets moved online, such concern diminished, driven not by a reduced concern but by a market design which effectively shielded the surveillance mechanisms of the digital market from consumer scrutiny. Indeed, digital advertising networks like DoubleClick (now a subsidiary of Google) recognised the potential of the internet early on and began developing mechanisms for aggregating large and detailed consumer data sets to assess and map consumer behaviour. The emergence of this AdTech landscape was enabled, to a significant extent, by the development of the computer cookie in 1993¹² and the subsequent move from contextual and towards behavioural advertising which relies on the collection and aggregation of data on a large scale and its deployment in a targeted, predictive manner.¹³

2.2.1 Cookies and Consumer Surveillance

Cookies are small text files which are placed on a consumer's hard drive by websites which they visit and which are accessible only to the consumer and the actor who placed them.¹⁴ Cookies monitor consumer activity and allow those placing them to track consumer activity on the website visited to which the cookie relates (through the use of first party cookies). Crucially, cookies do not operate in a vacuum but can be linked to personally identifiable information such as a name or e-mail address provided to access a platform or service thus enabling the actor who placed the cookie to store that consumer's information so that even where a consumer deletes a cookie if they subsequently visit the site again their previous information can be re-associated with them.¹⁵ Most

¹⁰ Contextual advertising, as its name suggests, tracks general consumer characteristics such as age bracket, and suggests products based on the attributes associated with consumers of that general description. On contextual advertising generally see, Kaifu Zhang and Zsolt Katona, 'Contextual Advertising' (2012) 31 *Marketing Science* 873.

¹¹ Turov, *The Aisles have Eyes: How Retailers Track your Shopping, Strip your Privacy and Define your Power*, 116.

¹² On the history and development of cookies see, Rajiv C Shah and Jay P Kesan, 'Deconstructing Code' (2004) *Yale Journal of Law and Technology* 278.

¹³ See, Bernal, *Internet Privacy Rights*, 144.

¹⁴ Lilian Edwards, 'Data Protection and e-Privacy: From Spam and Cookies to Big Data, Machine Learning and Profiling' in Lilian Edwards (ed), *Law, Policy and the Internet* (Hart 2018) 119, 126-7.

¹⁵ Turov, *The Aisles have Eyes: How Retailers Track your Shopping, Strip your Privacy and Define your Power*, 92. While some types of cookies, such as session cookies offer relatively few privacy implications and operate to optimise the operation of a website other types of cookies carry significant adverse privacy impacts, for example, analytics cookies monitor user visits and interactions with a website as well as across the Internet and may last indefinitely. See, Edwards, 'Data Protection and e-Privacy: From Spam and Cookies to Big Data, Machine Learning and Profiling'.

concerning from a privacy perspective are analytics cookies which monitor user visits and interactions with a website as well as across the Internet.

While this alone seems harmful to privacy, in practice analytics services (and thus analytics cookies) are predominantly offered by Google and Facebook with the result that such cookies effectively operate as third-party cookies. Third party cookies are placed on consumer devices, as the name would suggest, by third parties who contract with numerous websites to learn what consumers do - not only on those contracting websites but also across the web.¹⁶ By offering both analytics services and third party cookies Facebook and Google can negotiate further cookie placement agreements with hundreds or thousands of companies thus generating detailed profiles of individual online activity, personal characteristics and behaviours which can then be sold to private actors who can use them in a targeted manner in an attempt to influence consumer preferences.¹⁷

The scale at which Google and Facebook can assemble and sell such profiles is significant thanks to their market share – the companies take some 65% and 90% of total digital advertising spends respectively and 20% of all advertising spends (both digital and non-digital) globally.¹⁸ In Google's case this has been enabled in part by the company's acquisition of DoubleClick (now part of the Google Marketing Platform) whose cookies are found on an estimated 87% of sites,¹⁹ and whose databases Google merged with its own in 2018. Google's own databases include information about consumer behaviour across its services and platforms such as location, the time and date a device is turned on, the consumer's search history²⁰ and, controversially, the contents of communications sent via Gmail.²¹ Google also harvests data from some 90% of the free apps available on the Google Play store²² in addition to Google analytics cookies and AdSense which are present, and collecting data from 86% and 72% of websites respectively.²³ This data is all collected on the basis of consent

¹⁶ DoubleClick is the market leader in third party advertising. See, Lilian Edwards and Geraint Howells, 'Anonymity, Consumers and the Internet: Where Everyone Knows You're a Dog' in JEJ Prins and MJM van Dellen C Nicoll (ed), *Digital Anonymity and the Law* (Asser Press 2003).

¹⁷ Joseph Turow, *The Daily You: How the new Advertising Industry is Defining your Identity and your Worth* (Yale University Press 2011), 34-64.

¹⁸ Matthew Ingram, 'How Google and Facebook Have Taken Over the Digital Ad Industry' *Fortune* (<<http://fortune.com/2017/01/04/google-facebook-ad-industry/>>) accessed 4 March 2019.

¹⁹ Lucas Graves and Rasmus Kleis Nielsen Tim Libert, *Changes in Third-Party Content on European News Websites after GDPR*, 2018).

²⁰ Julian Angwin, 'Google has Quietly Dropped Ban on Personally Identifiable Web Tracking' *ProPublica* (<<https://www.propublica.org/article/google-has-quietly-dropped-ban-on-personally-identifiable-web-tracking>>) (accessed 25 February 2019).

²¹ John D McKinnon and Douglas MacMillan, 'Google Says It Continues to Allow Apps to Scan Data From Gmail Accounts' *The Wall Street Journal* (<<https://www.wsj.com/articles/google-says-it-continues-to-allow-apps-to-scan-data-from-gmail-accounts-1537459989?mod=djemalertNEWS>>) accessed 4 March 2019.

²² Ulrik Lyngs Reuben Binns, Max Van Kleek, Jun Zhao, Timothy Libert and Nigel Shadbolt, *Third Party Tracking in the Mobile Ecosystem* (University of Oxford 2018)Third Party Tracking in Digital Ecosystem.

²³ Tim Libert, *Changes in Third-Party Content on European News Websites after GDPR*; Privacy International, *How Apps on Android Share Data with Facebook*, 2018).

obtained when consumers accede to the terms of service and privacy policy attached to the relevant offerings.

Facebook's contractual practices (which users consent to when they agree to the platform's terms of service and privacy policy) similarly enables a business model which collects, records and monetises users' posts, photos, shared items, group and page memberships, location and installed apps as well as the time, date and locations for any consumer device using the company's services. Facebook has also, in the past, granted its advertising customers, which included the world's largest technology companies, access exceeding what was contractually permissible including accessing the names of Facebook users' friends and the contents of 'private' messages without the consent of its users.²⁴

Facebook's most significant contribution to the erosion of consumer privacy is enabled not only through these contractually permitted policies (and their breach), however, but through its embedded social plugins ('like' or 'share' buttons). Where these plugins appear, regardless of whether a consumer interacts with them, Facebook collects their data. Many websites may also incorporate a Facebook Pixel, an analytics tool, with the result that even where consumers are not logged on to Facebook or are not Facebook users (a group Facebook has ominously dubbed 'non-registered users'²⁵) the platform can still associate their data with an IP address, the other websites they have visited that contain Facebook pixels or social plugins and can thus build a detailed profile of individual preferences and activity.²⁶

Google and Facebook through this activity have become 'triple threats' in the digital market – offering analytics services to other websites, collecting and aggregating large amounts of data through their own platforms and integrated service offerings²⁷ and benefitting from the sale of highly targeted profiles of consumers which they can build and auction as a result – part of a broader

²⁴ Michael LaForgia and Gabriel JX Dance Nicholas Confessore, 'Facebook Failed to Police How Its Partners Handled User Data' *The New York Times* (<<https://www.nytimes.com/2018/11/12/technology/facebook-data-privacy-users.html>>) accessed 4 March 2019.

²⁵ Brendan Van Alsenoy² Güneş Acar¹, Frank Piessens³, Claudia Diaz¹, Bart Preneel¹, *Facebook Tracking Through Social Plug-ins*, 2015).

²⁶ The implications of this practice for the status of sites as joint data controllers was recently considered by the CJEU in Case C-40/17 *FashionID* EU:C:2019:629.

²⁷ In the United States for example, Facebook has sought to integrate financial services offered by Chase, Wells Fargo, Citigroup and US Bancorp with its messenger service, Deepa Seetharaman and Anna Maria Andriotis Emily Glazer, 'Facebook to Banks: Give us your data, we'll give you our users' *Wall Street Journal* (<https://www.wsj.com/articles/facebook-to-banks-give-us-your-data-well-give-you-our-users-1533564049?mod=yahoo_hs&ypr=yahoo>) accessed 9 April 2019.

model which Zuboff refers to as ‘surveillance capitalism’²⁸ and Citron and Pasquale have referred to as part of the emergence of a ‘scored society.’²⁹

2.2.2 *Deference to Private Ordering as a Regulatory Method*

The AdTech market (of which this activity by Facebook and Google is a part) has to date been subject to regulation through two mechanisms. The first is private ordering through contract as part of which, in theory, consumers may choose not to contract with market actors in accordance with the premise of freedom of contract inherent in the notice and consent procedures adopted in EU secondary law. The second regulatory mechanism is the self-regulatory efforts in the form of the Interactive Advertising Bureau Europe Framework, which governs the open real time bidding (Open RTB) market and Google’s parallel AB Guidelines which seek to establish regulatory standards applicable to AdTech.

The Open RTB system in Europe is used by the majority of those actors selling and buying data in the digital market for advertising purposes. The system is currently subject to a voluntary Framework established by the European branch of the Interactive Advertising Bureau - the ‘Europe Transparency & Consent Framework’ which provides an open-source, industry standard with the aim of ensuring actors in the digital advertising chain comply with the GDPR and ePrivacy Directive when processing, accessing or storing data.

The Framework does not provide any heightened regulatory standard. Rather its operation is predicated on the collection of consent from data subjects for all subsequent data sharing to third parties during the Open RTB process noting,³⁰

‘A Vendor may choose not to transmit data to another Vendor for any reason, but a Vendor must not transmit data to another Vendor without a justified basis for relying on that Vendor’s having a legal basis for processing the personal data.

If a Vendor has or obtains personal data and has no legal basis for the access to and processing of that data, the Vendor should quickly cease

²⁸ Shoshanna Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (Public Affairs 2019).

²⁹ Danielle Keats Citron and Frank Pasquale, ‘The Scored Society: Due Process for Automated Predictions’ (2014) 89 Washington Law Review 1.

³⁰ See, IAB Europe, ‘Europe Transparency & Consent Framework’ <http://www.iabeurope.eu/tcfdocuments/documents/legal/currenttcfpolicyFINAL.pdf> accessed 4 March 2019.

collection and storage of the data and refrain from passing the data on to other parties, even if those parties have a legal basis.’³¹

Actors broadcasting bid data are thus afforded significant discretion in determining whether those to whom they broadcast their data possess a ‘justified basis for relying on that Vendor’s having a legal basis for processing personal data.’ This effectively circumvents the consent basis on which the Framework purports to rely and conditions the integrity of the system on the presence, and rigour, of the vendor’s assessment of consent.³² Indeed, as the CNIL decision in *Vectuary* (discussed in the proceeding part) illustrates it is not clear that such consent management platforms are compliant with GDPR, nor (arguably) with the preceding Data Protection Directive. This model is neither covert nor newly emerged, yet until the last three years there has been little if any attention focused on its prevention or restriction. Indeed, the deference to voluntary systems of compliance and private ordering is most obvious in this area.

Google has, thus far, declined to integrate the IAB Europe Framework³³ and has instead operated its own parallel system in the Google Authoring Buyer Guideline which governs Google’s own proprietary advertising market. Similarly to the IAB Framework the AB Guideline shifts responsibility for data protection compliance from the data controller to those third parties to whom the data is broadcast.³⁴ The Guideline also permits data broadcast during the bidding process (with the exception of Location Data) to be retained by a Buyer for up to 18 months.³⁵

The Guideline does impose limitations on how Buyers use this data obtained during the bidding process noting only that it is not permissible to use it to create user lists or to profile users and prohibiting the association of callout data with third parties.³⁶ However, this ignores the practical reality that bidders for such data, of which Cambridge Analytica is an example, can and do perform a ‘sync’ that uses personal data obtained through the bidding process to augment existing consumer

³¹ See, IAB Europe, ‘Europe Transparency & Consent Framework’ <http://www.iabeurope.eu/tcfdocuments/documents/legal/currenttcfpolicyFINAL.pdf> accessed 4 March 2019, para 14.4, 14.5.

³² See, Media Trust, ‘IAB Europe CMP Validator Helps CMPs Align with Transparency and Consent Framework’ <https://mediatrust.com/media-center/iab-europe-cmp-validator-helps-cmps-align-transparency-consent-framework> accessed 4 March 2019.

³³ Motivated, no doubt, by such criticisms IAB Europe announced in 2018 it was developing a tool, in collaboration with The Media Trust, to determine whether the ‘consent management platforms’ (CMPs) that participate in the IAB Europe Framework are compliant with the Framework’s policies though this has subsequently been overtaken by events including several national regulatory developments. See, Robin Kurzer, ‘IAB Europe to release updated consent framework later this year, Google to sign on’ *MarTech Today* (<<https://martechtoday.com/exclusive-iab-europe-to-release-updated-consent-framework-google-to-sign-on-230704>>) accessed 4 March 2019.

³⁴ Google Authorised Buyer Guidelines, (<<https://www.google.com/doubleclick/adxbuyer/guidelines.html>>) accessed 7 March 2019.

³⁵ *Ibid.*

³⁶ *Ibid.*

profiles.³⁷ The result of this model is that infringes the aspects of privacy protected by the GDPR but also has more fundamental privacy impacts at an individual and societal level.

2.2.3 *The Resulting Impacts on Privacy Rights*

Recent filings in several jurisdictions indicate a growing unease with the privacy implications of the private control of privacy standards in the digital market which are enabled through the three trends examined. The decisions in *FashionID*,³⁸ *Planet49*³⁹ and the pending *Schrems* case (though the latter case concerns a broader issue of the use of standard contractual clauses for data transfers)⁴⁰ all demonstrate a rapidly escalating concern with the privacy impacts which private ordering has generated – and which has been enabled by the Union’s understandings of privacy.

At a Member State level the Belgian data protection authority has instructed Facebook to stop tracking internet users who did not have Facebook accounts within 48 hours or be fined 250,000 euros a day following a finding that the company had violated the GDPR by failing to inform consumers it had installed cookies in their browsers, or to ask for permission to do so.⁴¹ This, growth in concern is not limited to the EU. In December 2018 the Attorney General of Washington DC filed suit against Facebook citing the impact of misleading privacy settings⁴² in contributing to the use of consumer data by third-party applications with insufficient consent.⁴³ In Australia, the Office of the Australian Information Commissioner filed suit in Australian federal court on foot of the privacy breaches exposed by Cambridge Analytica.⁴⁴

These are not isolated examples of the impacts contractual practices have on individual privacy. Rather, the digital landscape has been characterised for much of its commercialisation by the use of ambiguous and dense contractual language to enable the exploitation of personal information at the expense of individual privacy. The result has been the creation of an online eco-system which is funded largely through the collection and exploitation of consumer data. For the purposes of the example of AdTech used in this work, the privacy reducing impacts are particularly evident in light

³⁷ Ibid.

³⁸ Case C-40/17 *FashionID* EU:C:2018:1039.

³⁹ C-673/17 *Planet49* EU:C:2019:246.

⁴⁰ Case C- 311/18 *Schrems*.

⁴¹ Kieran McCarthy, 'Facebook tells Belgian government its use of English invalidates privacy case' *The Register* (<https://www.theregister.co.uk/2016/01/29/facebook_tells_belgian_government_its_use_of_english_invalidates_privacy_case/>) accessed 23 April 2019.

⁴² Office of the Attorney General for the District of Columbia, *AG Racine Sues Facebook for Failing to Protect Millions of Users' Data* (2018).

⁴³ Ibid.

⁴⁴ Natasha Lomas, 'Australia sues Facebook over Cambridge Analytica, fine could scale to \$529BN' *Tech Crunch* (<<https://techcrunch.com/2020/03/09/australia-sues-facebook-over-cambridge-analytica-fine-could-scale-to-529bn/>>) accessed 12 March 2020.

of the provisions of the GDPR though they extend beyond that Regulation's limited understanding of privacy.

2.2.4 *The General Data Protection Regulation*

While, as the proceeding analysis illustrates, data protection is a poor barometer of the health of privacy writ large, the infringement of the data protection rights provided for under the GDPR offer a minimal indication of the systemic reductions of individual rights which the current AdTech schema and the private definition of privacy standards have occasioned for individuals.

2.2.4.1 Adequate Consent under Article 6 and Article 4(11) GDPR

In accordance with Article 6 processing of personal data is lawful only if and to the extent that at least one of the listed conditions are present, namely that the data subject has given consent for one or more specific purposes or the processing is necessary for; the performance of the contract,⁴⁵ compliance with a legal obligation or to protect vital interests of data subject, for performance of a task carried out in the public interest or where such processing is necessary for the legitimate interests pursued by a controller or a third party.

Under the Regulation consent is thus the primary basis for lawful processing, a position emphasised by Article 7 which requires data controllers to demonstrate that the data subject has consented, and that they are aware it is possible to withdraw that consent. When assessing the legitimacy of consent the Regulation emphasises in Article 4(11) that consent must be a freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she through a statement or by a clear affirmative action signifies agreement to the processing of personal data relating to him or her, a position reaffirmed in Recitals 42 and 43.⁴⁶

That the collection and sale of consumer data as part of the RTB process involves the processing of personal data is evident. The question then is whether such collection satisfies the consent requirements of Article 6. In terms of consent, the operation of the RTB system is ostensibly premised on the existence of consent. However, it is not clear that the IAB Framework or Google

⁴⁵ See also, Recital 44 and Article 7(4) which provides that when assessing whether consent is freely given utmost account shall be taken of whether the performance of a contract, including the provision of a service is conditional on consent to the processing of personal data that isn't necessary for the performance of that contract.

⁴⁶ Recital 42 requires that processing based on the data subject's consent should be demonstrable by the data processor and in the context of a written consent, safeguards should be put in place to ensure that the data subject is aware of the fact that and the extent to which consent is being given by them. Recital 43 provides that in assessing whether consent has been freely given, consent should not be considered to have been given where there is a clear imbalance between the subject and controller.

AB Guidelines in accordance with which the system works does, in practice, satisfy the GDPR's definition, as the recent *Vectuary* decision of the French *Commission Nationale de l'informatique et des libertés* (CNIL) demonstrates.

In January 2019 the CNIL found Vectuary, a French AdTech firm, had collected data to create consumer profiles subsequently auctioned through the RTB system without consent. The significance of the decision lies in its specifying that the validity of consent obtained directly through apps that embedded Vectuary's consent management platform through a process compliant with the IAB Europe Consent Framework ultimately failed to meet the consent criteria required by the GDPR in as much as it was not informed, specific or affirmative as required by Recital 32 and Article 4 GDPR.

Crucially, the decision found that consent obtained through the IAB Europe Framework is inherently invalid as consumer consent cannot be passed from one controller to another through a contractual relationship.⁴⁷ The decision also specifically queried whether, in light of the opacity of the RTB system, consumers could be considered to have given valid consent to a process they do not understand or of which they were unaware and stated that its decision should be read as placing not only Vectuary but the AdTech ecosystem as a whole on notice that existing market practices violate the requirements of the GDPR.⁴⁸

Similarly in *Planet49* the CJEU was asked to consider whether online cookie consent with pre-ticked boxes was in line with the requirement for consent under the GDPR. In his Opinion, Advocate General Szpunar noted the conditions for consent under GDPR Article 4(11) were not met where pre-ticked cookie consent boxes were used, a conclusion with which the Court agreed.⁴⁹ These decisions cogently illustrates the false narrative of consumer consent on which the AdTech industry relies and have implications beyond the IAB Framework.

IAB Europe responded to the CNIL judgment stating it merely provides a technical, voluntary standard in accordance with which its members may but are not bound to, abide and suggesting that Vectuary had fallen foul of the regulator as it had not adequately adopted and complied with the Framework rather than the error subsisting within the Framework itself.⁵⁰ However, this

⁴⁷ Commission Nationale de l'informatique et des libertés, 'Décision n°MED-2018-042 du 30 octobre 2018' at (<<https://www.legifrance.gouv.fr/affichCnil.do?oldAction=rechExpCnil&id=CNILTEXT000037594451&fastReqId=974682228&fastPos=2>>) accessed 1 March 2019.

⁴⁸ As defined under Article 9 GDPR.

⁴⁹ C-673/17 *Planet49*.

⁵⁰ Townsend Feehan, *The CNIL's VECTAURY Decision and the IAB Europe Transparency & Consent Framework* (2018).

conveniently ignores the central, contractual criticism on which the CNIL decision, and to a lesser extent *Planet49*, rest – that there is no refuge in packaged, contractual passing of consent and that consumers have not consented to the use of their data in a broader AdTech ecosystem when they agree to use a service or app.

Moreover, both decisions congrue with a more general trend in recent CJEU jurisprudence evidenced in *Wirtschaftsakademie*⁵¹ as part of which delegated consent mechanisms and those benefitting from the data collected using them will be closely examined for consent requirements under the GDPR. In *Wirtschaftsakademie* a preliminary reference from the German Courts, the CJEU was asked whether the failure by Facebook and the administrator of a fan page on the platform to inform visitors that cookies were placed on their device by Facebook when they visited the page constituted a breach of the data protection Directive. In particular the appellant's asked whether they could be considered a joint controller with Facebook.⁵²

The Court noted that though Facebook placed the cookies in accordance with its contract with *Wirtschaftsakademie* and the individual users, the appellant had benefitted from that placement and was involved in the subsequent analysis of the data which was collected in as much as it decided the parameters of the information collected was thus a joint controller of the data.⁵³ Given the apparent problems posed by a consent-based processing of user data it is necessary to consider whether the legitimate interest ground under Article 5 might offer an alternative means of legitimate processing.

2.2.4.2 Legitimate Interests under Article 6 GDPR

As an alternative to consent, under the GDPR personal data may also be processed on the basis of legitimate interests under Article 6(f). Article 6(f) operates in addition to the more general principle of legitimate interests outlined in Article 5 which provides that personal data shall be processed lawfully, fairly and in a transparent manner and collected for specified, explicit and legitimate purposes and not further processed in a manner incompatible with those purposes. Supplementing Article 6(f), Recital 47 (though non-binding) notes that there should be a relationship between the data controller and data subject on which a legitimate interest is based such as where the data subject is a client, or is in the service, of the data controller. The Recital notes, however, that the existence

⁵¹ Case C-210/16 *Wirtschaftsakademie* EU:C:2018:388. A similar finding was reached by the Court in Case C-25/17 *Tietosuojavaltuutettu* EU:C:2018:551.

⁵² Case C-210/16, [15].

⁵³ Case C-210/16, [40] noting that as non-Facebook users could visit the page in that circumstance the responsibility of the administrator of the page would be even greater.

of a legitimate interest requires careful assessment, including an assessment of the reasonable expectations of the data subject at the time and in the context of the collection of the data.

While this might seem, *prima facie*, to offer a readily available alternative to a consent-based processing in the context of AdTech, any reliance on legitimate interests for the operation of the RTB system would be misplaced. RTB data is broadcast to an undefined list of bidders, who, though they are directed and legally required not to retain or further use such data,⁵⁴ are not actively policed by the bid broadcaster to ensure this. Once a bidder is not successful, they no longer have a legitimate interest in processing the data but may retain it. Equally, the data may be received by bidders who have no interest in the segment or consumer data being auctioned but nonetheless receive the data through the RTB system.

The CNIL has previously found that ticking a box labelled “*I agree to the processing of my information as described above and further explained in the Privacy Policy*” did not satisfy the consent requirements under the GDPR because it attempted to require consent for over one hundred processes and set personalise ads as a default setting.⁵⁵ That decision, directed against Google⁵⁶ also noted that the processing could not be considered a legitimate interest of the company under Article 6(f) such that consent was not required. The CNIL noted that Google’s was particularly intrusive due to the number of services offered by the company, and the quantity and nature of the data processed and combined.

This mirrors the opinion expressed by the Article 29 Working Party that the legitimate interest basis does not cover situations where the processing is not genuinely necessary for the performance of a contract but rather relates to the ancillary use of data and is achieved through terms unilaterally imposed on the data subject.⁵⁷ In particular, the Opinion noted that the legitimate interest premise is not a suitable legal basis on which to compile a profile of consumer tastes and choices as the controller has not been contracted to carry out profiling, but rather to deliver particular goods or services and the inclusion of such terms in the contract does not make them necessary for it.⁵⁸ This critique is echoed by Frederik Borgesius who notes “the fact that a company sees personal data

⁵⁴ See, Article 5.

⁵⁵ Ibid. It is worth noting in this respect that the Article 29 Working Party in its 2012 Report on Cookie Consent noted that by default social plug-ins should not set a third party cookies in pages displayed to non-members, Article 29 Working Party, *Opinion 04/2012 on Cookie Consent*, 2012).

⁵⁶ Commission Nationale de l’informatique et des libertés, ‘Délibération SAN-2019-001 du 21 janvier 2019’ (<https://www.cnil.fr/sites/default/files/atoms/files/san-2019-001_21-01-2019.pdf>) accessed 5 March 2019.

⁵⁷ Article 29 Working Party on Data Protection, *Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC*, 2014), 16.

⁵⁸ Ibid.

processing as useful or profitable does not make the processing 'necessary'⁵⁹ to provide the contracted service to the user.

2.2.4.3 Explicit Consent under Article 9 GDPR

Even where it was possible to establish that processing was permitted on the basis of legitimate interest, under Article 9 processing of 'special categories' of personal data requires explicit consent if that data has not been 'manifestly made public' by the data subject and no other exception applies.⁶⁰ Special categories of data include; racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership, and the processing of genetic data or biometric data for the purpose of uniquely identifying a natural person or data concerning health or an individual's sex life or sexual orientation. In addition, Recital 51 requires that personal data which are by their nature sensitive merit specific protection in a context where their processing could create significant risks to fundamental rights and freedoms.

However, both the IAB Framework and the AB Guidelines permit data to be processed with, at most, implicit consent implied from the consumer's previous consents or continued use of a service. This is insufficient under the GDPR but specifically impermissible in the context of sensitive categories of personal data. A previous fine from CNIL has addressed Facebook's use of sensitive data such as sexual preferences for targeted advertising as a breach of EU data protection law.⁶¹ However, this does not appear to have deterred Facebook, as recent complaints filed by NOYB against them⁶² as well as WhatsApp,⁶³ Instagram⁶⁴ and Google⁶⁵ allege current breaches of the GDPR and Charter of Fundamental Rights as a result of those companies' contractual models.

⁵⁹ Poort, 'Online Price Discrimination and EU Data Privacy Law', 360.

⁶⁰ The exceptions provided in Article 9(2) include (a) explicit consent, (b) necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law as authorised by member state law (c) protect vital interests (d) carried out in the course of its legitimate activities and with appropriate safeguards by a foundation, association or other non-profit body for phi, religious, trade union aim with regard to its current and former members only (e) relates to personal data which are manifestly made public by the data subject (f) establishment, exercise or defence of legal claims (g) necessary reasons of substantial public interest (h) necessary for the purposes of preventive or occupational medicine (i) processing in necessary for reasons of public interest in health.

⁶¹ Commission Nationale de l'informatique et des libertés, '*The Restricted Committee of the CNIL imposed a sanction of 150,000 € against Facebook Inc and Facebook Ireland*' (<<https://www.cnil.fr/en/facebook-sanctioned-several-breaches-french-data-protection-act>>) accessed 5 March 2019.

⁶² NOYB, 'GDPR: noyb.eu filed four complaints over 'forced consent' against Google, Instagram, WhatsApp and Facebook' 25 May 2018 (<<https://noyb.eu/4complaints/>>) accessed 5 March 2019.

⁶³ NOYB, 'GDPR: noyb.eu filed four complaints over 'forced consent' against Google, Instagram, WhatsApp and Facebook' 25 May 2018 (<<https://noyb.eu/4complaints/>>) accessed 5 March 2019.

⁶⁴ NOYB, 'GDPR: noyb.eu filed four complaints over 'forced consent' against Google, Instagram, WhatsApp and Facebook' 25 May 2018 (<<https://noyb.eu/4complaints/>>) accessed 5 March 2019.

⁶⁵ NOYB, 'GDPR: noyb.eu filed four complaints over 'forced consent' against Google, Instagram, WhatsApp and Facebook' 25 May 2018 (<<https://noyb.eu/4complaints/>>) accessed 5 March 2019.

All four companies process special categories of data under Article 9 GDPR, however, the complaints allege that all four companies fail to specify the legal basis on which this is done, as required under Articles 6 and 9. In particular the complaints note that the contracts used by all four companies simply list all possible grounds for lawful processing under Article 6 leading to the assumption that processing is based on consent. However, the privacy policies of the companies only note that they process data of their users as necessary ‘to fulfil our terms’ importing a false association with Article 6(b) and failing to inform their users of the actual uses to which their data may be put, including sensitive data, as required under Articles 12 and 13.

2.2.4.4 Failure to Inform Data Subjects under Articles 12 and 13 GDPR

Article 12 requires the data controller to take appropriate measures to provide any information about how data will be used to be provided in an intelligible and easily accessible form, using clear and plain language. In addition, Article 13 provides that where personal data are collected the controller shall provide the data subject with a range of information including, but not limited to, the purposes of processing, the recipients or categories of recipients of the data, the period for which the data will be kept (and how such a period is determined) and the existence of automated decision-making including profiling which the data may be exposed to, including meaningful information about means used. Recital 39 further requires that any processing of personal data should be lawful and fair, and clarify what personal data are collected, used, consulted or otherwise processed and to what extent are those data processed by others.

In January 2019 the CNIL fined Google for violating Articles 12 and 13 GDPR Article through its use of contractual terms which lacked transparency and provided inadequate information to data subjects and thus failing to obtain valid consent.⁶⁶ In particular, the CNIL found that ‘*essential information*’ such as the data processing purposes, storage periods and the categories of personal data gathered were ‘*disseminated across several documents*’ such that users were required to make additional investigations to find how their data is being processed in personalising advertisements.⁶⁷

The decisions noted the information which was communicated to users was not sufficiently clear to enable consent and criticised the vague and obfuscatory nature of the description and purposes of processing presented to users. In particular the decision noted that ticking a box labelled ‘*I agree*

⁶⁶ Commission Nationale de l’informatique et des libertés, ‘Délibération SAN-2019-001 du 21 janvier 2019’ (<https://www.cnil.fr/sites/default/files/atoms/files/san-2019-001_21-01-2019.pdf>) accessed 5 March 2019.

⁶⁷ Ibid.

to the processing of my information as described above and further explained in the Privacy Policy’ did not satisfy the consent requirements under the GDPR because it attempted to require consent for over one hundred processes.⁶⁸

The decision also noted that the processing could not be considered a legitimate interest of the company such that consent was not required under Article 6 and was particularly intrusive due to the number of services offered by the company, and the quantity and nature of the data processed and combined. This mirrors the opinion expressed by the Article 29 Working Party that the legitimate interest basis does not cover situations where the processing is not genuinely necessary for the performance of a contract but rather unilaterally imposed on the data subject.⁶⁹ In particular, that Opinion noted Article 7(b) is not a suitable legal basis on which to compile a profile of consumer tastes and choices as the controller has not been contracted to carry out profiling but rather to deliver particular goods or services and the inclusion of such terms in the contract does not make them necessary for the contract.⁷⁰

Both a Belgian Court, and France’s CNIL⁷¹ have previously found that Facebook’s terms do not make it sufficiently clear that apps and therefore Facebook itself systematically collects personal data when consumers visit third party websites that contain Facebook social plugins even where they do not have a Facebook account. The Belgian Court noted that as Facebook determines the means of processing it remains the responsible processor under the GDPR.⁷² The decisions should have had a chilling effect on such activities by Facebook, and indeed other data brokers, however, this does not appear to have been the case.⁷³ Indeed, it appears that while Articles 12 and 13 are well intentioned, the requirements for simple, easily understood language, have been used to justify the deployment of overly simplified terms which in their simplicity offer a false reassurance to consumers.

2.2.5 *The e-Privacy Directive and Regulation*

⁶⁸ Ibid. It is worth noting in this respect that the Article 29 Working Party in its 2012 Report on Cookie Consent noted that by default social plug-ins should not set a third part cookies in pages displayed to non-members, Party, *Opinion 04/2012 on Cookie Consent*.

⁶⁹ Protection, *Opinion 06/2014 on the notion of legitimate interests of the data controller under Article 7 of Directive 95/46/EC*, 16.

⁷⁰ Ibid.

⁷¹ Commission Nationale de l’informatique et des libertés, ‘*The Restricted Committee of the CNIL imposed a sanction of 150,000 € against Facebook Inc and Facebook Ireland*’ (<<https://www.cnil.fr/en/facebook-sanctioned-several-breaches-french-data-protection-act>>) accessed 5 March 2019.

⁷² See, ‘The 16th of February, the court of First Instance rendered its judgment in the proceedings on the merits in the case of the Authority v Facebook’ (<<https://www.dataprotectionauthority.be/news/victory-privacy-commission-facebook-proceeding>>) accessed 5 March 2019; See also Case C-210/16, [28]-[29].

⁷³ See, Valerie Verdoodt Brendan Van Alsenoy, Rob Heyman, Jef Ausloos, Ellen Wauters and Güneş Acar, *From social media service to advertising network*, (2015).

The ePrivacy Directive (ePD) often, incorrectly, referred to as the ‘e-Cookie’ law is perhaps the most direct attempt by EU legislators to regulate the AdTech industry and requires Member States to ensure the use of electronic communications networks to store information or to gain access to information stored in terminal equipment is permitted only where the subscriber or user concerned is provided with clear and comprehensive information regarding the purposes of the processing, and is offered the right to refuse same.⁷⁴

The Directive requires that, in accordance with Article 5 cookies can be set only where the consumer has been ‘supplied with clear and comprehensive information’ concerning the purposes of the processing and is offered the right to refuse such processing by the data controller. In practice however, this ‘informed opt out’ provided little additional protection.

In light of this inefficacy reforms to the Directive in 2009 amended Article 5 to require that the user has opted in by giving consent ‘having been provided with clear and comprehensive information. Once again, the reform had little impact in practice with many websites actively employing interfaces that were hostile to consumer choice, and actively promoted user inertia or simply blocked consumers from accessing the site or service unless the default cookie settings were accepted, patterns which Richards and Hartzog have examined as illustrative of the unsuitability of ‘offline’ consent models in the digital market.⁷⁵ Forbruker Radet and NOYB has similarly noted that the settings of both Facebook and Google illustrate how default settings and dark patterns including misleading wording, illusory control and deliberately confusing or difficult interface design are used to manipulate and nudge users towards privacy intrusive options.⁷⁶

In part to remediate perceived inconsistencies within the Directive, but also to update the Directive given increased understanding of how digital marketplaces for advertising and personal information operate, a reformed e-Privacy Regulation (ePR) was due to enter into force alongside the GDPR however, as of writing the Regulation remains under review and the text has not been finalised.⁷⁷

⁷⁴ Article 5 GDPR.

⁷⁵ As a result of this concern Acquisti has emphasised the need for a contextual understanding of privacy as part of which the default settings for privacy used by companies are tools used to affect information disclosure and attempt to contextualise privacy in a manner which orientates the *status quo* toward their contractual practices as part of a malicious interface design through which designers and use features that frustrate or confuse users into disclose information is also widely deployed. See, Laura Brandimarte and George Loewenstein Alessandro Acquisti, 'Privacy and Human Behaviour in the Information Age' in Jules Polonestsky and Omer Tene Evan Selinger (ed), *The Cambridge Handbook of Consumer Privacy* (Cambridge University Press 2018), 187; Ralph Gross and Alessandro Acquisti, 'Information revelation and privacy in online social networks' (2005) WPES Proceedings of the 2005 ACM workshop on Privacy in the electronic society 71.

⁷⁶ Forbruker Radet, 'Deceived by Design: How tech companies use dark patterns to discourage us from exercising our rights to privacy' (2018) 3.

⁷⁷ Formal Complaint by Dr Ryan regarding IAB Europe AISBL website, 2nd April 2019 available at (<https://regmedia.co.uk/2019/04/02/brave_ryan_iab_complaint.pdf>) accessed 21 April 2019.

In the interim Article 95 and Recital (173) GDPR confirm the *lex generalis-lex specialis* relationship between the GDPR and the ePrivacy Directive. In particular, Article 95 provides that the GDPR shall not impose additional obligations on natural or legal persons in relation to processing in connection with the provision of publicly available electronic communications services in relation to matters for which they are subject to specific obligations with the same objective set out in the ePrivacy Directive.

Two persistent concerns have endured throughout the drafting of the proposed ePrivacy Regulation. The first is the concern, highlighted by the EDPS at an early stage, that the Regulation should not permit the processing of metadata under the ‘legitimate interest’ ground.⁷⁸ While the understanding of consent adopted in the Regulation will be required to be equivalent to that afforded under the GDPR there remained concern that to allow such processing of metadata without consent would dilute existing standards of protection afforded by permitting an over-broad opt out from consent requirements.⁷⁹ Instead such data should be processed only with consent or if technically necessary for a service requested by the user and only for the duration necessary for this purpose.⁸⁰

The second concern, also flagged by the EDPS recommended that strengthening Article 10 requiring privacy protective settings by default and the inclusion of Recital 24 as a substantive provision in the form of a legal requirement such that end users would be afforded the opportunity ‘to change their privacy settings at any time during use and allow the user to make exceptions, to whitelist websites or to specify for which websites (third) party cookies are always or never allowed.’⁸¹

It is unclear from the draft released in November 2019 whether these concerns will be reflected in the final text. In particular, Article 10 which, in previous versions sought to provide notification and reminder requirements regarding the placement of third party cookies has been deleted in its entirety.⁸² While Article 8 (and the related Recital 20) which considers consent for cookies remains under consideration⁸³ the most recent draft has deleted the final sentence of Recital 20 which previously read “Access to specific website content may still be made conditional on the consent

⁷⁸ European Data Protection Supervisor, *Opinion 6/2017 on the Proposal for a Regulation on Privacy and Electronic Communications*, 2017), 27.

⁷⁹ *Ibid.*

⁸⁰ European Data Protection Supervisor, *EDPS Recommendations on Specific Aspects of the Proposed ePrivacy Regulation*, 2017), 2.

⁸¹ *Ibid.*, 2-3.

⁸² See, Council of the European Union, ‘Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications)’ (2018)

⁸³ *Ibid.*, 3.

to the storage of a cookie or similar identifier.”⁸⁴ The Recital now provides that monitoring of end user devices should be allowed “only with the end-user's consent and or for specific and transparent purposes” because such monitoring may reveal personal data including political and social characteristics which require “enhanced privacy protection.”

This view of ‘cookie walls’ and similar mechanisms as impermissible is in keeping with the current interpretation of the GDPR by academics⁸⁵ and more recently by the Dutch data protection regulator. In a recent decision from the Netherlands the Dutch data protection regulator found that refusing users access to websites unless they consent to cookies was impermissible under the GDPR.⁸⁶ That decision, and indeed the content of Recital 20, echo the concerns flagged by the decision in *Vectuary* that special categories of data as classified under Article 9 GDPR are discoverable through the aggregation and analysis of the data collected by cookies. While the language of the proposed e-Privacy Regulation may thus seem strong, in reality it would achieve little more than a reproduction, albeit in explicit language, of the controls already imposed by the ePD and the GDPR.

2.2.6 Conclusion

It is clear, from the proceeding analysis that there are concrete basis under the GDPR on which to ground objections to the operation of the AdTech market. However, the impact of these basis, as well as the decisions in cases like *Plane49* and *Vectuary*, is diminished by the realities of the digital market. That such business models have perpetuated online despite these laws can be traced to two root causes. The most evident is a lack of effective enforcement. It now appears that this shortcoming of enforcement is being ameliorated at a national level by more active regulatory engagement.

The second more fundamental cause is more significant, and harder to ameliorate, indeed it is arguably the root of the failure to enforce the Regulation effectively – that is the combination of brittle constitutionalism, the functional equivalence of regulatory approaches, and the presence of market-oriented legislative preferences which have permitted private actors through their contractual terms to redefine the right to privacy in the digital market. These aspects of the rise of private policy are examined below.

⁸⁴ Ibid, Recital 20.

⁸⁵ Sanne Kruikemeier Frederik J Zuiderveen Borgesius, Sophie C Boerman and Natali Helberger, 'Tracking Walls, Take it or leave it Choices, the GDPR and the ePrivacy Regulation' (2017) 3 European Data Protection Law Review 353.

⁸⁶ Autoriteit Persoonsgegevens, *Websites must remain accessible when users refuse tracking cookies*, (2019).

2.3 Brittle Constitutionalism: Defining the Right to Privacy under the Charter

Contemporaneously the most influential articulation of the right to privacy is often identified as Warren and Brandeis' 1890 article 'The Right to Privacy.'⁸⁷ In establishing the need for a privacy right the authors of that piece contextualised their concerns by explicit reference to new technologies⁸⁸ (in that case flash photography) and what they perceived as the fundamental changes in the nature and models of publication which those technologies had enabled and which threatened traditional conceptions of privacy,⁸⁹

The intensity and complexity of life, attendant upon advancing civilisation, have rendered necessary some retreat from the world ... solitude and privacy have become more essential to the individual; but modern enterprise and invention have, through invasions upon his privacy, subjected him to mental pain and distress far greater than could be inflicted by mere bodily injury.⁹⁰

This context and the authors' deliberate delineation of privacy as an independent right are notable for their continuing relevance to the modern privacy debate and, contemporaneously, the article remains the foundation for much jurisprudential engagement with the right to privacy, including beyond the United States, a fact which is hardly surprising given the authors trace their initial inspiration to French laws of privacy developed in a European context.⁹¹

Despite this continuing engagement, the development of the right to privacy in European Union law has been shaped, not by North American scholarship, but by the unique experiences of the Union's Member States in the twentieth century. Thus, while the development of the right to privacy in the US has been divided into three periods by Westin, it cannot be said that European jurisprudence on privacy displays an amenability to being subjected to the same categorisation.⁹² Equally, while North American constitutional jurisprudence has exercised some influence on the formulation of European privacy rights, in a European context, the division into eras adopted by

⁸⁷ Brandeis, 'The Right to Privacy'

⁸⁸ In that case, the development of flash photography.

⁸⁹ Jessica E Jackson, 'Sensationalism in the Newsroom: Its Yellow Beginnings, the Nineteenth Century legal transformation and the current seizure of the American press' (2005) 19 *Notre Dame Journal of Law, Ethics and Public Policy* 789.

⁹⁰ Brandeis, 'The Right to Privacy', 196.

⁹¹ Though it is beyond the scope of this research it is worth noting that this repeated reference to the article is somewhat misguided in contexts where its contents, which specifically concerns the development of a private law tort, is deployed as a justification or support for public law standards in particular in the context of human and fundamental rights. See, Róisín Á Costello, 'The Indiscriminate Deployment of Warren and Brandeis' Private Law Concept of Privacy in Public Law Contexts' (2019) Forthcoming .

⁹² Alan F Westin, 'Social and Political Dimensions of Privacy' (2003) 59 *Journal of Social Issues* 431; Róisín A Costello, *Due Process and Unconstitutionally Obtained Evidence in the Digital Age* (2018).

Westin is less applicable, the rights' development instead being characterised in the EU by a steadily escalating concern following the second world war centred on the discriminatory impacts to which State actors might put private information where they remained unrestrained by human rights standards.

The 1948 United Nations Declaration of Human Rights (UNDHR) provided the basic model for the privacy protections subsequently developed within the Union, with Article 12 establishing that 'no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honour and reputation.'⁹³ Drawing on Article 12 the European Convention on Human Rights (ECHR) subsequently included in its text a guarantee of respect for private and family life, home and correspondence in Article 8. Similar wording was later adopted by the European Charter of Fundamental Rights (the Charter) and is reflected in EU law on privacy.

Significantly, the comments on Article 8 note the Anglo-Saxon and French understandings of privacy as protection from publicity (a presumptive reference to Warren and Brandeis' work) and include within the scope of the right, a personality based understanding of privacy as inclusive of the right to establish and develop relationships with others including in an emotional context, for the development and fulfilment of one's own personality.⁹⁴ This understanding of privacy as serving a fundamentally deontological function within the European rights architecture has endured and has, similar to the wording of Article 8 ECHR, also been absorbed into the jurisprudence of the CJEU.

This articulation of privacy should be understood as part of the post-World War Two efforts to restrain State action in order to prevent a re-occurrence of the rights violations which had occurred during the Second World War, enabled by infrastructures of state surveillance⁹⁵ as well as in the context of the nascent threats to individual autonomy and expression occasioned by communism.⁹⁶ Indeed, the Teitgen Report compiled by the rapporteur on the drafting of the ECHR explicitly noted that the protection of private life was contextualised as necessary by reference to the erosion of

⁹³ Oliver Diggelmann and Maria Nicole Cleis, 'How the Right to Privacy Became a Human Right' (2014) 14 Human Rights Law Review 441.

⁹⁴ Elizabeth Wicks and Clare Ovey Bernadette Rainey, *The European Convention on Human Rights* (7th edn edn, Oxford University Press 2017), 401; *X v Iceland* App no 6825/74 (ECHR, 18 May 1976).

⁹⁵ Though it is notable that several private actors, most notably IBM, were directly involved in this surveillance, see Black, *IBM and the Holocaust: The Strategic Alliance between Nazi Germany and America's Most Powerful Corporation*.

⁹⁶ In his concurrence in *Benedik Bosnjak J* observed, obiter, that the protection of privacy is a crucial achievement in European political and legal culture not least because of the historical context which framed its emergence but 'will stand as a fundamental right only so long as it is defended by society and it will disappear if society stops seeing it as an essential value. See, *Benedik v Slovenia* App no 62357/14 (ECHR, 24 April 2018), [50].

privacy which had been used for racial and religious discrimination in totalitarian regimes during the first half of the twentieth century.⁹⁷

Somewhat inconveniently from the perspective of an academic seeking to neatly articulate the scope and content of privacy, this deontological justification of privacy as based on human dignity and seeking to secure the development of individual personality and self-determination is now, increasingly, operating alongside an instrumental understanding of privacy. As part of this understanding, which was nascent in *Dudgeon* and *Klass*⁹⁸ and now appears ascendant in *Big Brother Watch*,⁹⁹ privacy serves a democratic function in facilitating the protection of democratic participation.

These understandings are not, however, mutually exclusive. As this work argues, the deontological understanding of privacy while more correctly understood as the dominant theory underlying the jurisprudence (however fragmented) of the CJEU and ECtHR, is central to assuring the individual autonomy necessary for democratic participation to flourish.¹⁰⁰

2.3.1 *Privacy Protections under the Charter: Ambiguous Delineations*

Despite this generally agreed context for the development and adoption of privacy protections by EU Member States as members of the Council of Europe, and later by the Union in the Charter, there remains an unacknowledged uncertainty over how to understand the right to privacy in EU law. This results, in part from the normatively evasive nature of privacy itself but more fundamentally from the ambiguous articulation of the right by the CJEU, and the failure within the Court's jurisprudence to clearly define the scope and content of the right. This has resulted to a significant extent from the failure of the CJEU to differentiate between the right of privacy protected in Article 7 (private and family life, home and communications) and the right of data protection under Article 8 (data protection) both in respect of the constitution of the rights themselves and their relation to each other.

2.3.2 *The Justification of the Right to Privacy*

⁹⁷ Pierre-Henri Teitgen, *Establishment of a collective guarantee of essential freedoms and fundamental rights* Vol I (1949), 220, 272.

⁹⁸ *Klass v Germany* App no 5029/71 (ECHR, 6 September 1978); *Dudgeon v United Kingdom* App no 7525/76 (ECHR, 22 October 1981).

⁹⁹ *Big Brother Watch and Others v The United Kingdom* App no 58170/13, 62322/14 and 24960/15 (ECHR, 13 September 2018).

¹⁰⁰ Chapter 4, page 142.

Conceptions of the right to privacy at law are notable for their contextual definition as part of which the right itself remains elusive and is defined not on its own merits but rather by reference to the situations which trigger its protection. This initial conceptual vacuum is one whose endurance has created an agglomeration of conceptual challenges and a legal landscape in which there is societal recognition of privacy rights but little practical understanding of the normative authority or practical scope of the right itself.

Private law conceptions of privacy as a tort (such as those forwarded by Warren and Brandeis) have negotiated this normative and functional uncertainty by delineating between discrete causes of action premised on personality based publicity right, the extension of traditional rules governing trespass and reputational harms.¹⁰¹ However, public law has been less successful in defining the precise content of privacy as a public right often, incorrectly, introducing references to private law understandings without advancing or drawing the necessary relationship to public law conceptions of the right.

The result has been a fragmentation of the jurisprudence of privacy as a public law right. Indeed, the right to privacy's the most enduring feature in public law is its diversity of definition - a 'haystack in a hurricane'¹⁰² which has been variously argued to be a property right,¹⁰³ an economic interest,¹⁰⁴ an amalgam of interests,¹⁰⁵ and a stand-alone right based in dignity and human personality.¹⁰⁶ This final understanding of privacy as linked to personality and dignity is the conception which has emerged in the jurisprudence of both Strasbourg and Luxembourg.

The ECtHR's statement that 'the very essence [of the ECHR] is respect for human dignity and human freedom'¹⁰⁷ orients the Convention's fundamental view of fundamental rights and their functions. The Charter of Fundamental rights, in addition to recognising dignity as a right in and of itself, in the explanations to the Charter emphasises a similar view of rights on the understanding that 'the dignity of the human person ... constitutes the real basis of fundamental rights.'¹⁰⁸ This view is not surprising and should be understood as an element of a broader, European conception

¹⁰¹ See, William L Prosser, 'Privacy' (1960) 48 California Law Review 383; Neil M Richards and Daniel J Solove, 'Prosser's Privacy Law: A Mixed Legacy' (2010) 98 California Law Review 1887.

¹⁰² *Ettore v Philco Television Broadcasting Co* 229 F 2d 481 (3rd Cir 1956) (Bigs CJ).

¹⁰³ Jessica Litman, 'Information Privacy/Information Property' (2000) 52 Stanford Law Review 1283.

¹⁰⁴ Richard A Posner, 'An Economic Theory of Privacy' (1978) 1 Regulation 18.

¹⁰⁵ Marc Rotenberg and Paul M Schwartz Daniel J Solove, *Privacy, Information and Technology* (Aspen 2006).

¹⁰⁶ E J Bloustein, 'Privacy as an aspect of human dignity: An answer to Dean Prosser' (1964) 39 NYU Law Review 962

¹⁰⁷ *SW v United Kingdom*, App no 20166/92 (ECHR, 22 November 1995). On the place of dignity within Europe's constitutional schema see, Dupré, 'Human Dignity in Europe: A Foundational Constitutional Principle', 325-326.

¹⁰⁸ 'Explanations to the Charter of Fundamental Rights' (2007) OJ C 303 17.

of fundamental rights as seeking to ensure dignity and self-ownership within society¹⁰⁹ perhaps best articulated by the German Federal Constitutional Court who noted,

This [freedom to determine and develop himself] is based on the conception of man as a spiritual-moral being endowed with freedom to determine and develop himself. This freedom within the meaning of the Basic Law is not that of an isolated-self regarded individual but rather [that] of a person related to and bound by the community.¹¹⁰

Dignity is understood in a European context as ensuring the freedom to develop one's self, through relationships with others and without being obliged to conform to a pre-determined definition of self, imposed by a public power.¹¹¹ In this respect then, dignity is fundamentally linked to, and affirming of, personality based theories rooted in self ownership and individual development of self.

Early case law from the ECHR in particular has repeatedly emphasised the connection between privacy and dignity in Article 8 in a broad range of contexts.¹¹² Under the Charter, Article 7 provides that everyone has the right to respect for his or her private and family life, home and communications, mirroring the tripartite guarantee of Article 8 ECHR. Indeed, the explanations to the Charter specifically note that Article 7 reflects the content of Article 8 ECHR, as reinforced by the requirements of Article 52.¹¹³ Beyond the relation between privacy and dignity, however, reference to Article 8 ECHR in clarifying the scope of Article 7 of the Charter is not particularly helpful, Article 8 ECHR itself being a provision which has been referred to as 'the least defined and most unruly of the rights enshrined in the Convention'¹¹⁴ and whose jurisprudence has become

¹⁰⁹ Donald P Kommers, 'Can German Constitutionalism Serve as a Model for the US?' (1998) 58 *Zeitschrift für ausländisches öffentliches und Völkerrecht* 787. More generally see, Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights'; Christopher McCrudden, 'Human dignity and judicial interpretation of human rights' (2008) 19 *European Journal of International Law* 655; Paolo G Carozza, 'Human dignity and judicial interpretation of human rights: A reply' (2008) 19 *European Journal of International Law* 931; Alan Gewirth, 'Human dignity as the basis of rights' in MJ Meyer and WA Parent (ed), *The constitution of rights: Human dignity and American values* (Cornell University Press 1992); Dupré, 'Human Dignity in Europe: A Foundational Constitutional Principle' David Luban, *Legal Ethics And Human Dignity* (Cambridge University Press 2007).

¹¹⁰ 45 BVerfGE 187, 227.

¹¹¹ Rao, 'Three Concepts of Dignity in Constitutional Law', 222-223.

¹¹² See, *Pretty v United Kingdom*, App no 2346/02 (ECHR, 29 July 2002), [65]; *Haas v Switzerland*, App no 31322/07 (ECHR, 20 June 2011); *CAS and CS v Romania*, App no 26692/05 (ECHR, 24 September 2012), [82]; *AMV v Finland*, App no 53251/13 (ECHR, 23 June 2017), [90]; *Kučera v Slovakia*, App no 48666/99 (ECHR, 17 October 2007), [119], [122]; *Rachwalski and Ferenc v Poland*, App no 47709/99 (ECHR, 8 July 2009), [73]; *Khadija Ismayilova v Azerbaijan* App no 65286/13 and 57270/14 (ECHR, 10 March 2019), [117]; *Goodwin and I v United Kingdom*, App no 25680/94 (ECHR, July 11 2002); *Norris v Ireland*, App no 10581/83 (ECHR, 26 October 1988).

¹¹³ Case C-345/17 *Buivids* EU:C:2019:122, [65]; Case C-419/14 *WebMindLicenses* EU:C:2015:832, [70].

¹¹⁴ Burton LJ, *Wright v Secretary of state for Health* [2006] EWHC 2886 (Admin), [66].

both capacious and unwieldy in both the exceptions and augmentations it has permitted to its explicit scope.¹¹⁵

Nonetheless, the decisions of the ECtHR have emphasised what is apparent in the framing of Article 8 – that privacy is understood within the European context as a socially situated right, stressing the connection between personal identity and privacy in its judgments. Thus, in *X v Iceland*¹¹⁶ the Court found that Article 8’s privacy protections include the ‘right to establish and develop relationships with other human beings ... for [the] development and fulfilment of one’s personality.’¹¹⁷ This articulation was subsequently cited with approval in *Niemietz v Germany*¹¹⁸ while the decisions in *Gaskin v UK*,¹¹⁹ *Stjerna v Finland*,¹²⁰ *Ciubotaru v Moldova*,¹²¹ *Odievre*¹²² and *Karassev v Finland*¹²³ reflect a retrenchment of the Court’s conviction that Article 8 privacy protections ensure the protection of the development and expression of personal identity. The decision of the Court in *X and Y v The Netherlands*¹²⁴ in particular noted that the concept of privacy protects not only the physical but also the moral integrity of the person.¹²⁵

The definitions of privacy offered in Article 12 UNDHHR and Article 17 ICCPR offer further support for a socially situated and personality-centred understanding of privacy within the European context when read in conjunction with the jurisprudence of the ECtHR. Both Articles provide that no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attacks upon his honour and reputation thus outlining an understanding of privacy as connected with and including the development and protection of personal identity through reputation and honour.

Tying into this conception of privacy as allied to individual personality, the CJEU has repeatedly emphasised the centrality of personal identity in its discussion of privacy under Article 7. Thus, in

¹¹⁵ *Niemietz v Germany* App no 13710/88 (ECHR, 16 December 1992); *Société Colas Est v France* App no 37871/97 (ECHR, 20 November 2002); *Peev v Bulgaria* App no 64209/01 (ECHR, 26 July 2007); *Copland v United Kingdom* App no 62617/00 (ECHR, 3 April 2007).

¹¹⁶ *X v Iceland*.

¹¹⁷ *Ibid*, [88].

¹¹⁸ *Niemietz*.

¹¹⁹ *Gaskin v United Kingdom* App no 10454/83 (ECHR, 17 February 1989). The State’s refusal to provide the applicant access to records it held regarding his time in care was a violation of Article 8.

¹²⁰ *Stjerna v Finland* App no 18131/91 (ECHR, 25 October 1994). The State’s refusal to register the applicant’s desire change of name was analysed as an Article 8 issue.

¹²¹ *Ciubotaru v Moldova* App no 27138/04 (ECHR, 27 April 2010). Where the Court found that, along with name, gender, religion and sexual orientation an individual’s ethnic identity constituted an essential aspect of their private life and identity.

¹²² *Odievre v France* App no 42326/98 (ECHR, 13 February 2003).

¹²³ *Karassev v Finland* App no 31414/96 (ECHR, 12 January 1999).

¹²⁴ *X and Y v The Netherlands* App no 8978/80 (ECHR, 26 March 1985).

¹²⁵ *Ibid*, [22].

*Sayn Wittgenstein*¹²⁶ the Court found the appellant's name was a constituent element of identity which triggered protection of his private life under Article 7¹²⁷ while in *Malgozata Runevic-Vardyn*¹²⁸ the Court found that a person's forename and surname, as a means of personal identification and familial link, were as an aspect of his private and family life under the same article.

These readings of privacy as socially oriented and intimately connected to ideas of personality development must be understood as part of the framing of European human rights following the Second World War but also as situated within broader constitutional heritage of the Union which places a premium of individual autonomy and dignity as evidenced in the constitutional elevation of both values through Article 2 TEU as well as the preamble to the Charter¹²⁹ and in the preamble to other documents including Convention 108 to which the Union is a signatory.¹³⁰

Dignity and personality based understandings of privacy such as those adopted by the CJEU and ECtHR have been propounded by academics, notably Bloustein whose conception of privacy, is based on human dignity, and which seeks to establish a normative basis for the right by proposing 'a general theory of individual privacy which will reconcile the divergent strands of legal development-which will put the straws back into the haystack.'¹³¹ Bloustein argues that the essence of individual freedom and dignity lies in the right and thus the capacity of individuals to 'be free from certain types of intrusions ... which degrade a person by laying his life open to public view.... [I]n the public disclosure cases it is his individuality which is lost' though Bloustein himself falls foul of the conflation of private and public conceptions of privacy.¹³²

While such views of privacy are generally understood as distinct from Kantian or Hegelian conceptions of rights premised in self-determination¹³³ the jurisprudence of the CJEU and ECtHR appear to have integrated these the two strands, building a specifically social understanding of privacy as a right intimately rooted in personal dignity and which seeks to protect personal identity and its development in the service of self-determination.¹³⁴ Indeed this association is explicitly

¹²⁶ Case C-208/09 *Sayn Wittgenstein* EU:C:2010:806.

¹²⁷ *Ibid.*, [52].

¹²⁸ Case C-391/09 *Malgozata Runevic-Vardyn* EU:C:2011:291, [66].

¹²⁹ Dupré, 'Human Dignity in Europe: A Foundational Constitutional Principle'.

¹³⁰ According to which data protection serves to ensure all rights and freedoms but in particular the right to privacy.

¹³¹ Bloustein, 'Privacy as an aspect of human dignity: An answer to Dean Prosser', 963.

¹³² *Ibid.* 981. See also, David Matheson, 'A Distributive Reductionism About the Right to Privacy' 91 *The Monist*, (2008) 108, 114.

¹³³ Hardy E Jones, *Kant's Principle Of Personality*, (Madison, University of Wisconsin Press 1971); Margaret Jane Radin, 'Property and Personhood' 34(5) *Stanford Law Review* (1982) 957.

¹³⁴ On dignity in the jurisprudence of the ECtHR see, *KU v Finland* App no 2872/02 (ECHR, 2 December 2008), [45]-[49]; *Pretty v the United Kingdom* App no 2346/02 (ECHR, 29 July 2002), [65]; *CAS and CS v*

referenced in Recital 88 GDPR which notes that measures should be put in place to ‘safeguard the data subject’s human dignity, legitimate interests and fundamental rights.’ Floridi has long argued for the recognition of this implicit understanding of the relationship between privacy, dignity and personality within the European legal order in which he argues that privacy is best understood as a protection of personal identity based in human dignity as a ‘first order’ right.¹³⁵

Yet despite the recurrent emphasis on personality and self-development as well as privacy in both the ECtHR and CJEU no unified understanding of the content, and scope of privacy like that proposed by Floridi has been forthcoming. Indeed, the jurisprudence of both the CJEU and the ECtHR has displayed a markedly fragmented understanding of privacy, emphasising private and family life almost entirely at the expense of the privacy of home and communications¹³⁶ and, more problematically, advancing an increasingly market-oriented understanding of privacy as equivalent to, and undifferentiated from, data protection.

2.3.3 *The Relationship between Privacy and Data Protection*

Data protection, which under Article 8 of the Charter has risen to prominence within EU law can be traced to the 1970 Hessen Act¹³⁷ a legislative development which was taken up by other Member States during the 1970s and 1980s¹³⁸ as well as in the 1980 OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data.¹³⁹ As such the right is one which emerged much later than the rights documents which first recognised the right to privacy. It is also notable that the right emerged as a statutory or legislative entitlement. Indeed, it was not until the ECtHR’s decision

Romania App no 26692/05 (ECHR, 24 September 2012), [82]; *A-MV v Finland* App no 53251/13 (ECHR, 30 July 2013), [90]; *Kucera v Slovakia* App no 48666/99 (ECHR, 4 November 2003), [119] and [122]; *Rachwalski and Ferenc v Poland* App no 47709/99 (ECHR, 28 July 2009), [73]. On the place of dignity in relation to privacy under the Charter see, Luciano Floridi, 'On Human Dignity as a Foundation for the Right to Privacy' (2016) 29 *Philosophy and Technology* 307; Luciano Floridi, 'The ontological interpretation of informational privacy' (2005) 7 *Ethics and Information Technology* 185; Luciano Floridi, *The ethics of information* (Oxford University Press 2013); Luciano Floridi, 'Four challenges for a theory of informational privacy' (2006) 8 *Ethics and Information Technology* 109.

¹³⁵ Floridi, 'On Human Dignity as a Foundation for the Right to Privacy'.

¹³⁶ Tamara Harvey Steve Peers, Jeff Kenner and Angela Ward (ed), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014), 184 *et seq.*

¹³⁷ Gloria González Fuster, *The Emergence of Personal Data Protection as a Fundamental Rights of the EU*, vol 16 (Law, Governance and Technology Series, Springer 2014), 56.

¹³⁸ On the French and Swedish positions see, *ibid.*, 58-64; Maja Brkan and Evangelina Psychogiopoulou (ed), *Courts, Privacy and Data Protection in the Digital Environment* (Edward Elgar 2017); Fuster, *The Emergence of Personal Data Protection as a Fundamental Rights of the EU*, 21-23.

¹³⁹ OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (1980).

in *Amann v Switzerland* that data protection began to take hint at the constitutional character which it would subsequently assume under the European constitutional schema.

Indeed, despite these various legislative recognitions of data protection in Member States, the European Commission did not respond to calls for harmonization of data protection law until the 1990s¹⁴⁰ during roughly the same period that the ECtHR recognised the right in its case law as an aspect of the right to privacy under Article 8 ECHR.¹⁴¹ The recognition by the ECtHR was part of a broader move towards a dynamic interpretation of ‘private life’ under Article 8 ECHR to include digital and analog communications devices including telephone conversations and records,¹⁴² covert listening devices,¹⁴³ databases and electronic files,¹⁴⁴ biometric and genetic information,¹⁴⁵ workplace emails¹⁴⁶ and video recordings¹⁴⁷ within the scope of the Article.

It was not until the enactment of the Charter and the inclusion of the right to data protection in Article 16 TFEU that data protection ascended to its current constitutional footing in EU law, prompting the confusion as between the relative hierarchy between the rights to data protection and privacy in EU law, and their relationship to each other. Data protection having been a right guaranteed by secondary law – what would in a common law context be referred to as a statutory right, prior to becoming a constitutional one, but given its implicit protection as a fundamental

¹⁴⁰ Commission Communication to the Council, *Community Policy on Data Processing*, 21 November 1973 SEC(73) 4300; S Simitis, ‘Data Protection in the European Union- The Quest for Common Rules’ in *Collected Courses of the Academy of European Law*, European Community Law, Vol VIII, Book 1 (The Hague, Kluwer Law, 1997) 101.

¹⁴¹ *Amann v Switzerland* App no 27798/95 (ECHR, 16 February 2002).

¹⁴² *Amann* *ibid.*, [41]; *Klass*, [44]; *Halford v United Kingdom* App no 20605/92 (ECHR, 25 June 1997), [44]; *Malone v United Kingdom* App no 8691/79 (ECHR, 2 August 1984).

¹⁴³ *PG and JH v United Kingdom* App no 44787/98 (ECHR, 25 September 2000).

¹⁴⁴ *Leander v Sweden* [48]; *Amman* [65]; *Rotaru v Romania* App no 28341/95 (ECHR, 4 May 2000), [42]-[43]; *Bouchacourt v France* App no 5335/06 (ECHR, 17 December 2009); *Gardel v France and MB v France* App no 16428/05 (ECHR, 17 December 2009); *Dimitrov-Kazakov v Bulgaria* App no 11379/03 (ECHR, 10 February 2011).

¹⁴⁵ *S and Marper v United Kingdom* App no 30562/04 (ECHR, 4 December 2008). Yet as chapter 6 examines, this broad definition under both the ECHR and CFR has led to a degree of confusion of the precise delineation and structure of the right which hampers its efficacy.

¹⁴⁶ *Copland v United Kingdom*.

¹⁴⁷ *Peck v United Kingdom* App no 44647/98 (ECHR, 28 April 2003); *Wisse v France* App no 71611/01 (ECHR, 20 December 2005).

right¹⁴⁸ as part of the general principles¹⁴⁹ of EU law might also have had constitutional standing all along. The failure to navigate this contradictory position of data protection as a right is problematic. It becomes more so in light of the failure of the explanations to the Charter and of the CJEU to justify the inclusion of the distinct right to data protection under the Charter and to explain how and in what manner it differs from the right to privacy.¹⁵⁰

This failure is particularly unusual given the approach of the ECtHR, which views data protection as an aspect of privacy and the existence of a right to privacy, and the provision of Article 52 that the jurisprudence of the CJEU is to be read in congruence with the jurisprudence of the ECtHR. In the circumstances, it is not clear why the right to data protection was not simply adopted as an aspect of the right to privacy. Indeed, despite their delineation under the Charter, the CJEU itself seems unclear on the specific boundary between the two rights.¹⁵¹ The majority of cases considered by the Court do not distinguish clearly between the two rights or treat them as interchangeable.

In *Digital Rights Ireland*¹⁵² and *Seitlinger*¹⁵³ the Court failed to differentiate between the rights¹⁵⁴ and a close analysis of these judgments reveals that the Court seems to understand privacy as a right broadly overlapping with data protection.¹⁵⁵ The CJEU in its judgment in those joined cases describes both Articles 7 and 8 as implicated but discusses only Article 7 in detail.¹⁵⁶ Interestingly the Court also refers in its judgment to ‘the other rights laid down in Article 7 of the Charter,’ though what those other rights might be is not made clear.¹⁵⁷

¹⁴⁸ There is a not insignificant body of work considering the motivations for the inclusion of the right to data protection as a distinct Article under the CFR. See, Antoinette Rouvroy and Yves Poullet, 'The Right to Informational Self-Determination and the Value of Self-Development: Reassessing the Importance of Privacy for Democracy' in Yves Poullet Serge Gutwirth, Paul De Hert, Cécile de Terwangne and Sjaak Nouwt (ed), *Reinventing Data Protection?* (Springer 2009). See also Cannataci and Mifsud-Bonnici, who note the possibility that ‘having data protection formally firmly entrenched at a constitutional level will put a stop to current ‘anti-data protection principles’ positions taken by the Member States both at an EU level in the areas covered in the second and third pillars and at national levels,’ JA Cannataci and JP Mifsud-Bonnici, 'Data Protection Comes of Age: The Data Protection Clauses in the European Constitutional Treaty' (2005) 14 *Information and Communications Technology Law* 5; Article 29 Working Party (A29WP), ‘The Future of Privacy—Joint contribution to the Consultation of the European Commission on the legal framework for the fundamental right to protection of personal data’, adopted on 1 December 2009 (WP168), 7; Report of the Expert Group on Fundamental Rights, ‘Affirming Fundamental Rights in the EU: Time to Act’, Brussels, February 1999, 8. (<<http://ftp.infoeuropa.euroid.pt/database/000038001-000039000/000038827.pdf>>) accessed 8 March 2019.

¹⁴⁹ Case C-137/79 *National Panasonic v Commission* EU:C:1980:200, [18]-[20].

¹⁵⁰ Paul De Hert and Serge Gutwirth, ‘Data Protection in the Case Law of Strasbourg and Luxembourg: Constitutionalisation in Action’ in S Gutwirth et al (eds), *Reinventing Data Protection?* (Springer 2009) 5.

¹⁵¹ Orla Lynskey, 'Deconstructing Data Protection: The ‘Added Value’ of a Right to Data Protection in the EU Legal Order' (2014) 63 *International and Comparative Law Quarterly* 569.

¹⁵² Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* EU:C:2014:238.

¹⁵³ *Ibid.*

¹⁵⁴ Joined Cases C-293/12 and C-594/12, [26].

¹⁵⁵ Joined Cases C-293/12 and C-594/12, [36], [40].

¹⁵⁶ *Ibid.*, [32] *et seq.*

¹⁵⁷ *Ibid.*, [39].

The Court's decision in *Schrems* is similarly unclear in its delineation between the rights affirming 'the important role played by the protection of personal data in the light of the fundamental right to respect for family life'¹⁵⁸ but then continuing, despite citing both Article 7 and 8, to focus on the right to privacy under Article 7. This tendency to cite the provisions separately *de jure* but treat them as *de facto* overlapping or interchangeable is also evidenced in *Google Spain*¹⁵⁹ in which the Court repeatedly referred to privacy as an aspect of the 'effective and complete protection of data subjects.'¹⁶⁰

These decisions, in particular the implication in *Google Spain* that privacy is an aspect of data protection, appeared to signal a departure from the Court's pre-Charter position in *Rundfunk*.¹⁶¹ In that decision the Court substituted privacy under Article 8 ECHR in the place of the applicable Union data protection rules¹⁶² in what appeared to be an implicit endorsement of the view that data protection rights are a subset of the right to privacy. While it can be argued that *Rundfunk* should be limited to its facts on the basis that the Court would have reached a similar if not the same outcome had it relied on the Directive, it is unclear why a treatment of the right to privacy as including a right to data protection was adopted here (prior to the ECtHR decision in *Amann*) and subsequently abandoned.

Indeed, the Court has repeatedly returned to the idea that data protection is synonymous with or derived from a right to privacy. In the subsequent decision in *Promusicae*¹⁶³ the Court, noting that the e-Privacy Directive 'seeks to ensure full respect for the rights set out in Articles 7 and 8 of the Charter'¹⁶⁴ stated that '[t]he present reference for a preliminary ruling thus raises the question of the need to reconcile the requirements of the protection of different fundamental rights, namely the right to respect for private life on the one hand and the rights to protection of property and to an effective remedy on the other.'¹⁶⁵ The clear implication was that, in the Court's analysis data protection is synonymous with, or a subset of, a broader privacy right.

Thus, in *IPI*¹⁶⁶ the Court treated data protection as an intrinsic part of the right to privacy stating that 'the protection of the fundamental right to privacy requires that derogations and limitation in relation to the protection of personal data must apply only in so far as is strictly necessary.'¹⁶⁷

¹⁵⁸ Case C-362/14 *Schrems* EU:C:2015:650, [78].

¹⁵⁹ Case C-131/12 *Google Spain* EU:C:2014:317, [38], [53], [58], [66], [74], [80]-[81], [97]-[99].

¹⁶⁰ C-131/12 *Google Spain*, [38].

¹⁶¹ Case C-465/00 *Rundfunk* EU:C:2003:294.

¹⁶² *Ibid.*

¹⁶³ Case C-275/06 *Promusicae* EU:C:2008:54.

¹⁶⁴ *Ibid.*, [64].

¹⁶⁵ *Ibid.*, [39].

¹⁶⁶ Case C-473/12 *IPI* EU:C:2013:751.

¹⁶⁷ C-473/12 *IPI*, [39].

Similar reasoning prevailed in *Rynes*,¹⁶⁸ and echoes in the decisions in *Satamedia*,¹⁶⁹ *Schecke*¹⁷⁰ and *Commission v Germany*¹⁷¹ while Advocate General Colomer in *Burgemeester* thought the right to data protection is essentially subsumed by the right to privacy¹⁷² and the Court in *Huber* noted that ‘the right to privacy [is] ... in essence, [what] is at stake in data protection cases.’¹⁷³

The decision in *Satamedia*¹⁷⁴ in particular saw the CJEU return to its pre-*Promusicae* position making no reference to the right to data protection and treating the Data Protection Directive as a tool for the protection of the right to privacy.¹⁷⁵ This treatment is also seen, strikingly, in *YS*¹⁷⁶ where the CJEU stated the right to privacy is to be understood as including the right to lawful processing of personal data, thus clearly treating data protection as a constitutive element of the right to privacy.¹⁷⁷

However, the decision of the General Court in *Bavarian Lager*¹⁷⁸ has muddied the waters. The Court began by noting that though rights of privacy and data protection were distinct, data protection was ‘one of the aspects’ of the right to private life.¹⁷⁹ Confusingly, however, the Court then proceeded to agree with submissions made by the European Commission to the effect that not all violations of data protection necessarily result in violations of privacy.¹⁸⁰ In this manner the Court apparently acknowledged that data protection applies to a wider variety of contexts than privacy with the implication that the material scope of application of the two rights is distinct.

Indeed the interpretation of the scope raises the implication that data protection cannot be an aspect of the right to privacy as such, as any right derived from privacy would presumptively operate under a scope defined by the right from which it was derived.¹⁸¹ Subsequently, however, the Court of

¹⁶⁸ Case C-212/13 *Rynes* EU:C:2014:2428, [28]-[29].

¹⁶⁹ Case C-73/07 *Satamedia* EU:C:2008:727, [56].

¹⁷⁰ Joined Cases C-92/09 and C-93/09 *Volker and Schecke* EU:C:2010:662.

¹⁷¹ Case C-518/07 *Commission v Germany* EU:C:2010:125.

¹⁷² Case C-533/07 *College van Burgemeester* EU:C:2009:257, [25].

¹⁷³ Case C-524/06 *Huber* EU:C:2008:194, [30].

¹⁷⁴ Case C-73/07 *Satamedia*.

¹⁷⁵ *Ibid.*

¹⁷⁶ Case C-141/12 *YS* EU:C:2014:2081.

¹⁷⁷ Joined Cases C-141/12 and C-372/12 *YS and Others* EU:C:2014:2081, [13]-[31], [44].

¹⁷⁸ Case T-194/04 *Bavarian Lager*.

¹⁷⁹ *Ibid.*, [118]-[119].

¹⁸⁰ *Ibid.*, [123] echoing the Commission at [67].

¹⁸¹ Lynskey has suggested that the ease with which the General Court distinguished between two types of personal data in *Bavarian Lager*—those protected by the right to privacy and those that are not—‘does not sit comfortably with the formal constitutional codification of data protection within EU law.’ Orla Lynskey, ‘From Market Making Tool to Fundamental Right: The Role of the Court of Justice in Data Protection’s Identity Crisis’ in Yves Poullet Serge Gutwirth, Paul De Hert, Cécile de Terwangne and Sjaak Nouwt (ed), *European Data Protection: Coming of Age* (Springer 2013) 59, 76.

Justice has consistently overlooked the distinction drawn by the General Court in *Bavarian Lager*, including following the entry into force of the Charter and the Lisbon Treaty.

However, this side-lining of *Bavarian Lager* and the Court's subsequent decisions which treat the rights to data protection and privacy as coetaneous hardly clarifies whether the Court considers itself to have adopted a particular position. Certainly, the decision in *Schecke* indicates a simple failure to distinguish as between the rights rather than a conscious choice, with the Court first stating the two rights are 'closely connected' before continuing during the course of its decision to treat the rights as interchangeable or fundamentally linked noting, 'the right to respect for private life with regard to the processing of personal data, recognised by Articles 7 and 8 of the Charter.'¹⁸²

The recent decision in *Tele2 and Watson*¹⁸³ evidences an encouraging display of an explicit emphasis on the distinction between the two rights¹⁸⁴ noting that the rights contained in Article 8 'concerns a fundamental rights which is distinct from that enshrined in Article 7 of the Charter' but then, counterintuitively, adds that the right contained in Article 8 has 'no equivalent in the ECHR' a statement which is at best misleading given the explicit recognition of the ECHR of a right to data protection under Article 8. In clarifying the scope of the right to privacy and its relationship with data protection the social function and justifications offered for both rights provides a utile starting point.

2.3.4 *The Scope of the Right to Privacy*

While certain matters relating to the scope of Article 7 and 8 are agreed, such as their horizontal application and imposition of affirmative obligations on Member States¹⁸⁵ the relationship between the two rights more generally remains contested as the preceding part outlined. Attempts to disentangle the rights are equally contestable. Paul De Hert and Serge Gutwirth in seeking to locate the 'difference in scope, rationale and logic' between data protection and privacy conceive of privacy as a tool of opacity and data protection as a tool of transparency.¹⁸⁶

Yet it is not clear that the use of the transparency/opacity paradigm as a basis for distinguishing between the rights is particularly useful. To begin with, data protection is equally a mechanism for limiting transparency and preserving opacity and thus maintaining the limits of privacy. Nor is it

¹⁸² Case C-92/09 *Volker* EU:C:2010:662, [52].

¹⁸³ Case C-203/15 *Tele2 and Watson* EU:C:2016:970, [129].

¹⁸⁴ *Ibid.*

¹⁸⁵ In this respect the CJEU has mirrored the approach of the ECtHR which has developed positive obligations requiring States to respect data protection *Marckx; Evans; Babulescu*.

¹⁸⁶ Paul De Hert and Serge Gutwirth, 'Privacy, Data Protection and Law Enforcement: Opacity of the Individual and Transparency of the Power' in A Duff and S Gutwirth E Claes (ed), *Privacy and the Criminal Law* (Intersentia 2006), 70.

clear that the authors' argument concerning the indispensability of data protection as a distinct right on the basis of this distinct function can be maintained. The argument is in fact undermined by their own provision that, ultimately, data protection is judged on the basis of privacy, which acts as the benchmark for establishing prohibited interferences, while data protection, merely describes the permitted level of processing.

This, final point however while it does not necessarily support De Hert and Gutwirth's thesis does go to the heart of the structural differentiation between Articles 7 and 8. By variously claiming that the rights to data protection and privacy are distinct or interchangeable the CJEU has failed to clarify whether their scope is coetaneous or whether the scope of one right exceeds the other. The three broad formulations of the relationship between the rights forwarded by the Court at different points contend that,

- (a) Data protection is as aspect of privacy with discrete criteria and tests for its application and infringement and the right to data protection,
 - i. is broader in scope than the right to privacy,¹⁸⁷
 - ii. enjoys a scope equal to privacy,¹⁸⁸
 - iii. is narrower in scope than the right to privacy.¹⁸⁹
- (b) Data protection is a tool for the vindication of privacy¹⁹⁰
- (c) Data protection is an aspect of privacy and can be analysed by reference to the consideration of whether the right to privacy has been breached without regard to an independent set of criteria.¹⁹¹

Certainly (a) is the most accurate representation of the relationship between privacy and data protection as a matter of strict interpretation of the Union's constitutional documents – though there is disagreement within the CJEU's jurisprudence as to which, if any, of (i) to are correct. In contrast, (c) misrepresents the constitutional relationship as it is articulated in the Charter by considering both rights as necessarily the same. The understanding forwarded by (b) meanwhile, while understandable given the codification of data protection in the Union's secondary law denies its status within the Charter as a stand-alone right with constitutional footing.

The ambiguity surrounding these conflicting definitions and the scope of the rights can be remedied somewhat by a more doctrinal analysis of how data protection rights function in practice. Indeed, on a functional analysis what emerges is a picture of data protection rights as a series of conditions

¹⁸⁷ *Bavarian Lager*, [118]-[119]; *Google Spain*.

¹⁸⁸ *Promusicae*.

¹⁸⁹ *Rundfunk*; *IPI*; *Schecke*.

¹⁹⁰ Case C-73/07 *Satamedia* EU:C:2008:727.

¹⁹¹ Case C-524/06 *Huber* EU:C:2008:194, [30].

which, if met permit the right to privacy to be limited or abrogated by private parties. On such an understanding data protection rights are related to privacy rights but only in as much as they provide the conditions for permissible limits to a broader privacy right proper.

This understanding, indeed, clarifies or can offer clarification for the admixture of privacy and data protection in both legislative and judicial reasoning. In this understanding while privacy and data protection have been recognised as distinct rights¹⁹² they enjoy the same normative justification in light of the right to data protection's operation as establishing those circumstances in which an individual may reduce or alienate their right to privacy without losing or with only acceptable interference with, the normative justifications and social function which privacy rights seek to secure.

In this respect Rouvroy and Poulet argue that both privacy and data protection are justified by reference to their function in vindicating human dignity and individual personality and should thus be conceived as tools for fostering the autonomic capabilities of individuals necessary for sustaining democracy.¹⁹³ This emphasis on privacy as a right justified by reference to its capacity to vindicate autonomy is supported by Bloustein as noted previously who, though writing in a North American and private law context, nonetheless offers an apt articulation of privacy's basis in concepts of autonomy linked to human dignity, noting that individuality depends on 'the right to be free from certain types of intrusions ... which degrade a person by laying his life open to public view.'¹⁹⁴

This echoes in the definitions offered elsewhere including in Westin's definition of privacy as control,¹⁹⁵ and Matheson's argument for an understanding privacy infringements as interferences which alter the relations of the individual to their environment.¹⁹⁶ Though Nissenbaum's understanding of contextual integrity challenges this more traditional account of privacy as control it nevertheless displays a similar emphasis on the broader normative aims of privacy in its emphasis on evaluating privacy norms according to their effects on the interests and preferences of affected parties, and their capacity to sustain and promote ethical societal principles and values.¹⁹⁷

¹⁹² And queries about whether data protection might more appropriately be considered a privilege in a Hohfeldian analysis of jural correlatives are thus side-lined. There is, however, an interesting potential argument surrounding the potential for conflict between the two rights if they are distinct as the Charter indicates.

¹⁹³ Poulet, 'The Right to Informational Self-Determination and the Value of Self-Development: Reassessing the Importance of Privacy for Democracy'.

¹⁹⁴ *Ibid.*, 981.

¹⁹⁵ Westin, *Privacy and Freedom*, 23 *et seq.*

¹⁹⁶ David Matheson, 'A Distributive Reductionism About the Right to Privacy' (2008) 91 *The Monist* 108, 114.

¹⁹⁷ Helen Nissenbaum, 'A contextual approach to privacy online' (2011) 140 *Daedalus* 32; Helen Nissenbaum, *Privacy in Context: Technology, Policy and the Integrity of Social Life* (Stanford University Press 2010).

While the precise content and delineation of the rights to privacy and data protection in the European Union is contested there remains a broad agreement that privacy, however conceptualised, retains a central role in limiting the role of the State and protecting individual interests. As a result, privacy is deeply implicated in the preservation of individual autonomy by shielding individuals from the ‘unwanted gaze’¹⁹⁸ or the ‘watchful tower’ to build on Bentham¹⁹⁹ and Foucault.²⁰⁰ Privacy’s importance thus lies in its ability to offer individuals a space in which their actions or words will not subject them to State sanction or discrimination and thus to ensure personal autonomy without self-monitoring.²⁰¹

Read in this context and against the justification of privacy based on autonomy founded in individual identity which recurs throughout the CJEU and ECtHR jurisprudence, this work adopts a view in keeping with Floridi and Rouvroy and Pouillet of privacy as rooted in individual dignity and functioning to protect the control of the self.²⁰² This understanding privileges the development of individual personality and the promotion of self-determination and emphasises the role of duties and moral bounds, which converge to form an integrated, whole person.²⁰³ This reading is further supported by the aims of the Article 2 TEU, the ratification of Convention 108 by the Union’s Member States²⁰⁴ and the constitutional heritage of the EU which places a premium of individual autonomy and dignity.²⁰⁵

Ultimately the argument made by Rouvroy and Pouillet is that recognising the rights to privacy and data protection as distinct risks estranging data protection from these fundamental values of dignity

¹⁹⁸ Jeffrey Rosen, *The unwanted gaze: The destruction of privacy in America* (Vintage Books 2011).

¹⁹⁹ Miran Bozovic (ed), *The Panoptican Writings by Jeremy Bentham* (Verso 2010).

²⁰⁰ Michel Foucault, *Surveiller et punir* (Gallimard 2007).

²⁰¹ Julie E Cohen, 'Privacy, visibility, transparency and exposure' (2008) 75 *University of Chicago Law Review* 181, 194; Bloustein, 'Privacy as an aspect of human dignity: An answer to Dean Prosser'; C Fried, *An anatomy of values: Problems of personal and social choice* (Harvard University Press 1970).

²⁰² This is a general view echoed by Gavison, Moreham and Altman in their various works. See, Ruth Gavison, 'Privacy and the Limits of Law' (1980) 89 *The Yale Law Journal* 421; W.A. Parent, 'Privacy, Morality and the Law' (1983) 12 *Philosophy and Public Affairs* 269, 446; Nicole Moreham, 'Privacy in the Common Law: a doctrinal and theoretical analysis' (2005) 121 *Law Quarterly Review* 628, 626; Irwin Altman, *The Environment and Social Behavior: Privacy, Personal Space, Territory, and Crowding* (Brooks/Cole Publishing Company 1975). It is notable that this emphasis on privacy as control implicates questions over the capacity and potential restrictions which should be placed on self-disclosure as a threat to privacy — that an individual might reveal so much that they forfeit privacy and may indeed impact the privacy of others in doing so. Westin ultimately refrains from criticising such revelations noting that individuals themselves are best equipped to assess the appropriate disclosures relative to different classes of actors, see Westin, *Privacy and Freedom*, 52 *et seq.*

²⁰³ Hardy E Jones, *Kant's Principle Of Personality*, (University of Wisconsin Press 1971); Margaret Jane Radin, 'Property and Personhood' (1982) 34 *Stanford Law Review* 957; Donald P Kommers, *The Constitutional Jurisprudence Of The Federal Republic Of Germany* (Duke University Press 1989), 313; Gavison, 'Privacy and the Limits of Law'.

²⁰⁴ According to which data protection serves to ensure all rights and freedoms but in particular the right to privacy.

²⁰⁵ Dupré, 'Human Dignity in Europe: A Foundational Constitutional Principle'.

and autonomy which justify its existence. The authors are correct that the right to data protection appears to have been divorced, in contemporary contexts from its roots as a providing normatively justifiable limits on privacy rights – that is allowing limitations and abrogations of privacy which do not compromise the normative justifications and aims of the right to privacy as the following sections examine. In this understanding the minimum scope of data protection should necessarily be controlled by the normative justification of privacy as serving a social function by enabling self-determination and development of individual personality and thus protecting the individual autonomy of citizens and securing their capacity for, among other things, democratic participation.²⁰⁶

There are, of course, arguments about the precise manner in which privacy should be regulated, Allen for example argues that as a ‘foundational human good’ privacy should be regulated in a paternalistic manner.²⁰⁷ Cohen has similarly criticised views of privacy as amenable to being ‘traded off against other goods’ on the basis of its status as ‘an indispensable structural feature of liberal democratic political systems’ an importance which she argues must override individual consent in certain instances.²⁰⁸ However, if data protection is understood in accordance with the deontological understanding of privacy as involving the protection of self-determination and the imposition of correlative duties within moral bounds, as indeed it appears the constitutional culture of the Union intends it to be, the scope of the right should be complementary to rather than in conflict with a right to privacy.

This has not been the case in practice. As the proceeding part examines the right to data protection while, in theory in conformity with this articulation, has in practice been articulated as a grounding a set of legislative preferences which neglect the social functions of privacy in favour of market-oriented standards which enable its abrogation without seeking to vindicate its social aims. However, it is not clear that this alienation of data protection from its normative justification results from recognising the rights as distinct as Rouvroy and Poulet argue rather than the Union’s brittle constitutionalism which has failed to articulate the relative relationship between the rights, their scope, and their position vis a vis rights contained in statutory law. The result is a fragmented understanding of privacy and a right whose capacity to offer substantive and systemic protection is

²⁰⁶ The existence of data protection as the condition under which the infringement of privacy is legally permissible and the relationship between the “constitutional” and “statutory” aspects of the right are not problematic *per se*. Rather, what is problematic is the divorce of data protection from its normative source in privacy through its enumeration of independence non-contextual privacy abrogations. Read in a complementary fashion data protection in fact offers the basis for the development of a dense ‘thicket’ of privacy rights which provide comprehensive and multi-faceted protections for individuals and data flows, such a complex privacy matrix is, however, absent in the current schema.

²⁰⁷ Anita L Allen, *Hiding our Unpopular Privacy* (University of Pennsylvania 2011).

²⁰⁸ Julie E Cohen, 'What Privacy Is For' (2013) 1 Harvard Law Review 1904.

compromised as parts five and six examine.

This brittle constitutionalism has enabled the development of a system in which data protection and privacy have been (superficially) divorced from each other by the constitutional elevation of data protection in the treaties and thus through secondary law, as well as an unclear understanding of the precise nature of the relationship between the rights – a lack of clarity which is arguably the result of the migration of data protection from a statutory context, into a constitutional one in circumstances where its borders have not been clearly defined. This elevation has been achieved largely as a result of the Union’s legislative preferences for market-oriented iterations of rights.

2.4 Legislative Protections: Market-Oriented and Social Preferences

From the early 1970s both the European Commission and Parliament were becoming concerned about US dominance in the computing and data processing markets and began to formulate a European policy response.²⁰⁹ The first effort in the area, the 1973 Communication on Community policy in the area of data processing suggested it was necessary to devise a systematic system of support for European capacities in data processing which would enable European actors to compete internationally. As part of these efforts the Commission proposed in a 1973 measure that there was a need to adopt ‘common measures for the protection of the citizen.’²¹⁰

The 1973 communication is significant for its suggestion that harmonised measures to this end were necessary to enable the development of a competitive market in the area but also its contextualisation of these measures protecting citizens as economically oriented – targeted at achieving greater market participation and competition. Yet concern about the databased being developed as part of the Union’s Member States’ increasing activity in the area of data processing was ascendant from the following year when a French MEP Pierre Bernard Cousté raised the privacy threats raised by databases containing information about citizens though no action came subsequent to his expression of concern.²¹¹

As the OECD and Council of Europe began to consider the issue, the European Parliament ordered a report in 1974 on the rights of individuals in the field of data processing and subsequently adopted a resolution based on its contents calling for the adoption of a Directive on individual freedom and

²⁰⁹ European Commission, ‘The European Community and data processing: Government development aids permitted, information’ [Competition] 21/72.

²¹⁰ Commission for European Communities, ‘Community policy on data processing’ (Communication of the Commission to the Council) SEC(73) 4300 final, 13.

²¹¹ For a discussion of the issue see, Fuster, *The Emergence of Personal Data Protection as a Fundamental Rights of the EU*, 113-114.

data processing.²¹² However, no response was forthcoming and there followed a considerable period during which the Union's institutions undertook examinations and studies as well as passing further resolutions without concrete legal or policy developments.²¹³

Indeed it was only with the adoption of a package of proposals related to data protection that the proposal for a Directive first mooted in 1974 began to take form.²¹⁴ Beginning with the 1995 Directive on Data Protection,²¹⁵ followed by the Directive on Data Retention,²¹⁶ and the e-Privacy Directive²¹⁷ the Union's secondary laws developed with the expressed aim of harmonising national laws which sought to protect the 'fundamental rights of individuals, and in particular the right to privacy.'²¹⁸ The 1995 Directive, unusually, couched its language not in terms of data protection but rather the protection of individuals with regard to the processing of their personal data and described its central objectives not as the protection of personal data but the protection of the fundamental rights of natural persons in particular their right to privacy with regard to such processing.²¹⁹

Such language augured well from a rights perspective, indicating that the pro-trade or market oriented approach which had characterised the context of the development of the idea of and awareness of the need for such laws was to be tempered by fundamental rights concerns. However, while the Directive aimed to protect individuals it also forbid restrictions on the free flow of personal data,²²⁰ an uncomfortable marriage of competing social and market oriented aims which was drawn from the OECD's previous Guidelines on the Protection of Privacy and Transborder Flows of Personal Data from 1980.

This prioritisation of the free flow of personal data borrowed from the OECD was cast in new light in a European context. In the context of the creation of the internal market and the European principles of free movement the Directive was adopted as a measure necessary for the functioning of the internal market under Article 100a ECT. This orientation side-lined the Directive's fundamental rights component and has been characterised as a result, by Quillatre et al as a tool which was used to neutralise national rights in favour of economic efficiency.²²¹ Fuster argues that

²¹² Resolution of the European Parliament on the protection of the rights of the individual in the face of developing technical progress in the field of automatic data processing [1975] OJ C60/48.

²¹³ See again, Fuster, *The Emergence of Personal Data Protection as a Fundamental Rights of the EU*, 117-124.

²¹⁴ Commission of the European Communities COM(90) 314 final [1990] OJ C277/1.

²¹⁵ Directive 95/41/EC.

²¹⁶ Directive 2006/24/EC.

²¹⁷ Directive 2002/58/EC.

²¹⁸ COM(90) 314 final, 5.

²¹⁹ Directive 95/46/EC, Article 1.

²²⁰ *Ibid*, Article 1(2).

²²¹ Jean-Baptiste Thomas-Sertillanges and Elisabeth Quillatre, 'Libre circulation des données à une caractéristique personnelle au sein du marché intérieur et de l'espace de Liberté Sécurité Justice: Vers une diversification des instruments de régulation' (2011) 400 Petites Affiches 9, 3.

the Directive and the other measures adopted should be seen instead as part of a wider trend in Community law which viewed fundamental rights as the legitimate means of derogation from internal market freedoms.²²²

More recently, the subsequent legislative package, consisting of the GDPR and the (still proposed) e-Privacy Regulation, is notable for the dual emphasis on fundamental rights and market functions present in earlier legislative efforts. However, as with the previous measures the GDPR's recitals focus predominantly on the economic aspects of data protection as a market tool.²²³ Indeed there is no reference to privacy under Article 7 included within the text of the GDPR and while the proposed e-Privacy Regulation includes wording in its explanatory memorandum which makes explicit reference to privacy under Article 7, the Recitals focus only on the data protection concerns raised by terminal equipment and digital infrastructures as part of the digital single market and do not consider Article 7.²²⁴ Indeed, it is not clear that the provisions of the e-Privacy Regulation are not, in fact, a mere extension of the GDPR in the differentiated context of infrastructural regulation as opposed to content regulation.

Indeed both regulations have been contextualised as necessary (as part of a far broader set of legislative and policy initiatives) to achieve the Union's 'digital single market' strategy which seeks to diminish regulatory obstructions to citizen engagement with the digital market. By many measures the Union's initial ambition to compete as an international participant in the data market has been achieved, with Anu Bradford noting the Union's influence in digital environment has led to the development of a 'Brussels effect' in which the EU has leveraged its economic and cultural influence to influence international regulatory standards in particular in the digital environment.²²⁵

The practical reality is thus that while the trend identified by Fuster is in evidence in the Union's jurisprudence more generally, in the case of data protection it is more accurate to state that the Directive and later the Regulation have acted as a market facilitating measure rather than a market limiting one. This is hardly surprising, data protection is through its function the market-oriented aspect of a broader privacy right. The practical operation of data protection while expressly motivated by dual concerns of fundamental rights promotion and market enablement has in reality championed in a practical operation which has favoured the expression of these market functions rather than the social concerns expressed in the fundamental rights concern.

²²² Fuster, *The Emergence of Personal Data Protection as a Fundamental Rights of the EU*, 135.

²²³ GDPR Recitals 2 and 3. See also, *ibid*, 243-5.

²²⁴ Recital 1, 20 – 24.

²²⁵ Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford University Press 2020).

This legislative prioritisation of market-oriented aspects of privacy (in the form of data protection) over the socially oriented aspects of the right to privacy more broadly which focuses on human dignity, the promotion of autonomy and restrictions on privacy harmful practices raises the question, similarly posed by legislative prioritisation in the area of property,²²⁶ of whether the EU has codified a preference for those rights or the aspects of those rights which favour commercial innovation over individual protections. Data protection is after all, in the EU context, a series of derogations from blanket privacy protections - enabling actors to infringe individual privacy where they undertake to do so in accordance with the dictates provided by secondary law.

While this is not objectionable *per se*, the prioritisation of the market oriented aspects of the right to privacy in the form of data protection exposes a hierarchy of priority in which the root of privacy in human dignity and the fundamental goods of individual autonomy and the protection of identity which the right to privacy seeks to enable are relegated to abstract rhetorical values of which State actors should take account rather than achievable aims which require equal legislative protection and enforcement to ensure their realisation.

This discrepancy between data protection rights and substantive privacy protections lies at the heart of the Union's legislative mechanisms as they apply to the regulation of AdTech and privacy harmful practices more generally. Despite the proliferation of ostensibly privacy orientated secondary laws during the last two decades, the Union's legislative product while seemingly indicative of a strong commitment to privacy is, on closer examination, notable for its emphasis on market-oriented threshold regulations in the form of information and notice requirements rather than substantive interventions to protect consumer privacy writ large.²²⁷ These regulations rely on approaches which view the digital and traditional markets as functionally equivalent and thus amenable to comparable levels of deference to freedom of contract un-augmented by consumer protective standards.

2.5 Functional Equivalence and Deference to Freedom of Contract

The GDPR and the other applicable data protection or ostensible privacy based secondary laws in the Union is currently premised on notice and consent architectures which require that consumers be provided with certain types and levels of information. These architectures are common in European law generally but are particularly common in data protection contexts which are built on

²²⁶ See Chapter 3.

²²⁷ Fuster, *The Emergence of Personal Data Protection as a Fundamental Rights of the EU*, 243-5.

the architecture of notice, consent and purpose limitation first deployed in the OECD's 1980 Guidelines.

This primacy of notice and consent architectures, while augmented somewhat by the expansion of the basis for legitimate processing under the GDPR nevertheless remains premised, at its root, on deference to private ordering through freedom of contract. This approach is fundamentally premised on the assumption that digital markets are equivalent to and import the same risks for participants as traditional markets and that equivalent notice and consent mechanisms are thus appropriate.

Yet this is not the case. The shortcomings as between both the qualitative and quantitative differences between the digital and traditional market have been outlined in this work, however, it bears repeating that individuals' offline lives are deeply integrated with, and are in many ways, as diverse as their digital experiences.²²⁸ As a result, the capacity to track online activity (and by implication a certain amount of their related, offline activity) naturally generates concern about the impacts of surveillance on individual privacy and the manipulation which can result from such privacy reductions. This is perhaps best illustrated by way of comparison to comparable offline surveillance.

An individual who enters a shop. On entering the shop, their name and postcode are given to the shop owner. A private detective who has been following them since they last visited the shop then also hands the shop owner a list of their previous purchases and movements – the names and addresses of the locations they have gone since their last visit to the shop, the area where they live, the types and prices of the goods and services they view online most frequently. From this the shop owner can build a rough picture of the shopper's age, socio-economic status and perhaps political and religious persuasions.

As the shopper moves around the shop they are tracked by cameras which record the aisles they visit, the products they looked at and how long they considered each product. On leaving the shop they are then followed again by the private detective who records where they go and what they purchase or consider purchasing. The shopper stops into a coffee shop to meet some friends and the detective records what they eat and drink, and sits nearby listening to their conversation, he obtains a list of their other friends and the shops they enter and goods they purchase building a detailed profile of the social network of the shopper. At the end of the day the private detective gives this information to the shop owner. The shop owner now has an extensive list of the shopper's social connections, geographic movements, areas of interest and purchases from which more

²²⁸ Nissenbaum, 'A contextual approach to privacy online'.

intimate details such as his age, gender, race, sexuality, political and religious preferences and socio-economic status can be inferred.

The shop owner may use this information himself to target the shopper with ads for his products or services, hoping by the power of suggestion to influence his preferences. But the private detective who conducted much of the data gathering and analysis for the shop owner might also take his detailed profile of the shopper and sell it to other shop owners trying to influence the shopper to purchase their goods or use their services, to political actors seeking to influence the shoppers preferences in an upcoming election, or to any number of other actors who will bid for the data in order to be able to influence the shopper.

In the online environment, the AdTech market operates on a similar basis to the shopper and those who surveil him in this example. The privacy harm is, of course, evident. What also becomes clear is the negative consequences this surveillance may have for the activities or choices the shopper feels able to make (given that he is being watched) or which he is aware he can make (given that his attention is being vied for constantly by actors who have purchased large quantities of his personal data). Further still, the real world comparison draws to the fore the authoritarian undercurrent of such pervasive surveillance and its capacity to be exploited not only by commercial but also by State actors to influence the shopper. The information harvested to advertise a sale on raincoats to a shopper might equally be combined with the information gleaned from other sources to target him or her with political advertising, or to identify individuals susceptible to greater expenditure in online gambling, who are more dependent on certain medications or who have particular religious convictions.

In a traditional market scenario, the shopper would not merely notice but might reasonably object to the practices outlined above and choose to conduct their business in a setting which did not employ such mechanisms. However, the equivalent prompts to the presence of such surveillance, and alternatives which avoid it, are not necessarily present or available in the digital environment. Individuals are required if not by social, then frequently by professional necessity to engage with the digital market in ways which offer them little alternative but to consent to privacy policies and terms of use which permit their data to be gathered, aggregated, broadcast and sold as part of the AdTech market.²²⁹

Present notice and consent architectures fail to aver to this reality that individuals' offline lives are deeply integrated with and revelatory of personal identity, preferences and sensitive

²²⁹ Case C-40/17 *FashionID* EU:C:2018:1039; C-673/17 *Planet49* EU:C:2019:246; Case C- 311/18 *Schrems*.

characteristics.²³⁰ As a result, they do not appreciate that the capacity to track online (and by implication offline) activity naturally generates negative privacy outcomes beyond those implicated in traditional markets. Rather, the approaches adopted by EU law to date has been to treat online markets as equivalent to traditional ones, and as necessarily deserving a comparable deference to freedom of contract.

This approach of equivalence and deference is particularly apparent when one considers that the focus of the online AdTech marketplace on consumer activity and its stated focus being the influence of consumer behaviours. Yet, EU law does not currently consider consumer surveillance a consumer protection issue. The European Union has traditionally placed a high value on consumer protection, a fact reflected in the Treaty Articles,²³¹ and the Charter as well as through secondary law.²³² Yet the Union has not, thus far, viewed the digital market as requiring any supplementary and specifically consumer protection mechanisms.

Indeed, at present, there is no consumer protection law applicable to AdTech and the capacity of data protection law to limit behavioural advertising to date has been limited, albeit the capacity has existed for some time under the requirements for consent based on precursor to Article 6 in Article 7 Directive 95/46/EC. The Consumer Rights Directive,²³³ which replaced the Distance Selling²³⁴ and Doorstop Selling Directives²³⁵ establishes requirements for information to be provided in distance contracts,²³⁶ formal requirements for distance consumer contracts²³⁷ and the right of withdrawal does not offer any control of AdTech services.²³⁸

Similarly, the Unfair Consumer Contracts Directive²³⁹ and the legislative package A New Deal for Consumers²⁴⁰ which seek to tackle unfairness in contracts²⁴¹ and in digital markets in particular while they include requirements that contractual terms are drafted in clear language, intelligible to the ordinary consumer, and that contracts for digital content and services are subject to cooling off periods and other terms which are already in place in standard contracts do not regulate the privacy

²³⁰ Nissenbaum, 'A contextual approach to privacy online'.

²³¹ Articles 39, 107 and 169 TFEU.

²³² See, Stephen Weatherill, *EU Consumer Law and Policy* (2nd edn, Edward Elgar 2014). For a closer examination of the Union's commitment to consumer protection see Chapters seven and eight.

²³³ Directive 2011/83/EC.

²³⁴ Directive 97/7/EC.

²³⁵ Directive 85/577/EC.

²³⁶ Directive 2011/83/EC, Article 6.

²³⁷ *Ibid*, Article 8.

²³⁸ *Ibid*, Article 9-16.

²³⁹ Directive 93/13 [1993] OJ L095/29.

²⁴⁰ Council of the European Union, *Council and Parliament agree on new rules for contracts for the sales of goods and digital content* (2019).

²⁴¹ *Ibid*, Article 4.

infringing capacities of AdTech which current contractual practices enable.²⁴²

Provisions governing advertising do appear in the 2006 Directive on Misleading Advertising,²⁴³ and in the Directive on Unfair Commercial Practices²⁴⁴ and though decisions considering the application of the Directives have been limited²⁴⁵ there is no reason, in principle, why its provisions could not be extended to cover AdTech where it was the advertising itself rather than the system which enables it that was at issue.

Yet it is clear that the privacy harms outlined in this chapter are a consumer issue in as much as they stem from interactions between consumers and private actors and asymmetry of power which endures between those parties even where asymmetries of information are ostensible remedied through notice and consent mechanisms. In particular, and as is the case in property considered in the following chapter, even where it is clear to consumers what they are consenting to (though it is not clear that notice and consent mechanisms are effective in this respect²⁴⁶) as a practical matter for consumers there remains no functional choice to engage with providers of goods and services who *do not* employ surveillance mechanisms which operate as part of the AdTech market.

The reliance of current protections premised on consent neglect the reality that individuals are unaware of, or unable to avoid, contractual terms which reduce their privacy due to restricted market offerings, complex technologies and ambiguous or complex language in contracts.²⁴⁷ In addition to

²⁴² Ibid, Article 5. Ambiguity in relation to the meaning will be resolved in favour of the consumer under this provision.

²⁴³ Directive 2006/114 [2006] OJ L376/21.

²⁴⁴ Directive 2005/29/EC.

²⁴⁵ Case C-281/12 *Trento Sviluppo* EU:C:2013:859; Case C-122/10 *Ving Sverige* EU:C:2011:299; Case C-428/11 *Purely Creative* EU:C:2012:651.

²⁴⁶ Frederik J Zuiderveen Borgesius, *Improving Privacy Protection in the Area of Behavioural Targeting*, vol 33 (Information Law, Wolters Kluwer 2015); Ryan Calo, 'Privacy, Vulnerability and Affordance' in Jules Polonestsky and Omer Tene Evan Selinger (ed), *The Cambridge Handbook of Consumer Privacy* (Cambridge University Press 2018); Alessandro Acquisti and Jens Grossklags, 'Privacy and rationality in individual decision-making' (2005) 1 IEEE Security and Privacy 24; Hartzog, 'Privacy's Trust Gap'; Kirsten Martin, 'Do Privacy Notices Matter? Comparing the Impact of Violating Formal Privacy Notices and Informal Privacy Norms on Consumer Trust Online' (2016) 45 Journal of Legal Studies 191; Kirsten Martin, 'Transaction costs, privacy and trust: The laudable goals and ultimate failure of notice and choice to respect privacy online' (2013) 18 First Monday 1; Jonathan A Obar and Anne Oeldorf-Hirsch, 'The biggest lie on the Internet: ignoring the privacy policies and terms of service policies of social networking services' (2018) Information, Communication & Society 1; Carlos Jensen and C Potts, 'Privacy policies of Internet users: self-reports versus observed behaviour' (2005) 63 International Journal of Human Computer Sciences 203; Radet, 'Deceived by Design: How tech companies use dark patterns to discourage us from exercising our rights to privacy' John Schwartz, 'Opting In: A Privacy Paradox' *The Washington Post* (3 September 2000) <https://www.washingtonpost.com/gdpr-consent/?destination=%2farchive%2fbusiness%2f2000%2f09%2f03%2fopting-in-a-privacy-paradox%2f09385146-74bc-4094-be07-c4322bf87c78%2f%3f&utm_term=.b3b6220c6771> Solove, 'Privacy Self-Management and the Consent Dilemma'.

²⁴⁷ Coalition, 'Charter of human rights and principles for the Internet', 19-20; Solove, 'Privacy Self-Management and the Consent Dilemma'

the findings in relation to the shortcomings of consent analysed above the ICO in the United Kingdom in a recent Parliamentary report has testified that businesses are increasingly buying and selling data without the consent or knowledge of the individuals to whom it relates²⁴⁸

The result has been a proliferation of contractual terms which enable large scale collection of private information through discrete data points which can in turn be aggregated to allow inferences to be drawn about individuals based on travel, residence and employment patterns and preferences by private actors. Such broad collection and largely unregulated use of data renders even ostensibly innocuous data highly sensitive through its capacity to combine a multiplicity of datapoints and, in doing so, paint a highly detailed portrait of the individual, their personal identity and their preferences.²⁴⁹ This is the point raised in the decisions in *Vectuary* which has been made repeatedly by literature concerning the manner in which the online marketplace, which relies on advertising to fuel its expansion, has exploited and monetised personal information.²⁵⁰

The digital marketplace relies on an absence of market choice, and individual ignorance rather than information to impose contractual clauses which effectively reduce individual autonomy under a Razian mode. In Raz's account, autonomy is the power of individuals to act as authors of their lives through successive decisions.²⁵¹ This understanding of autonomy requires the presence of meaningful choice - free from manipulation, coercion or excessive undue influence²⁵² and accords with classical liberal accounts which understand autonomy as a capacity for socially situated individuals to make choices which result from deliberative action. Under this conception autonomy is not only an individual but also a social good, ensuring the primary condition for democratic governance in deliberative choice and is thus central to the idea of liberal, democratic society.²⁵³

Yet the digital market operates in a context in which choice has been effectively marginalised as dominance market participants like Google and Facebook function without effective competition and as part of market in which they have set the status quo for contractual practice.²⁵⁴ In particular, their dominance of the AdTech market means that even those individuals who decline to engage with them indirectly fall within their collection and analysis practices through their control of the

²⁴⁸ Coalition, 'Charter of human rights and principles for the Internet', 20.

²⁴⁹ Ibid, 21-23; Acquisti, 'Information revelation and privacy in online social networks'; Alessandro Acquisti, 'Privacy and Human Behaviour in the Information Age'; Borgesius, *Improving Privacy Protection in the Area of Behavioural Targeting*.

²⁵⁰ Ibid.

²⁵¹ Raz, 'Autonomy, toleration and the harm principle', 369.

²⁵² Bernal, *Internet Privacy Rights*, 24-5.

²⁵³ Raz, 'Autonomy, toleration and the harm principle', 314 'the ruling idea behind the ideal of personal autonomy is that people should make their own lives.' See also, chapter 4, page 143.

²⁵⁴ , *Social Networks and Statehood: The Future is Another Country* (2010).

AdTech market. In such a context it is not clear that individuals do have a meaningful choice regarding their capacity to protect a greater or lesser degree of privacy.²⁵⁵

The failure to recognise this dominance goes to the heart of the disconnect between the rights to data protection and privacy in Union law. While data protection is currently conceived of as a right, functionally it operates as the condition under which the infringement of a private right is legally permissible. As such, it is the market-oriented manifestation of privacy, imposing the threshold conditions under, and extents to which, privacy can be forfeited by individuals as the condition for market access and participation.

As such, data protection is commercially, and indeed personally, necessary. However, in the current schema of rights protection within the Union it has taken on an outsize importance to this role, effectively dwarfing the right to privacy which it is intended to enable. More fundamentally, if we

²⁵⁵ Manipulation is a type of influence which seems to alter how an individual chooses to make, or makes, choices. Concerns about manipulation are thus concerns about the independence of decision making processes, see Calo, 'Privacy, Vulnerability and Affordance'; Cass R Sunstein, 'Fifty Shades of Manipulation' (2016) 213 *Journal of Marketing Behaviour* 57; Tal Z Zarsky, 'Privacy and Manipulation in the Digital Age' (2019) 20 *Theoretical Inquiries in Law* 157. Repeated claims that individuals do not 'care' about privacy, often articulated as the 'privacy paradox' are neither relevant nor, arguably, accurate. In terms of accuracy, while Westin has claimed the consumers can be located on a scale from privacy fundamentalists to privacy pragmatists to privacy unconcerned research has shown these categorisations bear little relation to in practice patterns of decision making. Surveys commissioned by the UK Information Commissioner's Office, IAB Europe, the Royal Statistical Society and Eurobarometer found that consumers were actively concerned about their online activity being tracked and used for advertising purposes. See, A F Westin, *Privacy and freedom* (Atheneum 1970); Kirsten Martin and H Nissenbaum, 'Measuring Privacy: Using context to expose confounding variables' (2016) *Columbia Science and Technology Review*; King 2014; Martin, 'Transaction costs, privacy and trust: The laudable goals and ultimate failure of notice and choice to respect privacy online'; Kirsten Martin, 'Do Privacy Notices Matter? Comparing the Impact of Violating Formal Privacy Notices and Informal Privacy Norms on Consumer Trust Online' (2016) 45 *Journal of Legal Studies*. The ICO reports that 53% of British adults are concerned about online activity being tracked, Information Commissioner's Office, 'Information Rights Strategic Plan: Trust and Confidence' (2018) Only '20% would be happy for their data to be shared with third parties for advertising purposes,' IAB Europe, *Europe online: an experience driven by advertising*, 2017); See, Royal Statistical Society, *The data trust deficit: trust in data and attitudes toward data use and data sharing*, 2014) 'the public showed very little support for 'online retailers looking at your past pages and sending you targeted advertisements,' which 71% said should not happen', 5; Six in ten (60%) respondents have already changed the privacy settings on their Internet browser and four in ten (40%) avoid certain websites because they are worried their online activities are monitored. Over one third (37%) use software that protects them from seeing online adverts and more than a quarter (27%) use software that prevents their online activities from being monitored. See, Eurobarometer, *Flash Eurobarometer 443: Report on e-Privacy*, 2016). Those results are reflective of an earlier survey by Eurobarometer from 2011, which found that '70% of Europeans are concerned that their personal data held by companies may be used for a purpose other than that for which it was collected. See, Eurobarometer, *Report on Attitudes on Data Protection and Electronic Identity in the European Union*, 2011); Similar concerns persist in the United States where a 2015 Pew Research Centre survey found '76% of [United States] adults say they are 'not too confident' or 'not at all confident' that records of their activity maintained by the online advertisers who place ads on the websites they visit will remain private and secure.' Respondents in that survey also expressed the least confidence in online advertising as opposed to any other category of data processor, including social media platforms, search engines, and credit card companies to keep data secure, 50% said that no information should be shared with 'online advertisers.' See, Mary Madden and Lee Raine, *Americans' Attitudes About Privacy, Security and Surveillance*, 2015).

consider compliance with data protection requirements as the necessary conditions for legally justified infringements of privacy, the analysis above illustrates that such conditions are being systemically violated by the AdTech market at present such that even this minimal understanding of privacy is not satisfied. The result, as the next part examines, is a perpetuation of a legal context in which privacy rights are ailing, importing consequences for individual autonomy, and the Rule of Law.

2.6 The Impacts of Privacy Infringements

It would be inaccurate to claim that the impact of private policy in diluting and diminishing individual privacy is active only in the AdTech landscape. This is evidently not the case as is indicated by the Union's engagement with privatised ethics systems for artificial intelligence²⁵⁶ and an expressed commitment to the regulation of facial recognition technologies on a similar notice and consent basis.²⁵⁷ However the AdTech market is currently the venue through which the privacy rights of the majority of the EU's citizens are engaged and the mechanism through which the right to privacy is most systemically redefined by the operation of private policy.

By allowing the compilation of large data sets from which layered profiles of individuals' actual and inferred preferences, characteristics and activities can be assembled, AdTech allows the revelation of intimate and detailed portraits of individuals. This, in itself, is harmful in as much as the fundamental right to privacy in EU law propounded by both the CJEU and ECtHR emphasises the right as crucially linked to the development of personal identity.²⁵⁸

Where privacy is infringed, individuals' capacity for personal identity development is thus jeopardised by forcing conditions in which individuals are unable, or do not feel able to make choices which accurately or meaningfully reflect their preferences in furtherance of their personal development. This threat is compounded in the context of AdTech which actively seeks to utilise coercive and manipulative tactics to influence consumer attention and preferences, in circumstances where the means of avoiding such tactics are not present. In that context individuals experience proportionate reductions in their capacity to choose without external influences but also experience

²⁵⁶ European Commission "Ethics Guidelines for Trustworthy AI" at (<<https://ec.europa.eu/digital-single-market/en/news/ethics-guidelines-trustworthy-ai>>) accessed 17 March 2020.

²⁵⁷ Oscar Williams, 'EU softens plans for facial recognition regulation, sparks privacy backlash' *The New Statesman* (<<https://tech.newstatesman.com/gdpr/eu-facial-recognition-regulation>> accessed 17 March 2020).

²⁵⁸ Case C-208/09 *Sayn Wittgenstein* EU:C:2010:806, [52]; Case C-391/09 *Malgozata Runevic-Vardyn* EU:C:2011:291, [66]. In the ECtHR see, *X v Iceland*; *Gaskin*. The State's refusal to provide the applicant access to records it held regarding his time in care was a violation of Article 8; *Ciubotaru v Moldova*; *Odievre*; *Karashev*; *Stjerna*.

chilling effects to their exercise of uninhibited choice or action resulting in the active diminution of individual autonomy.²⁵⁹

The European Union's understanding of privacy as fundamentally related to the development of personality, and thus to individual autonomy, recognises that the capacity for individual development diminishes as privacy does.²⁶⁰ Where such restriction of individual self-development occurs, the result is that, at a societal level, individuals are impeded from critical engagement with the processes of democratic self-government due to their impaired ability to fulfil their roles as active and engaged citizens. Citizenship, in a European context, is thus understood as more than a status, as a set of social practices whose fulfilment includes voting, public debate, and political opposition which are influenced by institutional mores.²⁶¹ The protection of privacy and the promotion of autonomy and individual liberty is thus constitutive of a healthy Rule of Law.

Privacy's importance lies in its ability to offer individuals a space in which their identity will not subject them to sanction or discrimination and thus to ensure personal autonomy without self-monitoring.²⁶² Where individuals' actions are actively monitored for further use privacy rights (including data protection rights) thus act 'both as a shield against vulnerability and a sword in its service' screening the existence and protecting against the exploitation of individual identity through privacy based controls.²⁶³ In the digital marketplace it is precisely these identity based characteristics which provide the most valuable data points, and which can be seized upon to manipulate the attention, or choices of individuals.²⁶⁴ This can contribute to, and exacerbate, social inequality by providing a mechanism to delineate distinct consumer groups and enabling

²⁵⁹ On the autonomy harms implicated in this work see chapter 4.

²⁶⁰ See, Poullet, 'The Right to Informational Self-Determination and the Value of Self-Development: Reassessing the Importance of Privacy for Democracy'; *X v Iceland* Application no 6825/74 (ECHR, 18 May 1976); Niemietz; *Dudgeon*, [41]; *Klass*; *Big Brother Watch and Others*; Case C-208/09 *Sayn Wittgenstein*; Case C-391/09 *Malgozata Runevic-Vardyn*, [66].

²⁶¹ Commission Communication, 'The Commission's Contribution to the Period of Reflection and Beyond: Plan D for Democracy, Dialogue and Debate' COM (2005) 494, 2-3; Andrew Williams, *The Ethos of Europe: Values, Law and Justice in the EU* (Cambridge University Press 2010), 154-156. See also, Ireneusz Pawel Karolewski, *Citizenship and Collective Identity in Europe* (Routledge 2010), 108-112 on the shift from a model of caesarean effective citizenship to one based on a deliberative model; John JH Weiler, 'To be a European Citizen: Eros and Civilisation' in John JH Weiler (ed), *The Constitution of Europe* (Cambridge University Press 1999).

²⁶² Cohen, 'Privacy, visibility, transparency and exposure' 181, 194; Bloustein, 'Privacy as an aspect of human dignity: An answer to Dean Prosser'; Fried, *An anatomy of values: Problems of personal and social choice*; Rachels 1975; Rosen, *The unwanted gaze: The destruction of privacy in America*; Bozovic (ed), *The Panoptican Writings by Jeremy Bentham*; Foucault, *Surveiller et punir*.

²⁶³ Calo, 'Privacy, Vulnerability and Affordance' 198.

²⁶⁴ Alessandro Acquisti, 'Privacy and Human Behaviour in the Information Age' 184, 185.

companies to engage in social sorting, cultivating high value and excluding low-value customers from goods and services – deciding what is relevant and to whom.²⁶⁵

While it may be tempting to argue that, in an EU context, the GDPR provides an effective means of limiting the use of such sensitive data under Article 9, prohibiting profiling through Article 22 and the pseudonymisation requirements of Article 32(a) the existing legislative provisions appear to have little effect on the practical operation of the AdTech market and its agglomeration of individually permissible data points to build composite profiles of consumers for use in behavioural advertising. Certainly reducing privacy to data protection in its legislative schema and declining to engage in a substantive enumeration of the content and scope of privacy rights the autonomy and identity based harms identified here and in chapter four, and which form a crucial part of privacy-harms are not vindicated by the Union's current laws.²⁶⁶

Individual privacy harms, are small, dispersed and are infrequently manifested as tangible harms. As a result of their character Solove has likened privacy harms to a bee sting which alone is an irritant which may go unnoticed but when multiplied can cumulatively prove fatal. Significantly, privacy also implicates broader social values. Indeed, several scholars have recognized privacy as 'constitutive' of society.²⁶⁷ Reidenberg in particular contends that 'society as a whole has an important stake in the contours of the protection of personal information'²⁶⁸ while Post has asserted that privacy protection 'safeguards rules of civility that in some significant measure constitute both individuals and community'²⁶⁹ as part of a pattern of distributive effects which Strahilevitz describes noting that, as a result, privacy has impacts far beyond the impact of the single individual acting.²⁷⁰

Schwartz, in particular, has developed the theory of constitutive privacy focusing on the protection of information privacy furthers self-governance and democracy while Richards's concept of 'intellectual privacy' also recognizes the broader social importance of privacy and argues that intellectual privacy 'should be preserved against private actors as well as against the state' because

²⁶⁵ Virginia Eubanks, *Automating Inequality: How High-tech Tools Profile, Police and Punish the Poor* (St Martin's Press 2017), 6.

²⁶⁶ Calo, 'Digital Market Manipulation'.

²⁶⁷ Professor Spiros Simitis recognizes that 'privacy considerations no longer arise out of particular individual problems' rather, they express conflicts affecting everyone, Spiros Simitis, 'Reviewing Privacy in an Information Society' (1987) 135 *University of Pennsylvania Law Review* 707.

²⁶⁸ Joel R Reidenberg, 'Privacy Wrongs in Search of Remedies' (2003) 54 *Hastings Law Journal* 877, 882-883.

²⁶⁹ Robert C Post, 'The Social Foundations of Privacy: Community and Self in the Common Law Tort' (1989) 77 *California Law Review* 957, 959.

²⁷⁰ Lior Jacob Strahilevitz, *Toward a Positive Theory of Privacy Law* (University of Chicago Law School 2013).

‘[w]e are constrained in our actions by peer pressure at least as much as by the state.’²⁷¹ The increasing availability of large volumes of detailed consumer data which can be used to categorise individuals²⁷² thus implicates not only reductions in the privacy of those individuals consenting to the contract but also those who share certain of the characteristics possessed by the consenting parties.²⁷³

Current collection models based on individual consent fail to acknowledge the direct disclosures which the subsequent, largely unregulated uses of individual data can have not only for individuals but also for other members of that individual’s familial, ethnic or religious group and their community more generally and is therefore problematic in its capacity to erode individual privacy rights, an erosion of which is cumulatively damaging to privacy at a collective level.

The development of fundamental rights in both the Charter and the ECHR was motivated by an understanding of the need to vindicate group interests which act as collective counter balances necessary for democracy through individual mechanisms. While a majority may hold a certain belief or position, fundamental rights guarantee a minimum freedom to opposing, and minority groups and positions. Indeed, the ECHR, and the more recent Charter are notable for their inclusion of rights which are demonstrably group based among their protections.²⁷⁴

Similar themes of privacy based on group identity or affiliation characterise academic conceptions of privacy perhaps most notably in works by Bloustein, who has articulated relational or family privacy as a group privacy right.²⁷⁵ Moving beyond privacy as a group right and towards an understanding of privacy as a collective one, this work argues the capacity of privacy to protect individuals from abusive practices and State intrusion relies on a critical mass of individuals enjoying its protection.

²⁷¹ Neil M Richards, *Intellectual Privacy* (Oxford University Press 2017).

²⁷² Sandra Wachter, 'Affinity Profiling and Discrimination by Association in Online Behavioural Advertising' (2019) 35 *Berkeley Technology Law Journal* Forthcoming.

²⁷³ Róisín A Costello, 'The Erosion of Collective Privacy Rights: Toward a Theory of Herd Immunity' Society of Legal Scholars Annual Conference 2019.

²⁷⁴ Within the ECHR the prohibitions on discrimination (Article 14), rights to freedom of thought, conscience and religion (Article 9) and freedom of assembly and association (Article 11), while Articles 10 (freedom of thought, conscience and religion), 11 (freedom of expression and information), 12 (freedom of association and assembly), 13 (freedom of the arts and sciences) and Chapter III (which covers various forms of equality and non-discrimination rights) of the Charter while framed as individually exercisable rights all protect group activity or identification.

²⁷⁵ Edward J Bloustein, 'Privacy as an Aspect of Human Rights: An Answer to Dean Prosser' 39 *NYU Law Review* 962. See also, Thomas Baar Lanah Kammourieh, Jos Berens, Emmanuel Letouzé, Julia Manske, John Palmer, David Sangokoya, and Patrick Vinck, 'Group Privacy in the Age of Big Data' in Luciano Floridi and Bart van der Sloot Linnet Taylor (ed), *Group Privacy*, vol 126 (Springer 2017), 54.

Where a critical mass enjoy and avail of their right to privacy, the privacy of those who are careless or unaware retains a minimal but effective protection. However, if more and more individuals begin to or are unable to exercise their right to privacy the power of the right to protect everyone is reduced. Regan has perhaps come closest to articulating the privacy as a collective social good, likening it to clean air or water²⁷⁶ and noting that ‘if one individual or a group of individuals waives privacy rights the level of privacy for all individuals decreases because the value of privacy decreases ... privacy’s importance does not stop with the individual ... a recognition of the social importance of privacy will clear a path for more serious policy discourse about privacy and for the formulation of more effective public policy to protect privacy.’²⁷⁷

Regan treats privacy as having common, public and collective value reflected in shared meaning and perceptions of what it is under threat. Regan’s articulation, however, is somewhat abstract – concerned with the rhetorical power of privacy in value discourses. However, in a digital context this abstract concern is overtaken by the practical reality that as part of a digital ecosystem which relies on the collection and monetisation of large quantities of personal data, the individual is no longer as central as was previously the case. Data is now gathered and analysed on the basis of patterns and group profiles whose results are used to develop algorithms and policies which are applied on a large scale.

The fact the individual is often no longer central but incidental to these processes, challenges the basis of existing legal practice and social theory, which in the European context, following the Second World War focused on individuals, and group identities or affiliations as reflected in the earliest European human rights documents,²⁷⁸ and now the CFR and ECHR, which grant individuals the right to protection of a specific privacy interest in engaging in relationships and developing family ties.

Privacy in the EU at present does not understand privacy as a collective good but rather protects and contextualises privacy as an individual interest, exercised by citizens atomistically. Yet if all members of a group are protected on an individual basis, it might be ventured that the collective value of privacy itself is protected on a cumulative basis? The answer is no. While this argument would be correct in relation to group privacy, and certainly this appears to be the implicit attitude of the European Union to ensuring group privacy under the Charter and GDPR, the vindication of

²⁷⁶ Priscilla M Regan, *Legislating Privacy: Technology, Social Values and Public Policy* (University of North Carolina Press 1995); Colin J Bennett and Charles D Raab, *The Governance of Privacy: Policy Instruments in Global Perspective* (MIT Press 2006).

²⁷⁷ Regan, *Legislating Privacy: Technology, Social Values and Public Policy*, 220.

²⁷⁸ Luciano Floridi and Bart van der Sloot Linnet Taylor, 'Introduction: A New Perspective on Privacy' in Luciano Floridi and Bart van der Sloot Linnet Taylor (ed), *Group Privacy*, vol 126 (Philosophical Studies Series, Springer 2017), 8-9.

privacy as a collective good cannot be assured through a distinct protection of one or several classes of sensitive data.

Rather, the digital capacities which enable greater data collection and analysis mean the loss of privacy of one individual may have an impact on the privacy of others²⁷⁹ and large scale data technologies challenge how individuals can assert or resist identification when their personal information is not individually contextualised. Thus, the revelation by one individual from a geographic area or socio-economic group of certain political preferences, spending habits or content consumption may impact only their own privacy.

However, where this information is collected about a larger portion of the population it can be used not only to profile and target individuals but also to accurately determine the preferences or behaviours of individuals who have sought to otherwise shield those preferences or behaviours through exercising their privacy rights. As a result, their privacy has been eroded and they may suffer negative consequences associated with that erosion, despite their best efforts to vaccinate themselves against such consequences.

Traditionally, the law acts to regulate a market or area where individuals through their acts or omissions generate externalities which impose upon others negative consequences or conditions. Examples of the regulatory effect of the law in seeking to internalise such negative consequences are readily seen in private law - notably in the rule in *Rylands and Fletcher* but also in the contractual principles of privity of contract, the imposition of vicarious liability and more generally in consumer protection secondary laws including product liability secondary laws. On this basis the secondary impacts which current contractual practices have for the privacy rights of those not consenting to their terms supply an additional justification for their amelioration. More broadly, such collective reductions in privacy, and in the protective scope which privacy offers for individual autonomy and personal identity to develop import risks to the realisation of democratic governance and the Rule of Law.

2.7 Conclusion

Building on the decisions of both the CJEU and ECtHR this chapter has described the development of the right to privacy in the EU as one premised on a deontological understanding of privacy as enabling individual autonomy and the development of self, rooted in an understanding of individual dignity. The chapter has charted the Union's failure to translate its apparent allegiance to this

²⁷⁹ Beate Roessler and Dorota Mokrosinska, 'Privacy and social interaction' (2013) 39 *Philosophy and Social Criticism* 771.

understanding as expressed in the decisions of the CJEU and ECtHR into actionable legal standards, instead favouring a market oriented understanding of privacy as reducible to data protection in the Union's secondary law. More significantly, the contours of the right in practice have been defined not by the EU or public actors but, as a result of a deference to freedom of contract and an approach of functional equivalence, to private actors contracting with consumers.

The result has been the adoption of privacy standards within the Union which have been largely ineffective in reducing the privacy harms occasioned by current contractual practices and a private redefinition of what constitutes and who can enjoy privacy in the digital environment.

While the subsequent dilution of privacy is harmful in and of itself it also imports secondary harms in the form of reduced privacy protections for other individuals as part of a reduction of 'collective privacy' a reduction which in turn imports concerns for the Rule of Law through the erosion of the constitutionally protected spaces which facilitate political dissent, and the active engagement with political ideas on which democratic governance and the Rule of Law rely.

CHAPTER THREE

PROPERTY RIGHTS & PRIVATE POLICY IN THE DIGITAL MARKET

3.1 Introduction

Blackstone opined that nothing ‘strikes the imagination and engages the affections of mankind’ to the extent of the right of property.¹ Indeed, property rights have endured as a central, though controversial, tenet of the liberal political schema since the time of Plato and Aristotle.² Contemporaneously, while definitions of property, as right and as concept, differ a majority of fundamental rights documents place the right among the four orienting values of democratic theory, alongside liberty, equality, and security.³

This chapter examines how property rights have been transmuted to the digital context, with a particular focus on how private actors in the digital market mediate individual relationships with digital goods. In its examination the chapter draws a differentiation between consumer and intellectual property rights. While there has been increasing attention to the interaction between intellectual property and fundamental rights in EU law, in particular in relation to the right to freedom of expression,⁴ there has been little engagement with the conflict internal to Article 17 between intellectual property and property rights more generally.

Consumer property rights are understood within the chapter as those rights to own and deal with goods which are held by natural persons as consumers, and which are vindicated by Article 17 of the Charter of Fundamental Rights of the European Union as part two explores. The chapter argues that at present the EU’s legal and policy approach to the relationship between intellectual property and property rights holders, and rights, has consistently favoured intellectual property rights and has progressively limited the capacity of consumers to engage with and exercise property rights in and over, digital goods. This is accomplished specifically through limitations and exclusions of

¹ William Blackstone, *Commentaries on the Laws of England*, vol 2 (1765) Article I, Of Property in General.

² Thomas C Grey, 'The Disintegration of Property' in Richard A Epstein (ed), *Modern Understandings of Liberty and Property* (Garland Publishing 2000), 295

³ Pierre-Joseph Proudhon, *What is Property* (Cambridge University Press 1994), 37.

⁴ See, Laurence R Helfer, 'Mapping The Interface Between Human Rights And Intellectual Property' in Christopher Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015), 5; Dirk Voorhoof, 'Freedom of Expression and the Right to Information: Implications for Copyright' in Christopher Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015), 331; Laurence R Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence' (2003) 5 *Minnesota Intellectual Property Review* 47.

consumer capacities to use, transfer and possess digital goods and the failure of consumer protection standards to intervene and assure minimum consumer property rights.

The chapter begins, in part two, by outlining the nature of the rights conflict under examination before turning in part three to examine the existing judicial and constitutional understanding, and protection, of individual and intellectual property rights in EU law and the philosophical justifications which underpin such rights. In this part the chapter examines the brittle constitutional understanding of property rights within EU law and how this brittle character underpins the imbalances identified. Part four then turns to examine how intellectual property and consumer property rights have found expression in the Union's secondary law.

This part emphasises the failure of individual property rights to successfully cross the Rubicon from constitutional to legislative expression, and the failure of the Union's secondary law to recognise both the destructive and constructive capacities of intellectual property in its secondary law. Part five examines the third feature, namely the Union's adoption of a regulatory approach of functional equivalence when dealing with the digital and traditional markets. The resulting impacts on individuals' capacity to engage with and exercise proprietary rights in digital goods, and the secondary impacts of such interferences are examined in part six.

3.2 The Conflict Between Intellectual and Consumer Property Rights in the Digital Market

Rose, in her efforts to predict the future of consumer property at the dawn of the digital age argued that, contrary to public assumptions, property systems are neither free nor cheap.⁵ Rather, Rose argues, there is a significant cost involved in defining property rights, monitoring trespass to those rights and enforcing them. As a result, society has constructed systems of registration for property which is considered important (such as land, or cars) with institutional regulations which decline in size and cost relative to the value of those items it seeks to protect.

Historically, Rose's argument mirrors that made by Demsetz in his examination of property rights protections by reference to the effects of an increase in the value of beaver pelts in early colonial Quebec and Labrador. The increase in price in that context led to the development of a system of proto-property rights in response to the overhunting that resulted from an increase in the value of the pelts.⁶ Demsetz described these property rights as a solution to the costs of the previous communal regime – in other words the increased costs of a private property regime-which entails

⁵ Carol M Rose, 'The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trade and ecosystems' (1998) 83 *Minnesota Law Review* 129.

⁶ Harold Demsetz, 'Toward a Theory of Property Rights' (1967) 57 *American Economics Review* 347.

marking and enforcing boundaries, among other things-became worthwhile only after the value of the hunted animals went up.⁷

Both Demsetz and Rose proposed, as a result of their examinations, that changes in the technological or administrative costs of establishing, monitoring and exchanging property prompted parallel shifts in property regimes⁸ and that the future direction of property lay where savings were to be made. In the context of the digital market these observations have proved apposite. In an environment in which digital goods are suddenly valuable, incentivising regulatory practices which can monitor the exchange of digital property and minimise both the risks and costs of such property being misappropriated have become not only desirable but necessary.

In this context intellectual property protections have been coupled with contractual clauses and built in restrictions on interoperability and use as part of a system of ‘digital rights management’ (DRM). DRM technologies seek to control the use, modification, and transfer of works protected by intellectual property rights, through systems within devices that enforce these policies.⁹ Measures which seek to ensure intellectual property is protected are neither unusual nor problematic in and of themselves. However, the agglomeration of DRM and contractual restrictions which are currently employed in the digital market exceed traditional restrictions on tangible goods and content by effectively limiting to the point of non-existence the capacity of consumers to transfer, use and possess digital goods and content.¹⁰

This is accomplished largely through the creation of limited, and unilaterally revocable licenses in digital content in particular as well as in digital goods¹¹ in accordance with which termination can

⁷ Ibid, 351-3.

⁸ Rose, 'The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trade and ecosystems', 133.

⁹ See iOS 12 terms (<<https://www.apple.com/legal/sla/docs/iOS12.pdf>>) accessed 27 March 2019.

¹⁰ Apple is currently the world’s largest music retailer, and a market leader in the provision of other digital content including e-books and audiobooks, television and film and is also one of two platforms through which mobile applications are available for download and sale. The iTunes store describes the content it makes available through transactions with users as ‘purchases’ and invites users to ‘buy’ or ‘rent.’ (“is available through App Store are licensed and not sold to you” and “each Transaction you acquire a license to use the Content only. Each Transaction is an electronic contract between you and Apple, and/or you and the entity providing the Content on our Services.”) Despite this, Apple’s terms of service Ronald Krotoszynski, *Privacy Revisited* (Cambridge University Press) specify that consumers enjoy only a license in their ‘purchases’ or the content they ‘buy’ and prohibits users from renting, leasing, loaning, selling or otherwise distributing to others the content they purchase (“ You agree not to modify, rent, loan, sell, or distribute the Services or Content in any manner, and you shall not exploit the Services in any manner not expressly authorized.”) The TOS further provide that although customers may redownload previously acquired content to devices associated with the same Apple ID, content may not necessarily be available for re-download in other jurisdictions

¹¹ Amazon provides this content on terms having the same result as those used by Apple, and grants consumers a “non-exclusive, non-transferable right to use ...for your personal, non-commercial purposes” as well as prohibiting resale, rental, lease or other transfer of purchased items. “Amazon or its content providers grant you a limited, non-exclusive, non-transferable, non-sublicensable license to access and make personal

occur where users fail to comply with the conditions of the licenses which prohibit alteration, or alienation and carry further conditions prohibiting future use where those conditions are violated.¹² This effect is only heightened because private actors lock users in – associating proprietary hardware, software and content with their offerings to prevent consumers from alternating between providers to force more advantageous, or at a minimum, more competitive market conditions.¹³

This trend has not gone unremarked. Perzanowski and Schultz,¹⁴ and Fairfield¹⁵ writing in a US context have argued that the combination of aggressive enforcement of intellectual property rights, restrictive commercial practices and technological locks (through DRM) have combined to weaken end user control over digital goods and fundamentally undermine the capacity of individuals to exercise ownership over their goods. Fairfield refers to this trend as part of a rise of ‘digital serfdom,’¹⁶ with Perzanowski and Schultz referring to it as part of the ‘end of ownership.’ Writing on the European context Jütte,¹⁷ Helberger,¹⁸ Guidaut,¹⁹ and Schovsbo and Schwermer have noted similar patterns, with Schovsbo and Schwermer in particular emphasising that legislative

and non-commercial use of the Amazon Services ... No Amazon Service, nor any part of any Amazon Service, may be reproduced, duplicated, copied, sold, resold, visited, or otherwise exploited.” Similarly to the TOS used by Apple, Amazon reserves the right to refuse service, terminate accounts, remove or edit content, or cancel orders at their sole discretion. Similarly to the TOS used by Apple, Amazon reserves the right to refuse service, terminate accounts, remove or edit content, or cancel orders at their sole discretion

¹² Ibid.

¹³ Nor are such contractually enabled limitations exclusive to these two companies, rather they have become a norm not only in digital but also in physical goods. Aspen, the legal publisher, tied its physical books to an online subscription and demanded the return of the physical text books at the end of the course Daniel Nazer, *Aspen to Students: Your Property Book is Not Your Property* (2014); John Deere Olivia Solon, 'A right to repair: why Nebraska farmers are taking on John Deere and Apple' *The Guardian* (<<https://www.theguardian.com/environment/2017/mar/06/nebraska-farmers-right-to-repair-john-deere-apple>> accessed 20 March 2019 and Tesla both impose restrictive conditions on how consumers may use or interact with their vehicle Andrew J Hawkins, 'Tesla won't let you use your self-driving Model X to drive for Uber' *The Verge* (<<https://www.theverge.com/2016/10/20/13346396/tesla-self-driving-ride-sharing-uber-lyft>> accessed 20 March 2019. Senator Elizabeth Warren in her policy platform as part of her Presidential bid has announced the right to repair as a specific area of concern with relation to its impacts on farmers, see, Senator Elizabeth Warren, *Levelling the Playing Field for America's Family Farmers* (2019). In respect of this lock-in through hardware and software restrictions and the control of markets it enables, the conduct of Amazon and Apple bears a striking resemblance to the strategy employed by AT&T during the nineteenth and twentieth centuries in the United States when that company maintained strict control over its communications infrastructure and prohibited interconnections as part of the ‘Bell System.’ Tim Wu, *The Master Switch: The Rise and Fall of Information Empires* (Knopf 2010); Jonathan E Neuchterlein and Philip J Weiser, *Digital Crossroads: Telecommunications Law and Policy in the Internet Age* (2nd edn, The MIT Press 2013); Peter Temin, *The Fall of the Bell System* (Cambridge University Press 1989). See also, Bernd Justin Jütte, 'Coexisting digital exploitation for creative content and the private use exception' (2016) 24 *International Journal of Law and Information Technology* 1.

¹⁴ Schultz, *The End of Ownership: Personal Property in the Digital Economy*.

¹⁵ Fairfield, *Owned: Property, Privacy and the New Digital Serfdom*.

¹⁶ Ibid.

¹⁷ Jütte, 'Coexisting digital exploitation for creative content and the private use exception'.

¹⁸ Joris van Hoboken and Natali Helberger, 'Looking Ahead—Future Issues when Reflecting on the Place of the iConsumer in Consumer Law and Copyright Law' (2008) 31 *Journal of Consumer Policy* 489.

¹⁹ Natali Helberger and L Guibault, 'Clash of Cultures - Integrating copyright and consumer law' 14 *Info* 23.

interventions as part of EU law have led to a risk of ‘over enforcement’ of intellectual property rights at the expense of consumers.²⁰

Against this background, Samuelson’s articulation of the ‘right to tinker,’²¹ as well as Perzanowski and Schultz’s proposal for the extension of exhaustion to digital goods²² and Fairfield’s argument for the recognition of consumer rights to hack,²³ repair,²⁴ and sell²⁵ have been proposed as potential solution in the United States. While rights of repair²⁶ and extensions of exhaustion²⁷ have also been considered in the European Union the primary focus has been on the capacity of consumer protection to re-orientate the balance between the property interests at stake in such transactions.

Consumer law has, to date, been unsuccessful in re-orientating the property interests of intellectual property rights holders and consumers. Helberger and Guibault argue this can be attributed in part to the challenges in integrating copyright and consumer law as a result of their diverging understandings of rights, property and the internal market.²⁸ This argument however, neglects the standing of consumer rights as part of consumer protection within the Union’s constitutional documents, and the cross-definitional nature of the rights interests involved in such conflicts²⁹ recognised in the idea of user rights within the CJEU’s jurisprudence, albeit that such a concept is both poorly defined and contested.³⁰

Moreover, the broad nature of the property protection afforded under Article 17 of the Charter, and the justification for the protection of property which both the ECtHR and the CJEU have implicitly endorsed supports the idea of intellectual property as protecting right holders in as much as such

²⁰ Sebastian Schwermer and Jens Schovsbo, 'What is Left of User Rights? Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime' in Paul Torremans (ed), *Intellectual Property Law and Human Rights* (4th edn, Wolters Kluwer 2020).

²¹ Pamela Samuelson, 'Freedom to Tinker' (2016) 17 *Theoretical Inquiries in Law* 563.

²² Schultz, *The End of Ownership: Personal Property in the Digital Economy*; Jason Schultz and Aaron Perzanowski, 'DigitalExhaustion' (2011) 58 *UCLA Law Review* 889.

²³ Fairfield, *Owned: Property, Privacy and the New Digital Serfdom*, 189.

²⁴ *Ibid*, 191.

²⁵ *Ibid*, 199.

²⁶ Jessika Luth Richter Sähra Svensson, Eléonore Maitre-Ekern, Taina Pihlajarinne, Aline Maigret, Carl Dalhammar, *The Emerging Right to Repair legislation in the EU and the US*, (2018).

²⁷ Exhaustion as a means of remediating this imbalance in relation to digital goods has been rendered unlikely following the recent decision in Case C-263/18 *Tom Kabinet* EU:C:2019:1111. On exhaustion more generally see, Péter Mezei, *Copyright Exhaustion: Law and Policy in the United States and the European Union* (Cambridge University Press 2018).

²⁸ Guibault, 'Clash of Cultures - Integrating copyright and consumer law'. See also, Helberger, 'Looking Ahead—Future Issues when Reflecting on the Place of the iConsumer in Consumer Law and Copyright Law'.

²⁹ See, part 3.4.

³⁰ Pascale Chapdelaine, 'The Ambiguous Nature of Copyright Users’ Rights' (2013) 26 *Intellectual Property Journal* 1.

protection is necessary for furthering broader societal goals. This is examined in the proceeding part.

3.3 Brittle Constitutionalism: Defining Property Rights under the Charter

In the EU, property rights are reflected in the constitutional traditions of Member States³¹ as the CJEU examined in *Nold*³² and later in *Hauer*,³³ as well as in legislative provisions governing property and succession law at a national level. The development of constitutional schema for the protection and enforcement of property rights is historically contextualised, in Europe, as resulting from the deliberate dismantling of feudalism, whose central feature was a hierarchy of estate and ownership and the exclusion of large classes of individuals from ownership or control of property on an individual basis.³⁴ In this context, property rights, and national schemes of property protection emerged to replace feudal ordering with a system which would promote equality and freedom through conferring on individuals the capacity and power to deal with or alienate individual property.³⁵

Yet, in any society with an interest in avoiding the accumulation of power enabled by small groups controlling large amounts of individual property as was the case under feudalism, it is necessary to have, not only a system of rules to enable that objective, but also a justification for doing so which will enable the scope of such rules to be determined. In particular, theories of property are faced with a need to distinguish those arguments which support the right of property in general from arguments which support the existence of a specific system of property rights.³⁶

The inclusion of property protections in fundamental rights documents have proved controversial as a result of disagreements over just this issue – whether and what specific system of property

³¹ Allan Rosas, 'Property Rights' in Allan Rosas (ed), *The Strength of Diversity: Human Rights and Pluralist Democracy* (Springer 1992), 132-157; As examples of the national guarantees of individual property see Article 14 of the German Constitution, Articles 2 and 17 of the French Constitution, Article 33 of the Spanish Constitution, Article 42 of the Italian Constitution, Article 17 of the Greek Constitution, Article 14 of the Dutch Constitution all of which guarantee rights to private property.

³² Case C-4/73 *Nold v High Authority* EU:C:1974:51.

³³ Case C-44/79 *Hauer v Land Rheinland-Pflaz* EU:C:1979:290.

³⁴ See generally, Jerome Blum, *The End of the Old Order in Rural Europe* (Princeton University Press 2017).

³⁵ Grey, 'The Disintegration of Property', 296.

³⁶ Jeremy Waldron, *The Right to Private Property* (Clarendon Press 1988).

ought to be recognised, rather than whether the right of individual property itself ought to be acknowledged and protected.³⁷ Despite this controversy, protections of individual property are included in Article 17 of the Universal Declaration of Human Rights³⁸ (UNDHR), in the European Convention on Human Rights (ECHR) in Article 1 to the First Protocol and most recently, and most relevantly for this article, in Article 17 of the Charter of Fundamental Rights³⁹ which protects property, including intellectual property.

3.3.1 *The Ambiguous Framing of Article 17*

Article 17 provides that ‘[e]veryone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions.’ The Article goes on to stipulate that no person may be deprived of his or her possessions, ‘except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss.’ The Article further stipulates that the ‘use of property may be regulated by law in so far as is necessary for the general interest.’

In contrast to this relatively comprehensive articulation, Article 17(2) provides only that ‘intellectual property shall be protected.’ Geiger has noted that 17(2) is thus remarkable not only for uplifting an economic right to constitutional status⁴⁰ in a context in which intellectual property rights are increasingly used as investment mechanisms⁴¹ but also for the breadth of its reach *prima facie* which leaves the right open to an abusive interpretation. Indeed, Geiger argues that this threat has been realised, as the provision has been consistently relied on in justifying maximalist conceptions of intellectual property rights in the Union and conceptions of a positive obligation to provide for the protection of such rights.⁴²

³⁷ Jacob Mchangama, *The Right to Property in Global Human Rights Law*, 2011); Jose E Alvarez, ‘The Human Right of Property’ (2018) Working Paper 18-21 Public Law and Legal Theory Research Paper Series .

³⁸ Burca, *EU Law: Text, Cases, and Materials*, 849 *et seq*; Ali Riza Coban, *Protection of Property Rights within the European Convention on Human Rights* (Ashgate 2004).

³⁹ Significantly, the guarantees of Article 17 apply to claims made by legal as well as natural persons. See, See Case C-154/78, 205/78 *Ferriera Valsabbia* EU:C:1980:81, [88] *et seq*; Case C-59/83 *Biovilac v EEC* EU:C:1984:380, [21]; Case C-265/87 *Hermann Schrader HS Kraftfutter GmbH* EU:C:1989:303, [13] *et seq*.

⁴⁰ On this, see Helfer, ‘Human Rights and Intellectual Property: Conflict or Coexistence’.

⁴¹ Christophe Geiger, ‘Implementing Intellectual Property Provisions in Human Rights Instruments: Towards a New Social Contract for the Protection of Intangibles’ in Christopher Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015) 661, 662.

⁴² *Ibid*, 671. Geiger notes, in particular, Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Recital 11; Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, Recital 16; European Commission, ‘Green Paper: copyright in the knowledge economy’ COM(2008)466 final, 4.

The ambiguity which follows from the terse articulation of 17(2) is resolved somewhat through a comparative examination of the provision in other languages. While the provision in English could be read as imposing a positive obligation, the French text states '*l]a propriété intellectuelle est protégée*' (intellectual property is protected). The German version similarly declares '*[g]eistiges Eigentum wird geschützt*' (intellectual property is protected). Both the German and French translations thus imply that intellectual property is to be understood only as one of the classes of property protected under 17 rather than elevating it above those other classes of property as a right requiring specific vindication.

This view is reinforced by the Explanations to the Charter which state, '[t]he guarantees laid down in paragraph 1 shall apply as appropriate to intellectual property.' How 'appropriate' is to be defined remains uncertain. Oliver and Stothers question (but do not offer a definition) whether it might ever be appropriate to grant more protection (or less protection) to intellectual property relative to other forms of property.⁴³ The predominant view, however, seems to be that advanced by Voorhoof⁴⁴ and Geiger⁴⁵ who have argued that in light of the explanation and the structure of Article 17 itself, Article 17(2) should be read as clarifying, for the avoidance of doubt, the inclusion of intellectual property as an aspect of Article 17.

Indeed, such a reading was affirmed in *Scarlett Extended*⁴⁶ and later in *Netlog*,⁴⁷ in which the CJEU clarified that the entry into force of Article 17(2) CFREU did not introduce an absolute protection and inviolability for copyright, a sentiment retrenched in *Luksan*,⁴⁸ where the failure to recognise the copyright interests of a director over one of his movies was defined as a deprivation of a 'lawfully acquired intellectual property right' pursuant to Article 17.

In that case the Court of Justice found ' [t]he protection of the right to intellectual property is indeed enshrined in Art 17(2) of the Charter... There is, however, nothing whatsoever in the wording of that provision or in the Court's case-law to suggest that that right is inviolable and must for that reason be absolutely protected'.⁴⁹

⁴³ Peter Oliver and Christopher Stothers, 'Intellectual Property under the Charter: Are the Court's Scales Property Calibrated?' (2017) 1 Common Market Law Review 54, 517.

⁴⁴ Voorhoof, 'Freedom of Expression and the Right to Information: Implications for Copyright', 343.

⁴⁵ Christophe Geiger, 'Intellectual Property Shall be Protected!?' – Article 17(2) of the Charter of Fundamental Rights of the European Union: a Mysterious Provision with an Unclear Scope' (2009) European Intellectual Property Review 115.

⁴⁶ Case C-70/10 *Scarlett Extended SA v SABAM* EU:C:2011:771.

⁴⁷ Case C-360/10 *SABAM v Netlog* EU:C:2012:85.

⁴⁸ Case C-277/10 *Luksan* EU:C:2012:65.

⁴⁹ *Scarlett Extended*, [43].

It thus appears that Article 17(2) merely confirms that intellectual property rights benefit from the protection and limitations applicable to property rights more generally under Art 17 of the Charter.⁵⁰ The argument, however, was only secondary and the Court did not provide any additional guidance on the scope or implications of Article 17(2).⁵¹

3.3.2 *The Relationship between the Rights Protected under Article 17*

Though Article 17 and (2) are thus understood as being read as coetaneous it remains unclear how this unified right of property which encompasses property rights in general and intellectual property rights in particular should be understood, and what its scope should be. The case-law of the CJEU and ECtHR, however, as well as the text of the Charter, offer some guidance on the scope and content of the rights protected by Article 17.

3.3.2.1 Property Rights as Multi-Component Rights

Though Article 17 protects the right to ‘own, use, dispose of and bequeath’ lawfully acquired possessions, subject to the public interest, the CJEU has offered further guidance in its judgments on the interests which the right vindicates. In *Sky Österreich*⁵² the Court defined individual property as being ‘rights with an asset value⁵³ creating an established legal position under the legal system, enabling the holder to exercise those rights autonomously and for his benefit’⁵⁴ and as encompassing moveable and immoveable property⁵⁵ and as well as immaterial positions such as claims of an economic value.⁵⁶

This view is also in accordance with the broad definition offered in the pre-Charter decision of *Hauer* which emphasised freedom of use, disposal and control.⁵⁷ Within the jurisprudence of the ECtHR the classes of property protected are also widely drawn and are understood as more than

⁵⁰ This also reflects the ECtHR’s earlier conclusions that intellectual property rights, including patents, copyright and trademarks, are “possessions” for the purpose of the right to peaceful enjoyment of possessions. The text of Art 17 Güneş Acar1, *Facebook Tracking Through Social Plug-ins* is based closely on the equivalent right under Art 1, of the First Protocol 1 to the ECHR. See also, Jonathan Griffiths, ‘Constitutionalising or harmonising? the Court of Justice, the right to property and European copyright law’ (2013) 38 *European Law Review* 65.

⁵¹ Caterina Sganga, ‘A Decade of Fair Balance Doctrine, and How to Fix It: Copyright versus Fundamental Rights before the CJEU from *Promusicae* to *Funke Medien*, *Pelham* and *Spiegel Online*’ (2019) 11 *European Intellectual Property Review* .

⁵² Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* EU:C:2013:28.

⁵³ *Ibid*, [35], the Court holding a right has an asset value if granted in return for consideration.

⁵⁴ *Ibid*, [34].

⁵⁵ Steve Peers (ed), *The EU Charter of Fundamental Rights: A Commentary*, 17.1(16).

⁵⁶ *Ibid* 17.1(16).

⁵⁷ Case C-44/79 *Hauer*, [19]-[20].

‘possessions’ as alluded to in the text of Article 1 Protocol 1, and is in fact more accurately and completely articulated by the French ‘*biens*’ used in the French version of the Convention.⁵⁸

Perhaps more significantly, the CJEU has found that measures regulating the use of property must be distinguished from a deprivation of possessions.⁵⁹ Deprivation of possessions, per the decision in *Booker Aquaculture*, requires not only that a person is deprived of property but also that the property is transferred to another person.⁶⁰ This seems similar to the provisions acknowledging *de facto* expropriations recognised under Article 1 Protocol 1 ECHR which finds incorporation through Article 52 of the Charter.⁶¹

Individual property rights in the European regime can thus be said to be multi-component and are infringed where the guarantee of individual property is deprived of its substance but not when it is affected only marginally or when the modalities of its exercise are regulated.⁶² In this respect a parallel can be drawn between the Charter’s conceptualisation of property rights as multi-component, centring on a functional ability to deal with possessions and Honoré’s incidents of ownership. Under Honoré’s schema full, individual ownership is disassembled into eleven constituent incidents.⁶³ Although Honoré does not consider it necessary to demonstrate all of these incidents are present, he does consider it necessary that possession and a sufficient number of further incidents can be identified in order to satisfy the existence of ownership.⁶⁴

Echoing Honoré’s analysis both the CJEU and ECtHR emphasise the ability to control, and act autonomously in relation to property,⁶⁵ in their decisions and consider possession to be a core requirement of individual property while implicitly endorsing a view of property as requiring freedom of use and transfer.⁶⁶ In accordance with this view, rights to property are lost where a central incident or component of their constitution is *de jure* or *de facto* restricted to the point it cannot be exercised.

⁵⁸ See, *Gasus Dosier-und Fördertechnik GmbH*, App no 15375/89 (ECHR, 23 February 1995), [52]; Michael O’Boyle David Harris, Ed Bates and Carla Buckley, *Law of the European Convention on Human Rights* (4th edn, Oxford University Press 2018), 850.

⁵⁹ Case C-44/79 *Hauer* [19].

⁶⁰ Joined Cases C-20/00 ad C-64/00 *Booker Aquaculture* [58] *et seq.* This similarly, finds expression in the ECtHR’s jurisprudence on the limitations to property rights under Article 1 Protocol 1 ECHR.

⁶¹ *Sporrong and Lönnroth* App no 7152/75 (ECHR, 23 September 1982) [63]; *Brumarescu v Romania* App no 28342/95 (ECHR, 28 October 1999), [76].

⁶² Case C-59/83 *Biovilac* EU:C:1984:380, [22]; Case C-177/90 *Kuhn* EU:C:1992:2, [17].

⁶³ A.M. Honoré, ‘Ownership’ in A.A. Guest (ed), *Oxford Essays in Jurisprudence* (Clarendon 1961).

⁶⁴ *Ibid.*

⁶⁵ See, *Loizidou* App no 15318/89 (ECHR, 18 December 1996); *Sporrong and Lönnroth*; *Erkner and Hofauer* App no 9616/81 (ECHR, 23 April 1987).

⁶⁶ See, Honoré, ‘Ownership’.

Yet the multi-component nature of the rights guaranteed under Article 17 offers little guidance in locating the relative scope of the right and how competing property rights are to be balanced against each other. In seeking to answer those questions it is necessary to understand the justifications and intended functions of the rights.

3.3.2.2 The Scope of Article 17

European arguments seeking to justify individual property and its limits can be traced to Plato⁶⁷ and Aristotle⁶⁸ and have endured through the early modern period, in the works of theorists including Hobbes and Hume.⁶⁹ These latter theorists, who focused on the institutional aspects of property, arguing against Greek natural law theories and contending that property rights should be understood as the creation of the State. In this understanding property is understood as a deliberate, socially constructed edifice⁷⁰ entered into ‘by all the members of the society to bestow stability on the possession of...external goods, and leave everyone in the peaceable enjoyment of what he may acquire by his fortune and industry.’⁷¹

Perhaps most prominent among the natural law theorists against whom Hobbes and Hume argued was Locke whose justificatory arguments for individual property focus specifically on the labour theory in accordance with which individuals gain ownership of property by mixing their labour with it.⁷² However, while Locke is most immediately associated with labour theories of property he is only one of a group of theorists whose justifications for property rights centre on ideas of self-ownership and which most accurately represent European articulations of the justification for the

⁶⁷ Plato, *Republic*, 462.

⁶⁸ Aristotle, *Politics*, 126.

⁶⁹ Hume considered there to be nothing natural about private property, writing that until possession is stabilised by social rules, there is no secure relation between person and thing, LA Selby-Bigge and PH Nidditch (ed), *David Hume, A Treatise of Human Nature (1739)* (Clarendon Press 1978), 488, 490.

⁷⁰ Thomas Hobbes, *Leviathan* (Penguin Classics 2016).

⁷¹ Nidditch (ed), *David Hume, A Treatise of Human Nature (1739)*, 489.

⁷² Peter Laslett (ed), *John Locke, Two Treatises of Government* (Cambridge University Press 1988) [27]; Hobbes, *Leviathan*, 84. Mill proposes a labour-based argument similar to Locke though he does not acknowledge the self-ownership argument of Locke. According to Mill the fundamental justification for the institution of private property is the right of producers to what they themselves have produced, a theory not limited to land but which extended to all property. John Stuart Mill, *Principles of Political Economy (1848)* (Oxford University Press 1994), 217. More recently, Doctorow notes the spectre of Locke which has been used to justify colonisation in the real world, locking indigenous and first nations’ peoples out of land held in common because Europeans mixed their labour with it, as well as the racially tinged deployment of intellectual property in a manner which protects western cultural values at the expense of those aspects of cultural works valued by other cultures and communities, see Cory Doctorow, *Cory Doctorow: Terra Nullius* (2019).

protection of consumer interests in property which can be broadly characterised as adhering to personality based property theories.⁷³

In addition to Locke, personality theorists include Kant,⁷⁴ Green,⁷⁵ Radin⁷⁶ and Hegel whose account centred on property's assurance of self-ownership and personhood 'superseding and replacing the subjective phase of personality.'⁷⁷ It is important, however, to distinguish between two distinct types of self-ownership within these theories. The first, is the Lockean idea of self-ownership as necessary to protect against invasions into the private and personal aspects of an individual's life. The second, Hegelian idea of self-ownership also views property as affording a barrier against intrusion, but additionally views self-ownership as a manifestation of individual personality and will in the world - valuable because they are necessary for the individual self-expression that is constitutive of a truly human life. Hegelian personality theorists thus maintain that control over physical and intellectual objects is essential for self-actualization as part of self-ownership.

While judicial considerations of Article 17 have tended to group the Article with the economic rights protected in Articles 15⁷⁸ and 16⁷⁹ the dicta of the Court of Justice in *Stauder*⁸⁰ and later in *Omega Spielhallen*⁸¹ emphasising human dignity, in combination with the textual endorsements of dignity and liberty in the Charter and the Treaties can be read as supportive of a Hegelian understanding of the justifications for individual property as necessary for autonomy or self-ownership in the absence of judicial commentary to the contrary.⁸²

⁷³ This Lockean justification for the protection of property rights is not without difficulties. See, Waldron, *The Right to Private Property*; Proudhon, *What is Property*; Robert Nozick, *Anarchy, State and Utopia* (Blackwell 1974).

⁷⁴ Kant derived connections between individual property and human agency who derived connections between individual property and human agency and suggests that it would be an affront to agency and thus to human personality if a system were not established to permit the use of useful objects or materials, Kant, *The Metaphysics of Morals*, 74.

⁷⁵ Green emphasized the contribution of ownership to the growth of individual, TH Green, *Lectures on the Principles of Political Obligation (1895)* (Longmans Green & Co 1941), though neither Green nor Hegel view individual development as the sole justification or end of property but rather as a stage in a broader pattern of the growth of social responsibility and positive freedom more generally.

⁷⁶ Radin, 'Property and Personhood'.

⁷⁷ Georg Wilhelm Friedrich Hegel, *Philosophy of Right* (Prometheus Books 1996).

⁷⁸ The right to choose an occupation and to engage in work.

⁷⁹ The right to conduct a business; Case C-44/79 *Hauer* [32]; Case C-63/93 *Duff et al v Minister for Agriculture and Food* EU:C:1996:51, [28] *et seq*; Case C-84/95 *Bosphorus v Minister for Transport* EU:C:1996:312, [21]; Joined Cases C-248/95 and C-249/95 *SAM Schuffahrt and Stapf v Bundesrepublik* EU:C:1997:377, [71]; Case C-200/96 *Metronome Musik* EU:C:1998:172, [21].

⁸⁰ Case C-29/69 *Stauder v City of Ulm* EU:C:1969:57.

⁸¹ Case C-36/02 *Omega Spielhallen* EU:C:2004:614.

⁸² Article 15 International Covenant on Economic, Social and Cultural Rights; Case C-4/73 *Nold* [14] referring to the social utility of property.

Of course, it is necessary to explain how this core European constitutional concern of dignity⁸³ encapsulates a personality justification expressed as concern with self-ownership and self-determination. The central commonality between dignity and self-ownership lies in the European constitutional understanding of dignity as relational⁸⁴ perhaps best articulated by the German Federal Constitutional Court who noted,

This [freedom to determine and develop himself] is based on the conception of man as a spiritual-moral being endowed with freedom to determine and develop himself. This freedom within the meaning of the Basic Law is not that of an isolated-self regarded individual but rather [that] of a person related to and bound by the community.⁸⁵

Dignity is thus understood in a European context as ensuring the freedom to develop one's self, through relationships with others and without being obliged to conform to a pre-determined definition of self, imposed by a public power.⁸⁶ In this respect then, dignity is fundamentally linked to and affirming of personality based theories rooted in self ownership and individual development. Dignity based Hegelian theories seek to secure to the individual a core autonomy. This social, function of dignity, and thus Hegelian idea of property finds reflection in the emphasis on social function as the limit of property in the European Union.

As Geiger notes, property rights are understood in the European legal schema as inherently limited by their social function.⁸⁷ In this respect, both the Charter and the second paragraph of Art 1 Protocol 1 ECHR provide for socially oriented limitations on the right to property. The Charter provides that the right may be restricted by the public and general interest while Art 1 of the Protocol provides for the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest.'

The ECtHR echoing this in *Potomska v Poland* noted that 'property ... has a social function which given the appropriate circumstances must be put into the equation to determine whether the fair balance has been struck between the demands of the general interest of the community and the individual's fundamental rights.'⁸⁸ The provision, in both documents for limitations in order to

⁸³ On the place of dignity within Europe's constitutional schema see, Dupré, 'Human Dignity in Europe: A Foundational Constitutional Principle', 325-326.

⁸⁴ Kommers, 'Can German Constitutionalism Serve as a Model for the US?'

⁸⁵ 45 BVerfGE 187, 227.

⁸⁶ Rao, 'Three Concepts of Dignity in Constitutional Law', 222-223.

⁸⁷ Christophe Geiger, 'The Social Function of Intellectual Property Rights, or How Ethics can Influence the Shape and Use of IP Law' in Graeme B. Dinwoodie (ed), *Intellectual Property Law: Methods and Perspectives* (Edward Elgar 2013), 153.

⁸⁸ *Potomska v Poland* App no 33949/05 (ECHR, 4 November 2014), [67].

achieve the public or general interest suggests that the operation of property rights for the furtherance of these objectives is the *status quo*, and intervention should occur only where the maintenance of this general or public interest require active intervention by the State.

This, Hegelian, justification of property as serving an autonomy preserving function in the general interest is the most accurate articulation of the implicit justifications of individual property within the framing values of the Charter enumerated in its preamble – namely human dignity and freedom as well as the other rights included within the Charter’s text (notably Article 1) and the text of Article 2 TEU. Read in concert these provisions support a view of Article 17 as part of a legal landscape which prioritises personal autonomy and human dignity. This position is further supported by the ECtHR’s statement that ‘the very essence [of the ECHR] is respect for human dignity and human freedom.’⁸⁹

The inclusion of intellectual property as an aspect of Article 17’s broader protection complicates the justificatory account of property within the Charter somewhat, intellectual property having historically different justifications than property rights more generally. The developmental origins of intellectual property protections within the European constitutional schema offer some help in this regard.

Article 27 UNDHR provides all individuals have the right to ‘protection of the moral and material interests resulting from scientific, literary or artistic production of which he is the author ... everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.’ Drafted less than three years after the end of the Second World War the Article was understood as offering a practical means of ensuring scientific and creative works were not used in a discriminatory manner and recognising that individuals enjoyed a right to share in the benefits of their creations.⁹⁰

The emphasis of Article 27 on enabling societal participation, militating against discrimination and seeking to vindicate personal interests in the emanations of an individual’s creative capacities is echoed in the International Covenant on Economic, Social and Cultural Rights⁹¹ (ICESCR). The ICESCR guarantees, in Article 15(c), the rights to take part in cultural life, enjoy the benefits of scientific progress and the application and to benefit from the protection of the moral and material

⁸⁹ *SW v United Kingdom*, App no 20166/92 (ECHR, 22 November 1995).

⁹⁰ Steve Peers (ed), *The EU Charter of Fundamental Rights: A Commentary*, 490 *et seq.*

⁹¹ Which all EU Member States have ratified.

interests resulting from any scientific, literary or artistic production of which individual is an author.⁹²

The justifications for intellectual property offered by the text of both the ICESCR and the UNDHR thus endorse a Hegelian understanding similar to that which underpins individual property, in as much as Hegel's personality-based justification of intellectual property rights includes an incentive-based justification on the basis that the protection of intellectual products promotes their proliferation for the benefit of society.⁹³ This reading finds further support in the jurisprudence of the CJEU as well as several pre-Charter decisions as Husovec has argued.⁹⁴

The next question which must be answered, is why and how consumer rights in property arise in the context of Article 17 given the scope of intellectual property as defined by its justification. Guibault has argued, for example, that consumer rights as politically granted, legislative rights lack the normative weight necessary to 'outweigh' intellectual property rights claims.⁹⁵ Yet such an argument in the context of Article 17 would ignore the constitutional character of consumer protection within the Union under both the Treaties,⁹⁶ and under the Charter.⁹⁷ Even on a conservative reading of consumer protection as a mere principle rather than a right under the Charter it must still be understood as a normative provision intended to guide the interpretation of other fundamental rights.⁹⁸ There is thus support for the idea of consumer rights generally in the Union's constitutional documents.

More specifically however, can it be said that there is a right to consumer property under the Charter? It is argued that it can. Intellectual property rights under the Charter and in accordance with a Hohfeldian notion of jural correlation must be held *vis a vis* a duty bearer. Those duty bearers are consumers. However, the social function of intellectual property also dictates the limits of this duty and its correlated right. The limits of intellectual property under the Charter are dictated by individual (or consumer) interests in property as part of a Hegelian understanding of property as necessary for self-determination as part of the autonomy necessary for the development of

⁹² Though it is notable that no parallel obligation is imposed in respect of individual property, the reasons for such parallel treatment are beyond the scope of this article.

⁹³ Hegel, *Philosophy of Right*

⁹⁴ Martin Husovec, 'The Essence of Intellectual Property Rights under Article 17(2) of the Charter' (2019) 20 *German Law Journal* 840.

⁹⁵ Guibault, 'Clash of Cultures - Integrating copyright and consumer law', 28.

⁹⁶ Article 169 Treaty of the Functioning of the European Union.

⁹⁷ Article 38 Charter of Fundamental Rights of the European Union.

⁹⁸ Iris Benohr, *EU Consumer Law and Human Rights* (Oxford University Press 2013), 64-65; Vanessa Mak, 'Two levels one standard? The multi-level regulation of consumer protection in Europe' in J Devenney and M Kenny (ed), *European Consumer Protection: Theory and Practice* (Cambridge University Press 2012).

individual personality. On this basis intellectual property rights, while rights within a Hohfeldian schema, are neither an absolute, nor the only, discrete category of rights recognised by the Charter.

Rather, intellectual property rights are recognised as exceptions (albeit constitutionally sanctioned ones) to a general schema in which the status quo is of individual interactions with and power over property. Intellectual property rights permit privately emanating restrictions on individual rights over and in relation to the property but do not extinguish these broader, subsisting rights.

This category of broader subsisting rights, given intellectual property's private nature (operating as between a right-holder and a consumer or group of consumers), must thus be characterised (however improperly characterised it is elsewhere) as a consumer right to exercise certain interests in property in as much as those exercising the rights are participants in the demand-side of the market for that property. In this schema both consumers and intellectual property rights holders are duty bearers and rights holders in respect of distinct rights which must be appropriately limited by reference to each other.

The broader category of property rights of which intellectual property forms part, is of course subject to freedom of contract. In this respect the ECtHR has held that the Convention will not intervene to vindicate property rights infringements which result from a contract between two private parties the conflict in such cases being a matter for national resolution.⁹⁹ However, this line of jurisprudence must, necessarily be read in light of the absence, under the Convention of a right of consumer protection and the interpretation of other constitutional articles in accordance with that provision. It must also be read in the context of its institutional setting.

The ECtHR is not, unlike the CJEU, the judicial organ of an institution with a policy competence parallel to Article 114, 115 and 169 TFEU nor is it situated in an institutional structure which places, as the EU does, such an emphasis on consumer rights. The assertion that freedom of contract operates as a total bar to recognition of a broader consumer interest in property is thus questionable.¹⁰⁰ Moreover, as chapter eight examines in detail, consumer protection has been used to limit freedom of contract within EU law.

Reading the core constitutional documents of the Union, along with those fundamental rights documents which contributed to their framing, a Kantian or Hegelian personality-based theory of

⁹⁹ *Gustafsson* App no 1107/04 (ECHR, 25 April 1996), [60]; *James and Others*, App no 8793/79 (ECHR, 21 February 1986), [35].

¹⁰⁰ Arjen van Rijn, 'Right to the Peaceful Enjoyment of One's Possessions' in Fried van Hoof Pieter van Dijk, Arjen van Rijn and Leo Zwaak (ed), *Theory and Practice of the European Convention on Human Rights* (4th edn, Intersentia 2006), 864.

rights emerges in which property is understood as part of a constitutional schema concerned with dignity and self-ownership central to the preservation of individual autonomy. The idea that such a constitutional culture would stop short of Article 17 would be to impose an artificial restraint on the Charter's character to retrospectively justify decisions and policies of the Union which have failed to reflect it. That there has been a failure to give voice to a coherent, Hegelian understanding of the scope of Article 17 within the CJEU's jurisprudence or secondary law is not indicative of its absence, but rather of a fragmentary and often contradictory understanding of the constitutional character and limitations on the scope of intellectual property within the Union.

3.3.3 The Normative Case for Consumer Property Rights

Before this chapter moves to consider the fragmentary nature of the Union's constitutional understanding of property it is necessary, drawing on what has been outlined, to chart the normative case for the inclusion of consumer property rights within Article 17. Fundamentally, this justification lies in the need to locate the appropriate compromise between the constructive and destructive understandings of property which are entailed in any system of property rights and particularly within Article 17.

The European justification of rights and of property rights, rooted in theories of dignity and self-determination can be considered broadly constructive in the relation it draws between property, personhood and controls on power. Despite this, personality theories may seem, on their face, to conflict with the distributive values of equality and solidarity enumerated in the preamble of the Charter as a result of the inevitable tensions between how individuals wish to act or use their goods and the collective good in how such goods should be used.¹⁰¹ However, it is more accurate to say that personality theories while constructive, also import destructive potentials for the same values they seek to protect – and which must be balanced against each other.

These twinned constructive and destructive potentials are illustrated by Marx's analysis of the means by which constructive impacts of property possession for one individual have corollary, destructive effects on the personhood of others, in the context of the eighteenth century enclosures of common land.¹⁰² Marx suggested that as a result of enclosure, while small classes of the population gained exclusive rights in land, broader classes of individuals were deprived of their previously communal means of production and subsistence. The result of that deprivation was a loss by individuals of control of their own labour with the result that they were unable to fully

¹⁰¹ GA Cohen, *Self-ownership, Freedom and Equality* (Cambridge University Press 1995).

¹⁰² Karl Marx, *Capital: A Critique of Political Economy (1887)* (International Publishers 1967).

realize themselves as persons through their work, being obliged to work for others under conditions over which they had no control.¹⁰³

In Foucault's account, without access to common land or control of private land, individuals were obliged to migrate and participate in workplaces characterised by embedded surveillance, punishment and discipline mechanisms designed to induce conformity and maximise productivity.¹⁰⁴ A similar enclosure and redefinition of rights has taken place in the digital market as intellectual property rights are used to concentrate ownership, and power, among a small proportion of private actors. There are, of course, dissimilarities between the physical enclosures Marx and Foucault consider and the intellectual enclosure occasioned by digitisation. The primary divergence results, perhaps obviously, from the differences as between tangible and intangible property concerned in each example.

Drawing on this difference Van Dijk has argued that enclosure in the digital environment does not suffer from the 'tragedy of the commons.'¹⁰⁵ This is correct in as much as intellectual property, which is intangible, is a supposedly non-rivalrous resource with the result that use by multiple parties does not diminish its utility. The argument, however, does not identify the tension between achieving an intellectual commons in which all members can participate and protecting the economic and moral interests of those who create the content on which the commons is based. It fails, in other words, to identify the tension between constructive and destructive understandings of property.

While the intellectual capacity on which intellectual property is based is, writ large, non-exhaustible, the individual contributions to that common pool of intellectual works rely on a legal construct of finite-ness to incentivise their creation, and therefore ensure the existence of a common intellectual pool. In this context there is, in fact, an intellectual corollary to the traditional tragedy of the commons – by allowing the abuse and uncontrolled use of intellectual property such content and creation will simply cease to be a viable means of earning a living, and will not be produced.

The need to incentivise creation through protection, however, is equally threatened by the intellectual enclosure currently taking place in the name of intellectual property rights protection. The failure to balance incentives for users who view the costs of content over which they can exercise little

¹⁰³ Ibid.

¹⁰⁴ Michel Foucault, *Discipline and Punish* (Penguin 1991), Part II, Article 1.

¹⁰⁵ Niels van Dijk, 'Property, privacy and personhood in a world of ambient intelligence' (2010) 12 *Ethics of Information Technology* 57.

control as too high, has by many accounts resulted in an increase, rather than a decline, in breaches of intellectual property rights.¹⁰⁶

This is acknowledged, albeit indirectly, in *Musik Vertreib*¹⁰⁷ and later in *Centrafarm* in which case the CJEU endorsed a view of intellectual property as justified by reference to the need to ensure that the rights holder's creative output is protected.¹⁰⁸ Indeed, this justificatory understanding of intellectual property is clearly present in the Copyright Directive.¹⁰⁹ Recital 11 of the Directive provides that the Directive aims to provide a rigorous, effective system for copyright protections in light of the role of such protection in 'ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.'¹¹⁰

The example of enclosures is thus relevant for the historical parallel they offer to current restrictions of access to and interaction with digital goods. The challenge facing any system seeking to guarantee property is to reconcile the tension the enclosures expose between the individually constructive capacity of property rights for discrete portions of a community and the destructive capacity of those same rights for others. The historical parallel has a further relevance, however, in as much as it highlights the role of the state in making value laden policy decisions which define property in ways which are claimed to be both neutral and natural, when neither is necessarily the case.¹¹¹

Indeed, central to the loss of autonomy occasioned by the re-organisation of property in Marx's account, was the reclassification of traditional, common land rights and uses, as civil and criminal interferences with the property rights of others. This shift was subsequently articulated by Foucault as occasioning a transition from 'illegality of rights' to 'illegality of property'¹¹² in an 'effort to adjust the mechanisms of power that frame the everyday lives of individuals.'¹¹³ It was not that

¹⁰⁶ World Economic Forum, *Digital Media and Society Implications in a Hyperconnected Era*, 2016); Morten Hviid and Sofia Izquierdo Sanchez and Sabine Jacques, *Digitalisation and intermediaries in the music industry* (CREATe Working Paper 2017/07, 2017).

¹⁰⁷ Case C-55/80 *Musik Vertreib* EU:C:1981:10 [12].

¹⁰⁸ Case C-15/74 *Centrafarm v Sterling* EU:C:1974:114.

¹⁰⁹ Directive 2001/29/EC OJ L 291, 24–47, Recital 6. which implements the provisions of the WIPO Copyright Treaty 1996 and the WIPO Performances and Phonograms Treaty 1996 into European law as well as harmonising the copyright laws of the various Member States.

¹¹⁰ In particular, Article 6bis. It should of course be noted that moral rights are not harmonised at an EU level, see, Jane C Ginsburg, 'A Tale of Two Copyrights: Literary Property in Revolutionary France and America' (1990) 64 *Tulane Law Review* 991.

¹¹¹ On the hypocrisy of 'respect for property' arguments which underwrote the enclosure movement see, James Boyle, 'Fencing off Ideas: enclosure and the disappearance of the public domain' (2002) 2 *Daedalus* 13, 14.

¹¹² Foucault articulated as a transition from 'illegality of rights' to 'illegality of property,' Foucault, *Discipline and Punish* 86-7.

¹¹³ *Ibid*, 77.

common land nor the existence of rights in it had been normatively transformed in the eighteenth century, but rather that political and social expediency demanded a more economically viable system of ordering.

In a modern context, the Union's secondary law and indeed the CJEU's constitutional articulation of property has delineated neatly between intellectual property rights (which are held by small groups as against a more general 'consumer' class as well as the State) and a broader class of diverse and varied property rights (which are held as against the State by the world at large and which are inclusive of intellectual property rights). This distinction artificially bifurcates a broad class of property rights into two discrete parcels of rights holders and duty bearers, ignoring the intersection of those classes of actors.

In a diverse range of interpretations, including from legal systems far less oriented toward a Hegelian notion of property, intellectual property is nevertheless understood as intended to enable 'creative self-expression,'¹¹⁴ to facilitate 'play,'¹¹⁵ and to 'participate in the production of culture.'¹¹⁶ These theories, in concert with the constitutional documents of the Union produce an idea of property rights and individual interactions with and interests in property as part of a process of individual self-determination and societal progress.

Under this view property rights in general, and intellectual property rights in particular, serve an economic function but more fundamentally, a social one and property rights are justified not only by reference to their economic value but by the social goods which those economic incentives permit.¹¹⁷

3.3.4 *The Union's Fragmentary Constitutionalisation of Property*

The fragmentary understanding of property rights in the Charter and EU law more broadly can be attributed, in part, to the ambiguity surrounding the structure and relation between the two provisions of Article 17 itself. This ambiguity is only deepened by the apparently contradictory statement in the explanations to the Charter that intellectual property rights are included within the

¹¹⁴ J Liu, 'Owning digital copies: copyright law and the incidents of copy ownership' (2008) 42 *William and Mary Law Review* 1245. See also, J Liu, 'Copyright law's theory of the consumer' (2003) 44 *Boston College Law Review* 397.

¹¹⁵ Julie Cohen, 'The place of the user in copyright law' (2005) 74 *Fordham Law Review* 347.

¹¹⁶ Niva Elkin-Koren, 'Making room for consumers under the DMCA' (2007) 22 *Berkeley Journal of Law and Technology* 1119.

¹¹⁷ See, in a similar argument about the interactions of copyright and consumer protection, Jens Schovsbo, 'Integrating Consumer Rights into Copyright Law: From a European Perspective' (2008) 31 *Journal of Consumer Policy* 393, 403.

Charter because of their growing importance within the Community's secondary laws.¹¹⁸ In stating this the explanations are countering the normative justifications for property found elsewhere in the Union's constitutional schema and are also, more problematically, permitting constitutional norms to be dictated by the provisions of secondary law.

Indeed, the minimal language of Article 17(2), and the inclusion of intellectual property within the Charter at all, is surprising given the lack of consensus on whether intellectual property deserves protection as a fundamental right - or should be treated, instead, as a private interest in conflict with other private interests through the law of contract, and to be balanced with fundamental rights.¹¹⁹ Proponents of the latter approach view intellectual property rights as inherently in conflict with fundamental rights and argue that such incompatibility can be resolved only through recognising the alternative, 'primary' right where a conflict arises.¹²⁰

In contrast, proponents of the first view argue that intellectual property and fundamental rights possess equivalent normative value and seek to navigate the balance between the rights in a manner which renders them compatible, if not in consensus. This approach appears to represent the view which the CJEU has sought to advance in *Laserdisken*¹²¹ and in *Metronome*,¹²² and which has been articulated elsewhere leading from the Court's decisions in *Medien*,¹²³ *Pelham*¹²⁴ and *Spiegel Online*¹²⁵ as a constitutionalisation of intellectual property.¹²⁶

There are, however, two issues with this approach as propounded by the Court. The first, is that the Court has largely demurred from recognition of an external influence of other fundamental rights on the scope of intellectual property – allowing a jurisprudence to develop in which intellectual property is presumptively elevated above other fundamental rights as an area which has omnipotently internalised the countervailing forces of other fundamental rights. The second issue is that it is not clear that even if such an external balancing mechanism was recognised, that a balancing approach would, in practice, be appropriate in cases involving intellectual property.

3.3.4.1 Fundamental Rights and the Fair Balance Test

¹¹⁸ Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02).

¹¹⁹ Steve Peers (ed), *The EU Charter of Fundamental Rights: A Commentary* ibid 17(2).04.

¹²⁰ Helfer, 'Human Rights and Intellectual Property: Conflict or Coexistence'.

¹²¹ Case C-479/04 *Laserdisken ApS v Kulturministeriet* EU:C:2006:549, [60]-[66]; EU:C:2006:292, [68].

¹²² Case C-200/96 *Metronome Musik* [21].

¹²³ Case C-469/17 *Funke Medien* EU:C:2019:623.

¹²⁴ Case C-476/17 *Pelham and Others* EU:C:2019:624.

¹²⁵ Case C-516/17 *Spiegel Online* EU:C:2019:625.

¹²⁶ Christophe Geiger, "'Constitutionalising" Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union' (2006) 37 *International review of industrial property and copyright law* 371; Christophe Geiger and Elena Izyumenko, *The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, But Still Some Way to Go!* (Centre for International Intellectual Property Studies 2019).

The CJEU has been consistently presented with cases requiring a balance or compromise to be located as between intellectual property and other rights. Thus, in *Metronome Music*¹²⁷ the Court of Justice was asked to decide the appropriate balance to be struck as between the intellectual property rights protected by Article 1 of the Rental Directive¹²⁸ and the applicant's freedom to pursue a trade. Eight years later, in *Laserdisken*¹²⁹ a Danish company, which had long relied on exhaustion exceptions to copyright protections in order to trade in copies of cinematographic works, challenged the validity of Article 4(2) InfoSoc Directive¹³⁰ and its system of regional exhaustion as a disproportionate violation of its freedom of expression rights.

The CJEU rejected both claims, using a two-step 'loose proportionality assessment' as part of which the Court first identified the rights and freedoms to be weighed against each other¹³¹ and then turned to evaluate the validity of the measure restricting the rights identified asking whether the restrictions were in accordance with the law, justified in light of the general interest and necessary and proportionate to the legitimate aim pursued or whether it constituted a non-justifiable interference impairing the very substance of the rights guaranteed.¹³²

However, this analytical approach later altered with the CJEU's decision in *Promusicae*.¹³³ In that case, the Court was asked whether EU law obliged Member States to impose an obligation on ISPs to communicate personal data of their customers in the context of civil proceedings. The CJEU declined to acknowledge the existence of such an obligation, rejecting the applicant's attempt to derive it from the protection of intellectual property under Article 17 of the Charter.

To support its conclusions, the Court introduced two key interpretative prescriptions. The first was the requirement that EU directives be read as permitting a 'fair balance' to be struck between the fundamental rights protected by the European legal order.¹³⁴ The second was the use of fundamental rights as interpretative tools to ensure that national measures transposing EU directives were read in accordance with fundamental rights and the general principles of EU law.¹³⁵ Both prescriptions

¹²⁷ Case C-200/96 *Metronome Musik* EU:C:1998:172.

¹²⁸ Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) OJ L 376.

¹²⁹ Case C-479/04 *Laserdisken* EU:C:2006:549.

¹³⁰ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 167.

¹³¹ The protection of intellectual property rights was qualified as a general principle of EU law in *Metronome* and part of the right to property in *Laserdisken*, [51]-[53].

¹³² *Ibid*, [60]-[66].

¹³³ Case C-275/06 *Promusicae* EU:C:2008:54.

¹³⁴ As reflected in Directive 2001/29, Recital 31.

¹³⁵ *Promusicae*, [68].

required the formulation of clear balancing criteria, which might be applied consistently in subsequent decisions. These have not been forthcoming. Instead, subsequent decisions have added only ancillary or indirect clarifications, reinforcing an *ad hoc*, case by case approach to decisions.¹³⁶

In *Painer*¹³⁷, the Court refused to use freedom of expression to broaden the scope of an exception provided by Article 5(e) InfoSoc¹³⁸ in favour of the defendant-newspapers, arguing that the provision's goal was not to strike a balance between Article 10 of the Charter and intellectual property concerns. The effect of the decision, in practice, was to narrow the criteria established in *Promusicae* by limiting the fundamental rights which could be used as interpretative tools to those which the legislature had explicitly sought to protect through the provision at stake. The second interpretative prescription was thus narrowed significantly. The more significant impact however has been the restriction of the first interpretative prescription, that of fair balance, which has similarly been interpreted restrictively in decisions subsequent to *Promusicae*.

Confronted with a fact pattern similar to that of *Promusicae*, the Court in *Bonnier Audio*¹³⁹ upheld a Swedish provision which permitted injunctions obliging ISPs to disclose users' data in civil proceedings concerning copyright infringement. The assessment of the fair balance remained cursory in *Bonnier* conducted as part of the proportionality analysis and suggested a synonymity between the notion of 'fair' and the notion of 'proportionate' thus confusing the nature of the analysis which was to be undertaken, fragmenting an apparently unified approach into several ambiguously differentiated tests.¹⁴⁰

Some attempt to redress this ambiguity emerged in *Sky Österreich*.¹⁴¹ In that case the Court was asked to consider the validity of conditions that permitted the unauthorized and uncompensated use by broadcasters of short excerpts of events of public interest under Article 15(6) of Directive 2010/13/EU.¹⁴² In its decision the Court introduced a two-step analysis for the assessment of a fair balance. The first step required the Court to verify whether the contested provision affected the core content or essence of the freedom at stake (in this case the freedom to conduct a business). Once the Court established that that freedom could still be exercised, the Court then moved to the second

¹³⁶ Sganga, 'A Decade of Fair Balance Doctrine, and How to Fix It: Copyright versus Fundamental Rights before the CJEU from *Promusicae* to *Funke Medien*, *Pelham* and *Spiegel Online*'.

¹³⁷ Case C-145/10 *Painer* EU:C:2013:138.

¹³⁸ Exceptions for use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings.

¹³⁹ Case C-461/10 *Bonnier Audio and Others* EU:C:2012:219.

¹⁴⁰ *Ibid*; Sganga, 'A Decade of Fair Balance Doctrine, and How to Fix It: Copyright versus Fundamental Rights before the CJEU from *Promusicae* to *Funke Medien*, *Pelham* and *Spiegel Online*'.

¹⁴¹ Case C-283/11 *Sky Österreich* EU:C:2013:28.

¹⁴² *Ibid*.

step - an evaluation of the proportionality of the interference as provided for under Article 52 of the Charter.

The second step of this analysis is thus a strict proportionality analysis which, in accordance with Article 52 asks whether the limitation is necessary and genuinely meets the objectives of general interest recognised by the Union or is necessary to protect the rights and freedoms of others. Sganga refers to this final requirement as the 'real' fair balance test, which seeks to locate an answer as to whether the impugned measure strikes the appropriate balance between the requirements of protection resulting from the two fundamental rights at stake.¹⁴³

In applying the test in *Sky Österreich*, the Court noted that based on the facts of the case the exception was proportionate and legitimate, as it was in the public interest and sought to protect the right to receive and impart information, while leaving to intellectual property rights holders the possibility to charge for the use of their programs through other channels.

In the later decision of *UPC Telekabel*,¹⁴⁴ which again concerned blocking measures by an ISP to end copyright infringements, the Court appeared to implement parts of the test but provided substantially less detail on its application. Subsequently, in *Coty Germany*¹⁴⁵ the CJEU specified that a measure which results in a serious infringement of a Charter right is to be regarded as contrary to the fair balance requirement, though it declined to specify whether this was a result of a failure to satisfy the proportionality requirements of the fair balance test or a result of a differing analytical approach.

Coty concerned the validity of a provision in German law which permitted banking institutions to refuse to disclose the name and address of an account holder. The law was relied on by the respondent, Stadtparkasse, in refusing to identify an account holder linked to an online seller of perfumes which was operating in violation of an exclusive licensing agreement. The CJEU concluded that by excluding any possibility for rights holders to acquire information on the infringers' data, the impugned provision infringed the essence of the applicant's right to an effective remedy under Article 47 and their right to the protection of intellectual property under Article 17 of the Charter.

The Court thus found a fair balance had not been achieved and determined there was no need to proceed further with the proportionality assessment. While this was in line with the decision in *Sky*

¹⁴³ Sganga, 'A Decade of Fair Balance Doctrine, and How to Fix It: Copyright versus Fundamental Rights before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online'

¹⁴⁴ Case C-314/12 *UPC Telekabel Wien* EU:C:2014:192.

¹⁴⁵ Case C-580/13 *Coty Germany v Stadtparkass* EU:C:2015:485.

Österreich, the decision in *Coty* crystallised the assumption that an infringement of the essence of a fundamental rights presumptively excludes the possibility of proportionality which appeared implicit in *Telekabel*. This approach was subsequently followed in *McFadden*¹⁴⁶ and was confirmed in *Bastei Lubbe*.¹⁴⁷ Significantly, in the context of this chapter the decision in *Nintendo v PC Box*¹⁴⁸ extended this line of jurisprudence to DRM locked content.

In *Nintendo* the CJEU found that DRM measures embedded into videogame consoles must be proportionate, in that they should not prevent activities or devices that have a commercially significant purpose or use other than the infringement of copyright. However, the decision continued to emphasise commercial aspects rather than consumer interests and thus is limited in its contribution to a re-orientation of property interests under Article 17.

Though the fair balance test appeared to settle somewhat in *Coty*, in *GS Media*,¹⁴⁹ the CJEU departed from the fair balance test. In that case, the Court was asked to determine whether the posting of a link to copyrighted content, without the consent of the rights holder, constituted a breach of Article 3 InfoSoc. Emphasising the need for a fair balance between intellectual property and other fundamental rights, the CJEU noted that finding such a breach to subsist would result in chilling effects on the expressive capacities of internet users who were unable to ascertain with certainty whether the linked content had been legitimately posted.

Rather than following the opinion of Advocate General Wathelet and find that hyperlinks be excluded from the scope of Article 3 InfoSoc, the Court introduced an additional criterion to identify illegitimate conduct under the Directive, requiring knowledge or a reasonable expectation of the illegitimate nature of the posted material for liability to attach. The solution sought to balance freedom of expression and intellectual property, but seemed to take place outside the fair balance doctrine.

This *ad hoc* pattern of balancing continued in *Renckhoff*,¹⁵⁰ in which the CJEU found the unauthorized reposting on a school website of a protected picture should not be subject to the criteria established in *GS Media*. The Court differentiated between the two cases on two grounds. The first was that while hyperlinks are necessary to preserve freedom of expression on the Internet, the same cannot be said for the reuse of an image. The second was that hyperlinks do not challenge the author's preventive right to control and eventually block the use of her work, in the same manner

¹⁴⁶ Case C-484/14 *McFadden* EU:C:2016:689.

¹⁴⁷ Case C-149/17 *Bastei Lubbe* EU:C:2018:841.

¹⁴⁸ Case C-355/12 *Nintendo v PC Box* EU:C:2014:25.

¹⁴⁹ Case C-160/15 *GS Media* EU:C:2016:644.

¹⁵⁰ Case C-161/17 *Renckhoff* EU:C:2018:634.

as a direct reposting. In this sense, the CJEU implicitly applied the first step of the fair balance test, identifying the fundamental right at stake. However, rather than proceeding to an assessment of whether the essence of the right or freedom involved was violated, the Court focused instead on the preservation of the effectiveness of Article 3 InfoSoc, limiting the evaluation of the necessity of the restriction to a cursory statement, and omitting the strict proportionality analysis.

The decision in *Deckmyn*¹⁵¹ once more employing a different balancing approach. In that case, the respondent had used a copyrighted image to illustrate a political critique and claimed the use was protected under the parody exception in Article 5(k) InfoSoc. The CJEU, applied the test developed in *Sky Österreich* and explicitly linked the parody exception under the InfoSoc Directive to the right of freedom of expression. While this reversion to the *Sky Österreich* test was welcome, Sganga and others have argued that the Court through its decision implicitly transformed the legislative parody exception into a rights based limit.¹⁵² The decision in *Deckmyn* was thus read as suggestive of a more prominent role for fundamental rights in the development of intellectual property with EU law – and a potential ‘constitutionalisation’ of intellectual property law.¹⁵³

3.3.4.2 Selective and Incomplete Constitutionalisation

The decisions in *Funke Medien*,¹⁵⁴ *Pelham*¹⁵⁵ and *Spiegel Online*¹⁵⁶ offered fuel for arguments that the CJEU is using fundamental rights in shaping the contours of intellectual property law in the Union. The first of the cases, *Medien* concerned an unauthorised publication of German military reports by a newspaper in that jurisdiction. The reports were held by the German government and

¹⁵¹ Case C-201/13 *Deckmyn*.

¹⁵² Sganga, 'A Decade of Fair Balance Doctrine, and How to Fix It: Copyright versus Fundamental Rights before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online'. See also, Jonathan Griffiths, 'Taking power tools to the acquis - The Court of Justice, the Charter of Fundamental Rights and European Union Copyright Law' in Christophe Geiger (ed), *Intellectual Property and The Judiciary* (Edward Elgar 2018).

¹⁵³ Geiger, "‘Constitutionalising’ Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union"; Izyumenko, *The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, But Still Some Way to Go!*; Christophe Geiger, 'The Constitutional Dimension of Intellectual Property' in Paul Torremans (ed), *Intellectual Property and Human Rights* (Kluwer Law International 2008), 101; Christophe Geiger, 'Fundamental Rights as Common Principles of European (and International) Intellectual Property Law' in Ansgar Ohly (ed), *Common Principles of European Intellectual Property Law* (Mohr Siebeck 2012), 223; Sganga, 'A Decade of Fair Balance Doctrine, and How to Fix It: Copyright versus Fundamental Rights before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online'; Tuomas Mylly, 'The Constitutionalisation of the European Legal Order: impact of human rights on intellectual property in the EU' in Christopher Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015).

¹⁵⁴ Case C-469/17 *Funke Medien* EU:C:2019:623.

¹⁵⁵ Case C-476/17 *Pelham and Others* EU:C:2019:624.

¹⁵⁶ Case C-516/17 *Spiegel Online* EU:C:2019:625. Christophe Geiger and Elena Izyumenko, 'The constitutionalisation of intellectual property law in the EU and the Funke Medien, Pelham and Spiegel Online decisions of the CJEU: Progress, but still some way to go!' (2019) Centre for International Intellectual Property Studies Research Paper No. 9.

included information on the deployment of that country's federal armed forces abroad. Seeking to prevent their publication, the German government sought an injunction against the paper claiming the government held the copyright in the reports and their release thus infringed its intellectual property rights. The copyright complaint was upheld at a national level and was subsequently referred to the CJEU.¹⁵⁷

The second case, *Pelham*, concerned the permissibility of unlicensed sampling of music, in particular a series of rhythms from a song written and recorded by the applicant which had been used in a song subsequently recorded by the respondent. The applicant complained the use of the rhythms constituted an infringement of their intellectual property rights. While the German court did find there was an infringement they nevertheless ruled that the sampling was permissible in the cause of protecting artistic creativity.¹⁵⁸

Finally, *Spiegel Online* concerned the re-publication by that newspaper of a book contribution made by a German politician. The paper published an article countering claims made by the politician that his contribution to the book had been altered by the publisher. The article claimed that the politician had deliberately misled the public in claiming such an alteration had occurred. The politician sued *der Spiegel* claiming that in reproducing the content they had infringed his copyright and the matter was subsequently referred to the CJEU.¹⁵⁹

Geiger has argued that two features in particular of the resulting decisions of the CJEU lend support to the idea that the Court is 'constitutionalising' intellectual property. The first is the recognition by the court of intellectual property exceptions in secondary law as 'user rights' and the second, is the capacity of intellectual property law to internalise fundamental rights in a manner which permits such rights to shape the internal contours of the area.¹⁶⁰ Both these features of the judgments however, lead (at best) to a selective and incomplete constitutionalisation of intellectual property.

¹⁵⁷ *Ibid*, [24]. In its judgment the CJEU noted that military status reports, such as those at issue, were purely informative documents, so that the information and the expression which they contained became indissociable and the reports were, as a result, entirely characterised by their technical function such that it was impossible for the author to express his or her creativity in an original manner and to achieve a result which is the author's own intellectual creation.

¹⁵⁸ German Federal Constitutional Court, "Metall auf Metall", 1 BvR 1585/13, 31 May 2016, DE:BVerfG:2016:rs20160531.1bvr158513.

¹⁵⁹ *Spiegel Online*, [4], [45], [80], [82]. Ultimately, the Court considered that freedom of expression required an interpretation of the quotation exception relied on which viewed hyperlinking as a form of quotation.

¹⁶⁰ *Funke Medien*, [24], [71], [73]-[76]. This is not the first time that the CJEU emphasizes the need to interpret EU copyright law in the light of fundamental rights, including freedom of expression and information: See e.g. CJEU, Judgments in Case C-145/10 *Painer*, EU:C:2013:138, [135]; Case C-201/13 *Deckmyn* EU:C:2014:2132, [27]; *Scarlet Extended*, [54]; *Netlog*, [52]; *Telekabel*, [47]; *GS Media*, [45]; *Mc Fadden*, [90]; and Case C-161/17 *Land Nordrhein-Westfalen v Dirk Renckhoff* EU:C:2018:634, [41]. See also, Christophe Geiger, 'The Role of the Court of Justice of the European Union: Harmonizing, Creating

In its judgments in all three cases the CJEU noted that copyright exceptions should not be understood as simple derogations from the exclusive rights of copyright holders, but rather as self-sufficient rights of users of copyright-protected subject-matter. Though the Court had previously hinted at this understanding in *Telekabel* and *Ulmer*¹⁶¹ in both *Funke Medien* and *Spiegel Online* it emerged explicitly.¹⁶² This concept of user rights is not novel, and has been articulated in a Canadian context by David Vaver¹⁶³ whose analysis of the rights-based nature of copyright exceptions has influenced the Canadian Supreme Court.¹⁶⁴ Yet it is not clear that the Court's description of these exceptions as rights is correct.

Based on Hohfeld's idea of jural correlatives¹⁶⁵ lawful consumers have a legal claim against intellectual property rights holders to exercise rights in those areas which are excepted from the intellectual property schema if they are rights but not if they are privileges or mere defences to copyright infringements. Within a European context, as the decisions discussed indicate, it appears in as much as 'user rights' are recognised within the Union's legal schema they are recognised as defences to copyright infringements in as much as their existence does not impose a correlative duty on the holder of the copyright or other intellectual property right to facilitate the performance of the permitted activities. Rather, when such a breach exists it subsists though the IP rights holder is estopped from enforcing it by the existence of a defence. The exceptions thus operate not as rights but as privileges under a Hohfeldian schema.¹⁶⁶ In this respect then it is difficult to support a claim that this recognition amounts to a constitutionalisation of intellectual property.

The assertion that these decisions amounted a constitutionalisation is also reliant on the opinion of the Advocate General in the cases and the affirmation of that opinion by the CJEU that fundamental rights could be used as an internal mechanism to define the contours of intellectual property. Advocate General Spunzar who delivered the opinion in all three cases considered that freedom of expression had a considerable role to play in defining the limits of intellectual property (and

and sometimes Disrupting Copyright Law in the European Union' in Irimi A Stamatoudi (ed), *New Developments in EU and International Copyright Law* (Kluwer Law International 2016), 435.

¹⁶¹ *Telekabel*, [57]; Case C-117/13 *Ulmer* EU:C:2014:2196, [43].

¹⁶² *Funke Medien*, [70]; *Spiegel Online*, [54].

¹⁶³ David Vaver, *Copyright Law* (Irwin 2000), 169-227. On a critique of the definitional nature of user rights see, Chapdelaine, 'The Ambiguous Nature of Copyright Users' Rights'. For a similar reflection in the context of copyright in the EU, see Christophe Geiger, 'De la nature juridique des limites au droit d'auteur' (2004) 1 *Propriétés intellectuelles* 882.

¹⁶⁴ Canadian Supreme Court, *CCH Canadian Ltd. v. Law Society of Upper Canada*, [2004] 1 SCR 339, [12]; *Théberge v. Galerie d'Art du Petit Champlain Inc.*, [2002] 2 SCR 336; *SOCAN v. Bell Canada*, [2012] 2 SCR 326; and *Alberta (Minister of Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, [2012] 2 SCR 345.

¹⁶⁵ Wesley N Hohfeld, *Fundamental Legal Conceptions: as applied in Judicial Reasoning* (Yale University Press 1923).

¹⁶⁶ *Ibid.*

particularly copyright) protections but did not opine on the capacity of fundamental rights more broadly to serve as limits or exceptions to the scope of copyright protections.¹⁶⁷

In its decisions, the CJEU followed the Advocate General in rejecting an idea of complementing the list of Article 5 with any external fundamental rights exception on the basis that copyright's own internal mechanisms presented sufficient safety valves for balancing intellectual property with freedom of expression rights.¹⁶⁸ In particular, the Court emphasised that the exceptions and limitations provided in existing secondary laws are 'specifically intended ... to ensure a fair balance' between the interests of rightsholders and users of works or subject matter.¹⁶⁹

This is problematic in several respects. First, the Court in the decisions in *Funke Medien*, *Pelham* and *Spiegel Online* appears to indicate that an externally-introduced flexibility beyond the use of a fair balance test could be harmful to legal certainty and intellectual property harmonisation more generally. While balancing exercises have been subject to criticism on the basis of their susceptibility to uncertain, and subjective deployment,¹⁷⁰ balancing as between fundamental rights is, nevertheless, the approach which the Court has adopted in other areas. The suggestion that in the area of intellectual property, and not in others, such uncertainty is not desirable is at best inconsistent.

In addition, the concept of fair balance itself is uncertain in both its content and application through the Court's own decisions. In such circumstances it is hard to ascertain how secondary law has internalised such a test and, more to the point, if it has why the Court has vacillated inconsistently between alternative approaches in its decisions. Fundamentally, this assertion by the Court that intellectual property secondary law has internalised a fair balance with all fundamental rights also assumes a commonality in the normative content of those fundamental rights in accordance with which they all weigh equally as against each other, and as against intellectual property rights. Yet it is not clear that such normative equality is present within the rights schema.

3.3.4.3 Balancing Fundamental Rights and Intellectual Property Rights

This lack of certainty in the Court's own jurisprudence has distracted from the broader concern implicated by cases involving conflicts between intellectual property and other fundamental rights,

¹⁶⁷ C-516/17 *Spiegel Online*, EU:C:2019:16, [63]; C-476/17 *Pelham* EU:C:2018:1002, [54], [77], [98].

¹⁶⁸ *Funke Medien*, [58]; *Pelham*, [60]; *Spiegel Online*, [43].

¹⁶⁹ *Funke Medien*, [70]; *Spiegel Online*, [54].

¹⁷⁰ Stothers, 'Intellectual Property under the Charter: Are the Court's Scales Property Calibrated?', 546; Thomas Kleinlein, 'Judicial lawmaking by judicial restraint? The potential of balancing in international economic law' in Armin von Bogdandy and Ingo Venzke (ed), *International Judicial Lawmaking* (Springer 2012); Niels Petersen, 'How to Compare the Length of Lines to the Weight of Stones: Balancing and the Resolution of Value Conflicts in Constitutional Law' (2013) 14 *German Law Journal* 1387.

namely how far-reaching fundamental rights of an economic nature such as intellectual property are or should be, and whether they are amenable to balancing against other fundamental rights to begin with. In the context of balancing in the ECtHR Helfer notes that, aside from the involvement balancing affords the Court in policy setting, the danger (which has been realised in the case of the CJEU as the examination above details) is that the standards applied become *ad hoc* absent an internalised balancing mechanism.

In the context of intellectual property this potential is augmented by the numerous competing social and economic claims implicated in disputes concerning the right.¹⁷¹ Indeed, Griffith argues that the *ad hoc* danger Helfer identifies has been actualised in the CJEU noting that, despite its pedigree, the concept of the 'fair balance' developed by the Court (on foot of existing ECtHR jurisprudence) is, 'vacuous and unhelpful' becoming useful only when understood as a metaphor for a detailed exercise of substantive comparison between the requirements of competing rights, which has been largely absent.¹⁷²

Adding to this uncertainty, the ECtHR has asserted that economic rights are less deserving of protection than political and civil rights with legal persons in particular, frequently enjoying more limited economic rights under the ECHR than natural persons.¹⁷³ It is not clear, however, whether a similar attitude has been adopted (as Article 52(3) would dictate) by the CJEU. Advocate General Wahl in *OHIM* offered some guidance in relation to intellectual property, echoing the judgment in *Scarlett* and noting,

intellectual property rules are meant to confer certain exclusive rights regarding the exploitation of creations of the intellect in order to foster creativity and innovation. Those exclusive rights are nothing but *sui generis* forms of monopolies which may limit the free circulation of goods or services. Thus, by their very nature, intellectual property rules are mostly trade-related.¹⁷⁴

Given the ECtHR's approach to balancing economic rights the various tests employed by the CJEU which assume equality of normative claims as between intellectual property as economic rights and

¹⁷¹ Laurence R Helfer, 'The New Innovation Frontier - Intellectual Property and the European Court of Human Rights' (2008) 49 *Harvard International Law Journal* 49-50.

¹⁷² Griffiths, 'Constitutionalising or harmonising? the Court of Justice, the right to property and European copyright law', 17.

¹⁷³ Peter Oliver, 'The Protection of Privacy in the Economic Sphere within the European Union' (2009) 46 *Common Market Law Review* 1443; Peter Oliver and Thomas Bombois, 'La liberté d'expression commerciale en droit de l' Union européenne', *Annuaire de Droit de l' Union européenne* (Editions Panthéon-Assasse 2015), 3; Peter Oliver, 'Companies and their Fundamental Rights: a Comparative Perspective' (2015) 64 *International and Comparative Law Quarterly* 661.

¹⁷⁴ Case C-3/15 *OHIM* EU:C:2016:657, [56].

other fundamental rights is questionable.¹⁷⁵ More pragmatically, however, balancing as it is currently employed by the CJEU fails to explain which normative criteria are used to resolve conflicts between fundamental rights leading to *ad hoc* interventions with weak foundations in positive law.¹⁷⁶

Peukert has identified just this problem in the context of freedom of expression, the right which intellectual property has most frequently been argued to conflict with before the CJEU and has argued that rights balancing is particularly inappropriate in such cases as it assumes that both fundamental rights are of equal normative value.¹⁷⁷ In a context in which the issue appears not to be the social function of intellectual property but its capacity to generate a monetary lock-in the presumption of normative equivalence on which the balancing exercise relies becomes still more problematic.¹⁷⁸ In particular it presumes that a private interest (e.g. maximisation of monetary return) is an interest of equal and potentially greater weight in a rights balancing schema to freedom of expression, privacy or the ability of users to exercise property interests in goods and content. Drassinower (albeit writing in a North American context) has similarly argued that the interests vindicated through intellectual property rights highlight the ‘radical insufficiency’ of the concept of balancing in cases of conflict between intellectual property and other fundamental rights.¹⁷⁹

Building on his critique, Peukert argues that deploying intellectual property rights in contexts where they conflict with other fundamental rights requires justification of the rights rather than balancing.¹⁸⁰ In a justification based analysis intellectual property rights are acknowledged as aspects of a constitutionally guaranteed property right but which are given force by the legislature as private rights of dominion which reduce the public domain and whose prevalence and enforcement is subject to tests premised on the social function and public justification of those rights.

¹⁷⁵ Geiger, ‘“Constitutionalising” Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union’; Geiger, ‘The Constitutional Dimension of Intellectual Property’; Mylly, ‘The Constitutionalisation of the European Legal Order: impact of human rights on intellectual property in the EU’.

¹⁷⁶ See, Ginsburg, ‘A Tale of Two Copyrights: Literary Property in Revolutionary France and America’.

¹⁷⁷ Alexander Peukert, ‘The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature’ in Christopher Geiger (ed), *Research handbook on human rights and intellectual property* (Edward Elgar 2015) 131. See also, Daniel Gervais, ‘Making Copyright Whole: a principled approach to copyright exceptions and limitations’ (2008) 5 *University of Ottawa Law and Technology Journal* 1; Laurence Helfer and Graeme W Austin, *Human Rights and Intellectual Property* (Cambridge University Press 2011), 507.

¹⁷⁸ Gervais, ‘Making Copyright Whole: a principled approach to copyright exceptions and limitations’ 89, 92; Christophe Geiger, ‘Fundamental Rights as a Safeguard for the Coherence of Intellectual Property Law’ (2004) 35 *International Review of Intellectual Property and Copyright Law* 268, 273.

¹⁷⁹ Abraham Drassinower, ‘From Distribution to Dialogue: Remarks on the Concept of Balance in Copyright Law’ (2009) 34 *J Corp L* 991, 998.

¹⁸⁰ Peukert, ‘The Fundamental Right to (Intellectual) Property and the Discretion of the Legislature’ 131, 140.

In this context, the jurisprudence of the CJEU has divorced rights of intellectual property from their Hegelian root, obscuring their social function and their relative placement within a broader class of property rights.¹⁸¹ The issue of course, is not only the ambiguity which balancing engenders. Rather, it is the lack of conceptual clarity which results from the Union's failure to accurately define the scope and constituent elements of the right protected by Article 17 in combination with the uncertain jurisprudence of the CJEU which results both from its unprincipled deployment of balancing tests as well as its failure to correctly understand the nature of the relationship between intellectual property rights, and consumer rights.

3.4 Market-Oriented Legislative Preferences

Given the supremacy of the Charter, the secondary law of the Union should mirror the scope of Article 17 and reflect a parallel balancing as between the social and economic aspects of intellectual property, and consumer property interests. However, given the constitutional ambiguities and lack of clarity in defining the right is perhaps unsurprising that this has not been the case. Rather, and in accordance with broader ordoliberal patterns within the Union's secondary law there has been an elevation of the market-oriented principles and a failure to consider substantive, socially-oriented consumer interests.

The intellectual property rights recognised in the European legal order are premised on the understanding that those who create content are inherently invested in the work they produce¹⁸² but that such content generation requires incentivisation. On this basis intellectual property rights are intended to guarantee and support the existence of an intellectual commons from which individuals may draw inspiration. The result, as the Union's secondary law illustrates, is an understanding of intellectual property as uniquely necessary for competitive markets to function¹⁸³ as part of the Union's broader ordoliberal preference for market oriented policy standards.¹⁸⁴

¹⁸¹ Gervais, 'Making Copyright Whole: a principled approach to copyright exceptions and limitations'.

¹⁸² See, Aristotle, *Politics*, 1268a; Rufus C King, 'The Moral Rights of Creators of Intellectual Property' (1991) 9 *Cardozo Arts and Entertainment Law Journal* 267, 270. On a similar vein of moral and economic interests see Lord Mansfield's pronouncements on copyright as a blend of economic and personal (arguably moral) rights in *Millar v Taylor* (1769) 98 Eng Rep 201, 252; Ben Longstaff Richard Davis, Ashley Roughton, Tom St Quintin and Guy Tritton, *Tritton on Intellectual Property in Europe* (4th edn, Sweet and Maxwell 2014), 4-017; King, 'The Moral Rights of Creators of Intellectual Property'.

¹⁸³ Harold Demsetz, 'Toward a Theory of Property Rights' in Richard A Epstein (ed), *Modern Understandings of Liberty and Property* (Garland Publishing 2000).

¹⁸⁴ Christopher Hermann, 'Neoliberalism in the European Union' (2007) 70 *Studies in Political Economy* 61; Stefan Bernhard, 'From Conflict to Consensus: European neoliberalism and the debate on the future of EU social policy' (2010) 4 *Work Organisation, Labour and Globalisation* 175; Kurt W Rothschild, 'Neoliberalism, EU and the Evaluation of Policies' (2009) 21 *Review of Political Economy* 213; Daly, *Private Power, Online Information Flows and EU Law, Mind the Gap*, 36.

Problematically, this understanding of the immediate justification and aim of intellectual property as solely a means of offering creative incentives for market participation offers a distorted view of the social function of intellectual property rights. The more accurate, and complete view of intellectual property's function, as Litman notes (albeit writing from a US perspective), is more than merely encouraging market participation. Rather, and ultimately, intellectual property seeks to ensure 'people will read the books, listen to the music, look at the art, and watch the movies' as part of a pattern of cultural and societal progress and ensuring an appropriate mediation of the competing constructive and destructive capacities of property rights for personhood.¹⁸⁵

During previous centuries this tension was successfully mediated through the imposition of copyright periods,¹⁸⁶ the concept of exhaustion¹⁸⁷ and, in some jurisdictions more than others, fair use.¹⁸⁸ Currently, in the European context limitations have primarily been imposed through the defences and exceptions outlined in Article 5 InfoSec. Article 5 provides technical exemptions,¹⁸⁹ payments of compensation for reproduction,¹⁹⁰ reproductions which are made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage,¹⁹¹ informative purposes,¹⁹² use for the purpose of caricature, parody or pastiche¹⁹³ and demonstration and repair of equipment.¹⁹⁴

However, limitations on the operations of the provisions of Article 5 through contractual terms, as well as the absence of a coherent understanding of how fair balance tests are deployed in relation to its provisions has hampered its capacity to effectively mediate the tension between consumer and intellectual property rights. Moreover, for mechanisms like Article 5 to operate effectively consumers must also be willing, and able, to pay supra-competitive prices for protected works available at near-zero marginal cost elsewhere. An effective system of intellectual property protections must thus convince consumers that a lawful copy is more desirable and provide deterrents to the use of unlawful copies to correctly pitch incentives for both creation and consumption.¹⁹⁵

¹⁸⁵ Jessica D Litman, 'Real Copyright Reform' (2010) 96 Iowa Law Review 1, 13.

¹⁸⁶ Directive 2001/92/EC Article 3(2).

¹⁸⁷ Ibid, Article 4. The doctrine of exhaustion establishes that once a rightsholder transfers a copy of a work to a new owner, its rights against that owner are diminished

¹⁸⁸ Though the EU does not operate an open-ended fair use basis as in the United States Directive 2001/92/EC Article 5 provides an exhaustive list of limitations of copyright.

¹⁸⁹ Directive 2001/29, Article 5.

¹⁹⁰ Ibid, Article 5(2).

¹⁹¹ Ibid, Article 5(2)(c), (d), (a).

¹⁹² Ibid, Article 5 Güneş Acar1, *Facebook Tracking Through Social Plug-ins*(c), (d), (e), (f), (g), (h), (j), (n).

¹⁹³ Ibid, Article 5ibid(k).

¹⁹⁴ Ibid, Article 5ibid(l).

¹⁹⁵ Evi Werkers, *Intermediaries in the Eye of the Copyright Storm - A Comparative Analysis of the Three Strike Approach within the European Union* (KU Leuven 2011); Trisha Meyer, 'Graduated Response in

Article 5, as well as the Union's legislative protections applicable to intellectual property and consumer rights more broadly has neglected to assure this as a practical necessity in framing its provisions. While Recital 3 of the InfoSoc Directive, claims it will ensure '...compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest' as the previous part examined, the balance struck between the rights under the Directive and fundamental rights more generally is ambiguous at best.¹⁹⁶

Moreover, the reference to compliance with rights of 'property, including intellectual property' is not reflected in the text or application of the Directive which has emphasised intellectual property rather than any understanding of property as inclusive of a broader understanding inclusive of consumer rights. The Enforcement Directive similarly presents its aims as ensuring respect for fundamental rights observing, 'the principles recognised in particular by the Charter of Fundamental Rights of the European Union.'¹⁹⁷ Yet as with the InfoSoc Directive there is an absence within its text of an acknowledgement of the competing property interests implicated by Article 17.

In *Hauer* the Advocate General specified that it was not the intention of the European Treaties to 'impose upon Member States or to introduce into the Community legal order any new conception of property or system of rules appertaining thereto.'¹⁹⁸ Indeed, this was a reflection of the acknowledged position within the Community from 1958 following the entry into force of the Treaty of Rome as part of which it was generally accepted that there existed no competence to legislate in the field of intellectual property.¹⁹⁹

The result was that any harmonisation of intellectual property was necessarily to be achieved at an international, rather than an European, level.²⁰⁰ This view that the EEC lacked a competence to legislate in respect of intellectual property was challenged by lawyers and academics who maintained that in certain circumstances the deployment of industrial property rights would result in anti-competitive practices and that the competition provisions of the Treaty of Rome applied as

France: The Clash of Copyright and the Internet' (2012) 2 Journal of Information Policy 107. It is also arguable that, in a marketplace where individuals can not enjoy a predictable ability to retain and deal with 'purchases' have poor incentives to engage with legitimate intellectual property mechanisms and avenues.

¹⁹⁶ Directive 2001/29, Recital 3.

¹⁹⁷ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2011] OJL 167, Recital 32.

¹⁹⁸ Case C-44/79 *Hauer* EU:C:1979:254, 3759 (Advocate General Capotorti).

¹⁹⁹ Richard Davis, *Tritton on Intellectual Property in Europe*, [1-038].

²⁰⁰ This view borne out in the signing of the European Patent Convention in 1973 as a regional European Treaty rather than an EEC legislative measure.

much to such practices as others in as much as they potentially affected the achievement of the Community's internal market.²⁰¹

Subsequent to these challenges, during the 1960s, the CJEU began to consider the relationship between intellectual property rights and the Treaty of Rome, as rights-holders sought to exercise their rights against parallel imports between Member States.²⁰² While initially such cases were considered under the competition provisions of the Treaty, the CJEU then clarified that when considering the exercise of intellectual property rights to prevent trade between Member States the most relevant provisions were the free movement of goods provisions (now Articles 34 -36 TFEU and Articles 30 -36 Treaty of Rome). This in turn led to the development by the CJEU, beginning in *Consten and Grundig*, of the exhaustion of rights principle²⁰³ according to which the rights holder should have only one opportunity to obtain remuneration for their rights but could not prevent parallel imports.²⁰⁴

In parallel to these judicial developments, the European Commission formed the view that harmonisation of intellectual property law was not only possible but desirable in order to achieve the single market.²⁰⁵ The Commission based this view on now Article 114 TFEU (previously Art 100 EEC Treaty and 95 EC Treaty), in accordance with which the legal basis on which an EU secondary law is adopted must be determined according to its main object.²⁰⁶ The Commission reasoned that until intellectual property laws were harmonised, trade in goods protected by such rights within the common market would be substantially hindered.²⁰⁷

²⁰¹ Norbert Koch and Franz Froschmaier, 'The Doctrine of Territoriality in Patent Law and the European Common Market' (1966) 9 Patent, Trademark and Copyright Journal of Research and Education 343; P Bernt Hugenholtz Mireille van Eechoud, Stef van Gompel, Lucie Guibault, Natali Helberger, *Harmonising European Copyright Law: The Challenges of Better Lawmaking*, vol 19 (Information Law Series, Wolters Kluwer 2009), 11 *et seq.*

²⁰² Case C-56/64 *Consten and Grundig v Commission* EU:C:1966:41. On the phases of the CJEU's development of its intellectual property jurisprudence see, Alain Strowel and Hee-Eun Kim, 'The Balancing Impact of General EU Law on European Intellectual Property Jurisprudence' in Ansgar Ohly and Justine Pila (ed), *The Europeanisation of Intellectual Property Law: Towards a European Legal Methodology* (Oxford University Press 2013) 121, 125-128.

²⁰³ See generally, Richard Davis, *Tritton on Intellectual Property in Europe*, [7-009] *et seq.*

²⁰⁴ Case C-56/64 *Consten and Grundig v Commission*.

²⁰⁵ Richard Davis, *Tritton on Intellectual Property in Europe*, [1-040].

²⁰⁶ Case C-155/91 *Commission v Council* EU:C:1993:98. The scope of Article 114 is not unlimited. It cannot be relied on where the sole issue is a disparity between the laws of Member States for example, rather it must be established that the difference sought to be remedied will, when eliminated, actually contribute to the elimination of barriers to the free movement of goods

²⁰⁷ It is not clear whether or not this was a view informed or influenced by the jurisprudence emerging from the CJEU during this period though Tritton has posited that this was indeed the case, Richard Davis, *Tritton on Intellectual Property in Europe*.

The Union's initial harmonisation measures under then Articles 100 and 95 were subsequently challenged, unsuccessfully, in several cases including *Netherlands v European Parliament and Council*.²⁰⁸ In that case the appellant argued that as Member States patent laws were derived from the European Patent Convention (EPC), it was more appropriate that the Convention should be amended rather than Article 114 being used to harmonise national law through the introduction of a new Biotechnology Directive. This argument was rejected by the CJEU who stated there was nothing to prevent the EU legislature from having recourse to harmonisation by means of a Directive in preference to the more indirect and unpredictable approach of seeking to amend the working of the EPC.²⁰⁹

The result is that, the Advocate General's statement in *Hauer* has proved less than accurate as a matter of Union law. In practice, even before the introduction of Article 345, which gave the Union an explicit competence in intellectual property, the European Community had promulgated a comprehensive schema for the protection of intellectual property on the basis of the need to harmonise intellectual property laws to ensure market competitiveness.²¹⁰

The Advocate's remarks in *Hauer* have, however, proved an accurate characterisation of the Union's approach to the protection of consumer rights in property which have received no similar legislative protection. Indeed, it is notably that while the lack of harmonisation as between Member States' intellectual property regimes was seen as a barrier to the development of the single market, no consideration appears to have been given to the differing capacities of consumers to engage with goods as affording similar challenges to market unification.

Certain consumer protection secondary laws, such as the Distance Selling Directive,²¹¹ and later the Consumer Rights Directive²¹² as well as the eCommerce Directive²¹³ offer protection for consumer rights.²¹⁴ However, these laws do not offer a counter-balance to intellectual property rights, but seek

²⁰⁸ Case C-377/98 *Netherlands v Parliament and Council* EU:C:2001:523.

²⁰⁹ *Ibid*, [25].

²¹⁰ Article 51(2) provides that the Charter does not establish any new power or task for the Community or the Union or modify any powers and tasks defined by the Treaties, a limitation mirrored in Article 6 Güneş Acar1, *Facebook Tracking Through Social Plug-ins* TEU and affirmed by *Opinion 2/13* EU:C:2014:2454.

²¹¹ Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [1997] OJ L 144.

²¹² Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance [2011] OJ L 304.

²¹³ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L 178.

²¹⁴ On the interaction of consumer protection and human rights see, Benohr, *EU Consumer Law and Human Rights*.

to re-assert a balance as between consumers and sellers is through notice and consent mechanisms in the contractual process rather than in relation to the contract's substance. The Directive on Unfair Terms in Consumer Contracts²¹⁵ meanwhile, can extend to finding a contractual term unfair where it misrepresented the nature of the property interest acquired by a consumer as being contrary to the requirement of good faith imposed by the Directive.²¹⁶ However, where there is an accurate description of the legal interest within the contract this will, evidently, not apply.

Several of the examples listed in the Annex to the Directive have the capacity to be used in re-asserting rights as between consumers and intellectual property holders. However, many of the examples, including terms regarding unilateral alteration of terms, unilateral change of the characteristics of the product and inappropriate limitations on the rights of the parties are only unfair where they are not provided for explicitly, and justified by the contract.

The example listed in the Annex which has the greatest potential in seeking to re-assert consumer rights in digital goods is the example of the use of terms which irrevocably bind the consumer to terms with which he had no real opportunity of becoming acquainted before the contract is concluded. However, if a seller had complied with the notice and consent architectures employed by the Union in the other secondary laws mentioned above it is unlikely that a claim under this example would be successful. This is all the more so as, the presence on the list of a term is not an automatic recognition of the term's unfairness. The analysis of whether a term is unfair will instead depend on the nature of the goods and services for which the contract was concluded and the circumstances of the conclusion of the contract and its subject matter.

More recent Directives, part of the Union's suite of laws intended to aid the achievement of the DSM offer the potential to move beyond such notice and consent mechanisms. The first Directive, Directive 2019/770²¹⁷ on contracts for the supply of digital content and digital services seeks to facilitate cross-border e-commerce in the Union more broadly by ensuring better access for consumers to digital content and digital services. Yet the Directive focuses largely on ensuring conformity of digital content or a digital services with the terms of contracts rather than providing rights in digital goods.

²¹⁵ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95.

²¹⁶ *Ibid*, Article 3.

²¹⁷ Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (Text with EEA relevance) [2019] OJ L 136.

In its focus on conformity and modification the Directive mirrors the provisions of the Sale of Goods and Associated Guarantees Directive²¹⁸ as well as the Directive on services in the internal market²¹⁹ which operate alongside national law to require that services conform to their represented nature.²²⁰ Moreover, as is the case with the Unfair Terms Directive, the provisions of 2019/770 also defer to contractual ordering, providing that where the conduct is in accordance with the provisions of contract sufficient consumer protection has been achieved.²²¹

Directive 2019/790 on copyright and related rights in the Digital Single Market²²² which is part of the same suite of secondary laws similarly neglects to engage with consumer rights in digital goods. What is notable about the Directive, and what could cautiously be considered an encouraging sign is the prominence afforded to the social and cultural role of copyright exceptions. In particular, the Directive provides for use exceptions for teaching,²²³ research²²⁴ and use by cultural heritage institutions,²²⁵ among others. Yet the Directive falls short of extending this understanding of the social function of exceptions to copyright, to one which countenances opposing rights for individual consumers extending beyond the flawed ‘fair balance’ system which already operates.

3.5 The Union’s Approach of Functional Equivalence in Regulating the Digital Market

The final feature of EU law which has enabled the legislative elevation of intellectual property rights and the Union’s neglect of consumer rights in property, is an approach of functional equivalence in regulating the digital market which defers to freedom of contract as the primary and sufficient mechanism necessary for ordering relationships in the digital market.²²⁶ In the absence of regulation as to the substantive content of contracts, private actors through contractual terms become standard setters for the range and extent of the rights consumers can expect to enjoy in and over digital goods.

²¹⁸ Directive 99/44/EC on certain aspects of the sale of consumer goods and associated guarantees (1999) OJ L171/12. See in particular Recitals 6-12 and Articles 1-5.

²¹⁹ Directive 2006/123/EC on services in the internal market (2006) OJ L 376/36.

²²⁰ *Ibid*, Recital 50, 51 and Articles 22 and 27(2).

²²¹ *Ibid*, Articles 7 and 8.

²²² Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Text with EEA relevance.) [2019] OJ L 130.

²²³ *Ibid*, Article 5.

²²⁴ *Ibid*, Article 3.

²²⁵ *Ibid*, Article 8.

²²⁶ Schultz, *The End of Ownership: Personal Property in the Digital Economy*, 11.

The legislative preferences embodied in the Union's existing consumer protection regulations illustrate this pattern in as much as they outline the absence of interventions to ensure consumer property rights beyond notice and consent mechanisms. This continuing deference largely rests on the misconception that in the digital market as in traditional markets, freedom of contract enables individual autonomy through preserving individuals' freedom of choice. Yet in the digital market it is not clear that the subsisting market features on which such assessments are premised are present.

3.5.1 *The False Narrative of Freedom of Choice in the Digital Market*

Early European measures²²⁷ sought to remove uncertainty about the legal status of online transactions by providing laws which imposed on the digital market, regulatory standards equivalent to those which characterised traditional ones.²²⁸ Indeed, the underlying motivation of the Digital Single Market Strategy is a continuing concern to provide such certainty through the specific promotion of equivalence with a view to furthering economic growth.²²⁹ Most recently, the Directive for the supply of digital content and digital services²³⁰ adopts an approach for the regulation of contracts in the digital market which offers an illustration of the continuing endorsement of approaches of functional equivalence within the Union.²³¹

This approach is hardly surprising. It aligns with the EU's ordoliberal attitude to market regulation more generally which is characterised by a significant deference to an ideal of private ordering through freely given consent.²³² In its thickest or most substantive form consent shapes and allows the individual consenting to shape their interaction with those forces and actors around them and thus constitutes an expression of individual autonomy.²³³ This is the basis on which systems of private ordering premised on freedom of contract base their claim to be, fundamentally, systems which seek to maximise the autonomy of individual actors. Against this narrative, paternalistic interventions in the market by State actors must be effected in such a way as to justify limitations on the autonomy which the market ensures.²³⁴

²²⁷ See, Howells, 'When Surfers Start to Shop: Internet Commerce and Contract Law'.

²²⁸ Directive 2000/31/EC, Article 9.

²²⁹ European Commission, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe COM(2015) 192 final.

²³⁰ Directive (EU) 2019/770 on certain aspects concerning contracts for the supply of digital content and digital services (2019) OJ L 136/1.

²³¹ Post, *In Search of Jefferson's Moose*, 186.

²³² Radin, *Boilerplate: the fine print, vanishing rights and the rule of law*, 19.

²³³ Beauchamp, 'Autonomy and Consent'.

²³⁴ Trebilcock, *The Limits of Freedom of Contract*. On the rejection of this assertion see, Kimel, 'Neutrality, Autonomy and Freedom of Contract'.

However, this understanding of freedom of contract as an autonomy enhancing mechanism, and the suitability of an approach of functional equivalence, presumes the presence of several conditions. In particular it requires the presence of voluntariness, capacity and meaningful choice. A market characterised by absolute voluntariness, free from asymmetries of bargaining power and replete with numerous competing participants remains an ideal. Yet, while shortcomings in the conditions for substantive consent are present in all markets, their prevalence in the digital market is particularly challenging to the functionally equivalent, approach to intervention in the market adopted by the Union.

The primary, and most readily appreciable, difference between digital and offline markets is quantitative, in two ways. The first, is that the digital market is characterised by a small number of private actors who due to their dominance effectively operate as standard setters for the contractual terms used by new entrants as well as among themselves. This feature of the digital market fundamentally differentiates it from traditional market settings. Crucially, in a market with a small number of actors who employ similar terms, individuals enjoy little or no functional choice as to the terms on which they consent to contracts, undermining the normative quality of that consent and posing challenges to the autonomy based theory of freedom of contract which relies on it.

In such a setting, the argument that a user may seek equivalent content or goods elsewhere is impractical, while the argument that user can simply ‘opt out’ and choose none of the offerings is, at best, disingenuous, failing to acknowledge the social and cultural damage occasioned by failing or being unable to engage with the digital environment and digital goods.²³⁵ Compounding this is the presence within the digital market of ‘lock-ins’ which restrict consumer choice by obstructing interoperability between certain content and/or goods restricting consumers from using content provided by one seller on devices provided by another and obstructing the operation of effective competition in which consumers can participate.²³⁶

The second quantitative difference between digital and offline markets relates to the volume and density of the terms to which individuals are asked to consent, and the linking of those terms to normative standard setting.²³⁷ In a market with few supply side participants or normative constraints

²³⁵ *Smith v Maryland* 422 US 735 (1979), Marshall and Brennan JJ dissenting, 1 articulated this necessity particularly well.

²³⁶ Kyle Wiens, 'Apple Shouldn't Get to Brick Your iPhone Because you Fixed it Yourself' *Wired* (<<https://www.wired.com/2016/02/apple-shouldnt-get-to-brick-your-iphone-because-you-fixed-it-yourself/>>) accessed 8 August 2019; Luis E Hestres, 'App Neutrality: Apple's App Store and Freedom of Expression Online' (2013) 7 *International Journal of Communication* 1265; Chaim Gartenberg, 'Amazon strikes deal with Apple to sell new iPhones and iPads' *The Verge* (<<https://www.theverge.com/2018/11/9/18079340/amazon-apple-iphone-ipad-watch-beats-deal-selling-products-online>>).

²³⁷ Jonathan A Obar and Anne Oeldorf-Hirsch, *Clickwrap Impact: Quick-Join Options and Ignoring Privacy and Terms of Service Policies of Social Networking Services* (York University; Quello Centre, Michigan State

private actors can orient their terms to the detriment of consumers to an extent not mirrored in the traditional market. The evidence is that as a result of the volume of terms to which consumers are asked to agree during digital transactions, as well as the low levels of choice as between sellers, two results follow. The first is that consumers are unaware of the content and implications of the terms to which they are consenting.²³⁸ The second is that consumers, even when they are aware of the social necessity of participation in the digital market, and in the absence of market alternatives, consumers consent knowing the only alternative is to abstain from participation in the digital market.

In either circumstance the nature of the context and the functional choice present undermines the quality and validity of the consent which consumers can give. While notice and consent architectures seek to remediate the first of these quantitative differences, absent parallel and substantive consumer protection measures regulating the content of contracts they fail to sufficiently impact contractual practices, and are unable to remediate the lack of alternatives within the digital market.

By failing to aver to these differences EU law is unable to appreciate the normative consequences which flow from them. Instead, European attitudes to the digital market have been characterised by an apparent acceptance that offering superficial prompts to action which consumers do not understand or are not empowered to avail of in a market which lacks alternatives is sufficient.²³⁹

3.5.2 *The Resulting Imbalances between Intellectual and Consumer Property Rights*

The combination of these features, but in particular the deference to freedom of contract has generated a digital market in which the rights which consumers can exercise fail to meet the central incidents of ownership which both the ECtHR and the CJEU have identified as part of their

University and University of Connecticut 2017); Jonathan A Obar and Anne Oeldorf-Hirsch, 'The biggest lie on the Internet: ignoring the privacy policies and terms of service policies of social networking services' (2018) 1 *Information, Communication & Society* 1.

²³⁸ This has been repeatedly demonstrated in the context of privacy choices, Rainer Bohme and Stefan Kopsell, 'Trained to Accept? A Field Experiment on Consent Dialogs' (Proceedings of the SIGCHI Conference on Human Factors in Computing Systems); Simone van der Hof Bart Custers, Bart Schermer, Sandra Appleby-Arnold and Noeline Brockdorff, 'Informed Consent in Social Media Use - The Gap between User Expectations and EU Personal Data Protection Law' (2013) 10 *SCRIPTed* 435; Hartzog, 'The Pathologies of Digital Consent'; Bietti, 'Consent as a Free Pass: Platform Power and the Limits of the Informational Turn'; Jones, 'Analysing the Legal Roots and Moral Core of Digital Consent'.

²³⁹ Schultz, *The End of Ownership: Personal Property in the Digital Economy*, 59-60; Oeldorf-Hirsch, 'The biggest lie on the Internet: ignoring the privacy policies and terms of service policies of social networking services'; Aaron Perzanowski and Chris Jay Hoofnagle, 'What we buy when we "buy now"' (2017) 165 *University of Pennsylvania Law Review* 315; Manoj Hastak and Michael Mazis, 'Deception by Implication: A Typology of Truthful but Misleading Advertising and Labeling Claims' (2011) 30 *Journal of Public Policy and Marketing* 157; Hoofnagle, 'What we buy when we "buy now"', 7.

articulation of the property rights vindicated under the European constitutional schema. Moreover, while limits on the use and management of property by consumers are accepted as legitimate, to an extent they are proportionate to the protection of intellectual property rights, at present there are substantive restrictions on the central incidents of property which exceed those necessary to secure these ends. The result, is a disproportionate restriction on the rights of consumers to own and to use and transfer property under Article 17.

3.5.2.1 Ownership (Possession)

Using Honoré's definitional schema, ownership implies the existence of possession which may be considered a, if not the, central incident of property rights under both the Charter and the Convention. Under the contractual terms permitted by the current legal landscape in the EU, and used by private actors in the digital market consumers 'purchase' digital goods. However, the ownership interest which consumers receive in doing so is merely a license. While licensing is not problematic in and of itself what is problematic are the license terms which restrict the capacity of consumers to claim that they in fact enjoy possession in the goods concerned.

Digital goods remain accessed in this licensing model through a unique identifier and the license is unilaterally revocable at the discretion of the licensor. In fact, even if the item is downloaded to a user device and not accessed 'online' it can only be used when the embedded identifier in the content file is approved by the provider's software as corresponding to the device or user attempting to access it. While this is consistent with licensing it is not clear that possession (as opposed to access) has ever, in fact, been granted to the consumer given the unilateral nature of the license, and the nature of consumers interactions with content.

This ephemerality of consumers' ability to possess goods in the digital environment was pointedly illustrated by Microsoft's announcement in 2019 that its e-book store would cease trading after failing to compete with other retailers in the digital market. Microsoft announced that items purchased through the platform would be removed from user devices and would be unavailable through the platform. While customers received refunds, if their original payment method was no longer valid they would receive a credit to their Microsoft account for use online in the Microsoft Store.²⁴⁰

Precisely how store credit which could no longer be used to purchase books, was intended to replace a carefully selected library, and why users would wish to 'purchase' more content which may then similarly disappear is unclear. Nor could such remuneration compensate the loss of the texts

²⁴⁰ Microsoft, *Books in Microsoft Store: FAQ* (2019)

themselves and the annotations and similar marks of interaction which they bore. What the example illustrates is that the rights of access and interaction with digital goods which currently subsist are neither normatively nor practically comparable to those which subsist in traditional market contexts.

3.5.2.2 Use and Transfer

Property rights in the constitutional documents of the EU, as well as in the constitutional traditions of the Union's Member States, place a premium on alienability and individual capacities to interact with and exercise control over property. In accordance with Honoré's analysis and the jurisprudence of both the CJEU and ECtHR control is a central, though implicit, characteristic of property rights. The implication is that individuals who lack this capacity cannot be said to enjoy an individual property right in the contested goods or material.²⁴¹ Conditions of current licenses for digital goods and content substantially restrict the capacities of consumers to use and transfer digital goods or content in a manner which satisfies alienability and control requirements to establish a right in property.

For example, the contractual terms governing digital goods purchased from Amazon and Apple's platforms do not permit, or permit only restricted or temporary, once-off transfers of digital goods. Their donation or more permanent transfer is not permitted. This inability to transfer content either for non-commercial purposes to other parties, or indeed as between the devices of a user restricts consumer rights in property beyond what is necessary to secure intellectual property rights, and does so to the extent that it functionally negates the existence of a capacity to transfer.

While Article 5 InfoSec does, ostensibly permit transfers and use by consumers, patterns of deference to freedom of contract, an absence of consumer property protections in the Union's secondary law, and a failure to interpret existing secondary law as requiring compliance with a broader socially oriented conception of property has led to a practical situation in which contractual provisions are used to exclude the exercise of such rights.

These capacities in relation to digital goods are currently forfeit as a result of the instability and impermanence of the property interests which are permitted to subsist in the digital market. The result is a digital market composed of goods which consumers can access and interact with only

²⁴¹ Honoré, 'Ownership'.

under such extensive restraints as to make the existence of the incidents of property rights which such interaction should be constitutive of questionable.

Licensing has traditionally meant that the owner of an exclusive right holds this exclusivity in abeyance,²⁴² however, in a digital context the use of licensing might more accurately be described as being a selective permission to access coupled with substantive restrictions on the individual use. This is particularly troubling in circumstances where there is no objective justification for the limited licensing regime in use rather than a digital transposition of the analogue system of sale and intellectual property rights enforcement.

3.6 Privacy Impacts of Consumer Property Rights Infringements

Under a classical, liberal view, the primary function of property rights is twofold, to restrain the government from intrusion upon individual citizens and thus maintain a zone of autonomy and to guide incentives in interpersonal interactions to achieve a greater internalisation of potential externalities.²⁴³ New property rights thus emerge in response to the need to adjust to new cost-benefit possibilities, and indeed this is the basis on which DRM has justified its operation since the emergence of the Internet.²⁴⁴

In the current schema, however, no new rights or protections oriented toward securing greater consumer interests in digital goods have emerged to deal with the challenges associated with digitisation. Instead there has been a redistribution of the risks associated with intellectual property protections which has placed a disproportionate burden on users, negatively impacting their capacity to enjoy rights over individual property and generating externalities in the form of negative impacts on individual privacy – and, as the subsequent chapters establish, for individual autonomy and the Rule of Law.

Much of the debate surrounding, and attention to the impacts of intellectual property rights on other fundamental rights in the digital environment is occupied with considerations of the interactions between intellectual property rights and freedom of expression.²⁴⁵ While the implications of intellectual property protections for academic and scholarly rights and abilities have received some attention²⁴⁶ relatively little focus has been afforded to the more immediate impacts of current

²⁴² JE Penner, *The Idea of Property in Law* (Oxford University Press 1997), 77.

²⁴³ Demsetz, 'Toward a Theory of Property Rights', 125-126.

²⁴⁴ Ibid.

²⁴⁵ See, Voorhoof, 'Freedom of Expression and the Right to Information: Implications for Copyright'.

²⁴⁶ Article 13 of the Charter is perhaps the most evident context in which a conflict might occur, see also Case C-479/09 *Laserdisken* EU:C:2010:571, [60]-[66]. In a US context this has been touched on briefly in Schultz, *The End of Ownership: Personal Property in the Digital Economy*, 6.

enforcement practice on rights to privacy.²⁴⁷ Yet, the technologies that have eroded individual property have also negatively impacted individual privacy by enabling platforms which provide copyrighted content to generate precise and detailed records of user behaviour and preferences which can be used to surveil user behaviour for targeted advertising.²⁴⁸

When a user purchases a film on iTunes, Apple charges the consumer and associates the 'purchases' with that user's device and Apple identifier which links to a record of previous purchases across Apple's platforms. More significantly, iTunes inserts pieces of microcode into the purchased file that notifies Apple when it is opened, by whom, when and where it is viewed and which portions are viewed, or skipped most frequently.²⁴⁹ While this code is embedded under the auspices of intellectual property protection, to prevent users copying, sharing or otherwise using the file except in accordance with their license it also functions as an effective means of consumer surveillance.

3.7 Conclusion

By privileging intellectual property rights without a corollary insurance for consumer property interests, the European Union has implicitly endorsed a hierarchy of property rights which values the commercial viability of intellectual property (as enforced by private actors) above securing the broader interests which subsist as part of the property rights protected by Article 17. In some respects, this is hardly surprising, the Union has had a demonstrable record in advancing an ordoliberal approach to policy evaluation and legislative enforcement.²⁵⁰

However, in light of the broader implications for individual autonomy - allowing the current imbalance to persist is increasingly untenable. In the longer term, the persistence of such imbalances will distort competition within the market by offering established actors who do not provide interoperable content or devices, and effectively locking out market entrants. A rights-oriented understanding of consumer protection law would mediate the constructive and destructive potentials of the systems of property which currently subsist in EU law by re-orientating the balance between the competing understandings and protections of consumer and intellectual property and the social and economic aspects of Article 17.

²⁴⁷ Case C-461/10 *Bonnier Audio AB v Perfect Communication Sweden AB* EU:C:2012:219.

²⁴⁸ Chris J Hoofnagle, 'Digital Rights Management: Many Technical Controls on Digital Content Distribution can Create a Surveillance Society' (2004) 5 *The Columbia Science and Technology Law Review* 1; Julie E Cohen, 'DRM and Privacy' (2003) 18 *Berkeley Technology Law Journal* 575.

²⁴⁹ Cohen, 'DRM and Privacy'; Hoofnagle, 'Digital Rights Management: Many Technical Controls on Digital Content Distribution can Create a Surveillance Society'.

²⁵⁰ Bernhard, 'From Conflict to Consensus: European neoliberalism and the debate on the future of EU social policy'; Rothschild, 'Neoliberalism, EU and the Evaluation of Policies'.

CHAPTER FOUR

FUNDAMENTAL RIGHTS, AUTONOMY AND ALIENATION

4.1 Introduction

The understandings of the rights to privacy and property which dominate in EU law can be, as chapters two and three examined, characterised as broadly Neo-Kantian or Hegelian - centring on the role of both rights to the development of personal identity and self-determination as part of an understanding of rights grounded in development of the self and dignity. The reduction of the rights themselves then, import reductions to these goods which they seek to vindicate. This chapter outlines the understanding of autonomy used in this work and the impacts which reductions in such autonomy have for individuals.

The chapter begins, in part two, by examining how the orienting values of dignity and self-determination ground individual autonomy. Part three then offers a definition of autonomy in the context of fundamental rights as understood by this work and outlines the connection between the rights to privacy and property and autonomy as understood in EU law. Part four then looks to the concept of alienation and how autonomy reductions implicate further harms through the alienation of individuals. Drawing on the rights considered in this work part five focuses, in particular, on the impact of market forces in driving autonomy reductions and consequent alienation. This analysis leads to the examination, in part six, of how autonomy and intervention can be reconciled.

4.2 Kant and Hegel - from Dignity to Autonomy and back again

The heart of liberalism is a concern with the basic political right to equality and autonomy. Indeed, in Dworkin's account autonomy and equality are less guiding principles within the liberal tradition than manifestations of the central liberal commitment to the equal worth and dignity of each and every person.¹ According to Dworkin, if democratic government and the liberty it seeks to ensure, is to foster dignity it must be exercised within the constraints of this commitment to equality and autonomy. Contemporaneously, and certainly within an EU law context fundamental rights have been conceptualised on this basis – with a prevailing emphasis on individual dignity as the orienting value of the fundamental rights regime.²

¹ Dworkin, *Taking Rights Seriously*.

² Luis Roberto Barroso, 'Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse' (2012) 35 *International and Comparative Law Review* 331. The CJEU has used the concept of human dignity to support its decisions in a variety of cases, see Case C-377/98 *Netherlands v European Parliament* EU:C:2001:523; Case C-13/94 *P v S and Cornwall County Council* EU:C:1996:170; Case C-36/02 *Omega Spielhallen* EU:C:2004:614 while the ECtHR and the national constitutional courts of

Kantian ethics, which have assumed a central role in the grammar and semantics of the study of human dignity, and thus fundamental rights, continue the liberal tradition by linking autonomy (as self-determination) with dignity and ultimately with the enjoyment of liberty.³ Within Kantian ethics, autonomy is the property of a will that is free and which determines the individual's capacity for self-determination, in accordance with self-governing reason. The fundamental conception of autonomy is thus that individuals are subject only to their own laws, that is that they are bound by their own will and not by the will of another.⁴ Dignity, in the Kantian view, is grounded in this individual autonomy – the capacity to be free from the will of another.⁵

Hegel, building on Kant's theory of dignity as autonomy, developed a critical account in which the full realisation of individual liberty requires the existence of autonomy in the form of subjective self-determination.⁶ Hegel, like Kant, posits that no political order can satisfy the demands of reason unless it is constituted in a manner which avoids depriving individuals of conscience choice which simultaneously avoiding an antinomianism that permits freedom to the detriment of social and political order.⁷

Crucially, in Hegel's account, autonomy is achieved in part through social relations not merely atomistic autonomy, and in this Hegel departs from Kant, criticising the latter's incapacity to move beyond practical philosophy noting that Kant's theory 'does not know how to become master of the individuality of self-consciousness; [it] describes reason very well, but does this in a thoughtless, empirical way by which it again robs itself of its truth.'⁸

For Hegel, autonomy is not, as it is for Kant, an empirical, all-or-nothing affair. Rather, individuals seek to accumulate social and relational interactions which reinforce their autonomy and must be supported in doing so. In this respect Hegel pushes back on liberal individualistic conceptions of rights within the liberal canon situating their function and limits within the social exchange in which

Member States have similarly relied on the concept. *Tyrer v The United Kingdom*, App no 5856/72 (ECHR, 25 April 1978); *SW v The United Kingdom*, App no 20166/92 (ECHR, 22 November 1995); Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights'; Dupré, 'Human Dignity in Europe: A Foundational Constitutional Principle'; Misztal, 'The idea of dignity: its modern significance'; Rao, 'Three Concepts of Dignity in Constitutional Law'.

³ Kant, *The Metaphysics of Morals*, 42-3.

⁴ In Kant's account, this free will which is central to autonomy is governed by reason which in turn is the proper representation of moral laws as determined by congruence with either hypothetical or categorical imperatives *ibid*, 40-42.

⁵ *Ibid*, 42-3.

⁶ Hegel, *Philosophy of Right*, 442.

⁷ *Ibid*.

⁸ Georg Wilhelm Friedrich Hegel, *Lectures on the History of Philosophy* (Gutenberg 2016), 332–33.

individuals are situated.⁹ To be dependent on these social relations in Hegel's view is not to lose one's freedom, but to actualise it. This has been seen by some as a betrayal of Kant yet Yeomans argues the turn can be seen instead as an elaboration rather than a betrayal of the antecedent Kantian theories autonomy putting into practice what was previously theorised.¹⁰

More saliently for the purposes of this work, it is this understanding of autonomy as both an individual good and one achieved through social relation and interactions among individuals and as between individuals and institutions which is discernible in EU law in the area of fundamental rights.

4.3 Autonomy and its Function

The necessity and centrality of autonomy in securing the individual dignity at the core of the fundamental rights project, in particular within EU law, is clear from the jurisprudence of the CJEU and ECtHR. Moreover, as chapters two and three examined, the rights to privacy and property have been understood in EU law as rooted in a similar understanding of the primary of self-determination in securing autonomy within the fundamental rights framework. However, this relationship of autonomy to dignity and to fundamental rights does not answer what, precisely, autonomy means.¹¹

Autonomy has been variously, and often ambiguously, defined in its own right and in its relation to liberty, used as an equivalent or synonym for liberty while also being variously equated with dignity, integrity, individual independence and self-determination, and sovereignty.¹² Common to these competing conceptions of autonomy is the central idea that underlies the concept of autonomy and which is indicated by the etymology of the term. This core conceptualisation is composed of the dual concerns of *autos* (self) and *nomos* (law) and was first applied in the context of the Greek state as *autonomia* referring to the circumstances in which citizens of the state made their own laws, as opposed to being under the control of a conquering power.¹³

Looking to its root, individual autonomy must be distinguished from liberty¹⁴ as extending beyond mere external capacities to exercise control and encompassing an internalised understanding of self-

⁹ Lewis P Hinchman, 'The Origins of Human Rights: A Hegelian Perspective' (1984) 37 *The Western Political Quarterly* 7, 17.

¹⁰ Christopher Yeomans, *The Expansion of Autonomy: Hegel's Pluralistic Philosophy of Action* (Oxford University Press 2015), ch 4.

¹¹ Nor indeed, what dignity means and how it may be defined however this is beyond the scope of the present research. On that question see, McCrudden, 'Human dignity and judicial interpretation of human rights'.

¹² Joseph Goldstein, 'On being adult and being an adult in secular law' in E H Erikson (ed), *Adulthood* (WW Norton 1978), 252; Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press 1988), 7.

¹³ Dworkin, *The Theory and Practice of Autonomy*, 12-13.

¹⁴ Isaiah Berlin, *Four Essays on Liberty* (Oxford University Press 1969), 131-34.

governance.¹⁵ In this understanding, autonomy concerns the independence and authenticity of the desires which motivate the actions liberty permits. Autonomy therefore encompasses both internal and external measures of control and constitutes a 'deep' form of individual control and self-determination. In keeping with this understanding liberty operates as a subset of autonomy composed of the external component of control and a 'shallow' form of outward facing control and self-determination. Dworkin has similarly distinguished between autonomy and freedom by insisting that freedom concerns particular actions while autonomy concerns a more general state of a person.¹⁶

The conception of the autonomous individual serves several functions in liberal political theory.¹⁷ First, and most fundamentally, autonomy serves as the model for the ideal individual by reference to whose perspective political principles are formulated and justified.¹⁸ The autonomous individual thus serves as the ideal representative whose basic interests are purported to be reflected in those political principles in the form of basic liberties and primary goods which are designated and recognised as fundamental to human flourishing.¹⁹ In this account, autonomy acts as the bellwether for the delineation and critique of oppressive social conditions, liberation from which is considered a fundamental goal of justice.²⁰

Political liberalism arises historically from the social contract tradition and rests on the idea of popular sovereignty. The concept of autonomy, figures centrally in the Kantian strand of this tradition, a strand exemplified more contemporaneously in Rawls's work which views justice as constitutive of those principles that would be chosen under conditions of unbiased rational choice²¹ mirroring Kant's Categorical Imperative.²²

¹⁵ Ibid, Lawrence Crocker, *Positive Liberty* (Nijhoff 1980), Gerald C MacCallum, 'Negative and Positive Freedom' (1967) 76 *Philosophical Review* 312.

¹⁶ Dworkin, *The Theory and Practice of Autonomy*, 13–15, 19–20; John Christman and Joel Anderson, *Autonomy and the Challenges to Liberalism: New Essays* (Cambridge University Press 2005), 13–14.

¹⁷ See generally, John Christman, *The Inner Citadel: Essays on Individual Autonomy* (Echo Point Books 2014). For the purposes of this work, liberalism is understood as referring to that approach to political power and justice which seeks to determine principles of right or justice prior to and independent of conceptions of the good. In this understanding the legitimation of political power can be justified without reference to controversial categories of value and moral principles, see John Rawls, *Political Liberalism* (Columbia University Press 1993), 13–15.

¹⁸ John Rawls, *A Theory of Justice* (Oxford University Press 1972).

¹⁹ Will Kymlicka, *Liberalism, Community and Culture* (Clarendon 1989), 10–19; Jeremy Waldron, *Liberal Rights: Collected Papers 1981-1991* (Cambridge University Press 1993), 155–6.

²⁰ Andrew Kernohan, *Liberalism, Equality and Cultural Oppression* (Cambridge University Press 1999); Drucilla Cornell, *At the Heart of Freedom* (Princeton University Press 1998); Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 1990); Carol Gould, *Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy and Society* (Cambridge University Press 1988); Nancy Hirschmann, *The Subject of Freedom: Toward a Feminist Theory of Freedom* (Princeton University Press 2002), 1–29.

²¹ Rawls, *A Theory of Justice*, 221–27.

²² Kant, *The Metaphysics of Morals*.

In response to criticisms of the Kantian account as inapplicable to modern populations characterised by moral pluralism Rawls developed a political conception²³ of liberalism which postulates that individual autonomy is grounded on one of several ‘device[s] of representation.’²⁴ In accordance with this conception, a diverse modern population can focus on the methods of derivation (e.g. the original position) of substantive principles of justice²⁵ on the understanding that justice is achieved only when an overlapping consensus among citizens can be attained on principles of justice.

Political liberalism thus shifts the focus from universally applicable and abstract, philosophical conceptions of justice towards a practical conception of legitimacy based on autonomy generated consensus. Crucially, this consensus is achieved through the engagement of public reason and deliberation. Democratic participation through public discussion and institutional participation must thus be understood as a constitutive part of the justification of principles of justice. Autonomy is critical to this process, as consensus can be legitimate only where it is premised on free and authentic engagement with and affirmation of shared principles. It is only where individuals are, and understand themselves as being, capable of endorsing or rejecting such shared principles that the consensus necessary to ground legitimate institutional power can emerge.

This necessarily leads to a consideration of the connection between political liberalism, autonomy, and democracy. While this is considered in further detail in chapter five it should be noted that, traditionally, liberal conceptions of justice view democratic mechanisms of collective choice as necessary but necessarily circumscribed by constitutional principles. In this view, individual rights and freedoms and the principle of equality before the law as aspects of individual autonomy are protected by principles of justice as given expression in the Rule of Law and are thus put beyond democratic review.²⁶ However, certain liberal conceptions of justice have evolved to include collective participation or engagement (also founded on autonomy) as a constitutive condition of legitimacy. In this respect Habermas is perhaps the most prominent in drawing the connection between individual (‘private’) autonomy and institutional (‘public’) legitimacy.²⁷

In Habermas’ account, legitimacy and justice cannot be established through philosophical construction and argument, but must be established through the *de facto* support of affected individuals as citizens (including through their representatives) as part of a process of democratic participation and deliberation.²⁸ As part of this account, systems of rights and protections including

²³ John Rawls, *Political Liberalism* (Columbia University Press 1993).

²⁴ Rawls, *A Theory of Justice* 303–58.

²⁵ *Ibid.*

²⁶ Amy Gutmann, ‘Democracy’ in Robert Goodin and Philip Pettit (ed), *A Companion to Contemporary Political Philosophy* (Blackwell 1993).

²⁷ Jürgen Habermas, *Between Facts and Norms* (MIT Press 1994).

²⁸ Iris Marion Young, *Inclusion and Democracy* (Princeton University Press 2000).

the vindication of autonomy and the rights which protect it, are necessary in order to institutionalise the frameworks of democratic participation and deliberation that render principles of justice acceptable to those affected by them.²⁹ Insofar as autonomy is necessary for democracy and democracy is a constitutive element of just political institutions, how we conceptualise autonomy thus becomes significant.³⁰

The primary distinction in the accounts offered of autonomy is between ‘weak’ accounts which look only to minimal conditions of self-responsibility and ‘strong’ or ‘ideal’ accounts. Strong accounts look beyond mere responsibility to individuals’ internal capacity to exercise sovereignty over their self in weighing competing reasons for action,³¹ and view autonomy as submission to the laws one has made for oneself and not to the will of another.³² Strong accounts of autonomy such as that proposed by Benn for example, thus argue that whereas autarchy is characterised by minimal independence of choice, autonomy designates an ideal of a self-determined life that goes beyond these minimal conditions to require that an individual have sufficient choice such that she can be considered the author of her own personality and therefore the author of her own life.³³ In this sense strong accounts are the truer to the originating Greek notion of autonomy or at a minimum to its etymology.

Gerald Dworkin’s and John Christman’s conceptions of autonomy adopt this strong account, requiring that autonomous individuals identify with their own desires in achieving self-determination.³⁴ Christman in particular focuses on the non-manipulative formation of preferences in individual autonomy noting, ‘self-mastery means more than having a certain attitude towards one’s desires at a time. It means in addition that one’s values were formed in a manner or by a process that one had (or could have had) something to say about.’³⁵

Similarly, Dworkin’s ‘full formula for autonomy’ provides that ‘a person is autonomous if he identifies with his desires, goals and values and such identification is not influenced in ways which

²⁹ Habermas, *Between Facts and Norms*, 111.

³⁰ Gerald F Gaus, *Justificatory Liberalism* (Oxford University Press 1996), Parts II and III; Gerald F Gaus, *The Order of Public Reason: A Theory of Freedom and Morality in a Diverse and Bounded World* (Cambridge University Press 2011); Joshua Cohen, ‘Deliberation and Democratic Legitimacy’ in James Bohman and William Rehg (ed), *Deliberative Democracy* (MIT Press 2002); Henry Richardson, *Democratic Autonomy: Public Reasoning about the Ends of Policy* (Oxford University Press 2003).

³¹ Thomas Scanlon, ‘A Theory of Freedom of Expression’ (1972) 1 *Philosophy and Public Affairs* 204, 215.

³² Robert Paul Wolff, *In Defence of Anarchism* (Harper & Row 1970), 14.

³³ Stanley I Benn, *A Theory of Freedom* (Cambridge University Press 1988), 155.

³⁴ Dworkin, *The Theory and Practice of Autonomy*; Christman, *The Inner Citadel: Essays on Individual Autonomy*.

³⁵ Christman, *The Inner Citadel: Essays on Individual Autonomy*; John Christman, ‘Liberalism and Positive Freedom’ (1991) 101 *Ethics* 343; John Christman, ‘Autonomy and Personal History’ (1991) 21 *Canadian Journal of Philosophy* 1.

make the process of identification in some way alien to the individual.³⁶ Dworkin conceptualises autonomy as the individual capacity to reflect critically upon preferences, desires and wishes and to develop the capacity to accept or attempt to change these in light of competing preferences and values. By exercising such capacity, individuals, in Dworkin's account, define their own personality and give meaning and coherence to their lives in a manner which cannot be replicated absent the presence of autonomy.³⁷

Autonomy is defined within this work in accordance with the strong account, according with the views articulated by Dworkin and Christman and, most recently articulated by Raz, as 'the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.'³⁸ In particular, Raz specifies that for this understanding of autonomy to subsist there must be an adequate range of morally acceptable options³⁹ to choose from, noting that choice between bad options may not constitute autonomy at all.⁴⁰

Raz's conception of personal autonomy engages the agency of autonomy in contrast with drifting - 'autonomy contrasts with a life of no choices or of drifting through life without ever exercising one's capacity to choose.'⁴¹ While scholars, notably Cohen, have been critical of the conceptual integrity of autonomy based accounts of rights (notably in the context of privacy) the account which has been offered by both the CJEU and ECtHR has been characterised by an emphasis on autonomy, dignity and self-determination and it is on this basis that this work thus proceeds.⁴²

4.4 Autonomy Reduction and Alienation

The result of the conception of both the rights examined by this work as autonomy based is that harms to, or reductions in the privacy and property rights of individuals necessarily result in reductions to the autonomy the rights enable. While this in itself is a harm, in as much as such autonomy reductions precipitate reductions in the capacity of individuals to participate in collective social and democratic processes as noted above, autonomy reductions also occasion more fundamental individual harms.

³⁶ Dworkin, *The Theory and Practice of Autonomy*, 7-10. See also, Christman, *The Inner Citadel: Essays on Individual Autonomy*, 346; Christman, 'Liberalism and Positive Freedom'; Christman, 'Autonomy and Personal History'.

³⁷ Dworkin, *The Theory and Practice of Autonomy*, 20.

³⁸ Raz, 'Autonomy, toleration and the harm principle', 369.

³⁹ Joseph Raz, *The Morality of Freedom* (Oxford University Press 1988), 369.

⁴⁰ Raz, 'Autonomy, toleration and the harm principle', 372.

⁴¹ Raz, *The Morality of Freedom*, 371.

⁴² Julie E Cohen, *Configuring the Networked Self* (Yale University Press 2012), 108-109.

In this respect, when Kant, Hegel and more recently Raz define autonomy by reference to the capacity to be the author of one's own life - to give it a shape and meaning – they are not only claiming that the individual must be allowed the capacity to independently and actively shape her life. In addition she must be able presuppose that something matters in her life. Determining oneself as an autonomous individual then must mean determining oneself *as* something.⁴³ Alienation occurs when this process is obstructed – that is when individuals are unable to establish a relation to other individuals, to things, to social institutions and thereby to themselves, and as a result are unable to distil meaning from their existence.⁴⁴ At its core, this is the most fundamental, individual, harm which reductions in the autonomy protective rights of privacy and property occasion.

The theory of alienation can be traced to Rousseau whose work contains the core conceptions upon which later theories of alienation have relied.⁴⁵ Rousseau begins his discourse on the origins of inequality among men with the image of the human being within society is alienated from his own needs, subjected to the conformist dictates of society as part of which his need for recognition and his self-worth is determined by and dependent on others. This mutual dependence gives rise at once, according to Rousseau, to domination and enslavement - as well as self-alienation - a condition directly opposed to the autonomy and authenticity of the state of nature conceived as a condition of self-sufficiency.⁴⁶

Following Rousseau, theorists viewed sociality and social institutions as either inherently alienating in keeping with Rousseau or, in keeping with the later Kantian school, as *potentially* alienating but linked to the social character of freedom. Hegel's concept of alienation which is part of this later, Kantian school is perhaps the most contemporaneously relevant in viewing modern alienation as a result of the fragmentation of consciousness and relationships entailed by modern society.⁴⁷

While Hegel takes up the problems outlined by Rousseau, he transforms Rousseau's starting point by conceiving that individuals become free in and through the social institutions that permit them to realise themselves as individuals, rather than being free only in a state of nature. Rousseau's atomistic ideal is thus replaced by one which locates autonomy and self-realisation in individuals' identification with the institutions of ethical social life.⁴⁸ Though Hegel strives to overcome the ideal of freedom as self-sufficiency proposed by Rousseau he also seeks to incorporate the Kantian

⁴³ Jaeggi, *Alienation*, 204-5.

⁴⁴ Habermas, *Justification and Application: Remarks on Discourse Ethics*, 48.

⁴⁵ Hans Barth, *Wahrheit und ideologie* (Suhrkamp 1974), 105; Bronislaw Baczko, *Rousseau* (Europa 1970), 27.

⁴⁶ Jean Jacques Rousseau, *The Discourses and Other Early Political Writings* (Cambridge University Press 1997), 124, 187.

⁴⁷ Hegel, *Philosophy of Right*; Charles Taylor, 'What's Wrong with Negative Liberty' in A Ryan (ed), *The Idea of Freedom* (Oxford University Press 1979), 211-229.

⁴⁸ Hegel, *Philosophy of Right*.

idea of autonomy: the ultimate goal of his account is to articulate the conditions that make it possible to re-find oneself in social institutions.⁴⁹

Following Hegel two distinct strands of alienation theory emerged and crystallised in the theories of Kierkegaard and Marx. Each of these authors use Hegel as their starting point for a specific conception of alienation though Marx's economic theory of alienation is in marked contrast to Kierkegaard's concern for the ethical dimensions of human existence.⁵⁰ In particular, while Kierkegaard focuses on despair as a symptom of alienation⁵¹ Marx's economic analysis of alienation argues that in as much as alienated labourers as individuals are unable to appropriate their own activity and its products they lose their capacity to realise themselves as individuals and relate to those around them in a fundamental interference with their 'species essence.'⁵²

Building on these accounts, the more recent articulation of alienation given by Jaeggi understands alienation as a particular form of the loss of what could be called, following Berlin's bifurcation, positive freedom.⁵³ As indeterminate as the dimensions of positive freedom may be, the significant point in Jaeggi's analysis is that conceptions of positive freedom consistently depict free life as life which is *not* alienated and unfree life as one characterised *by* alienation.⁵⁴

According to Jaeggi's view being a human being rather than a mere thing necessarily involves ascribing to oneself desire, will and resulting actions, taking responsibility for such forces and their realisation and therefore identifying with them. Thus freedom and alienation concern the capacity for self-determination in order to determine one's relations to oneself and to the world through action and appropriation which is fundamental not only to autonomy but to the determination of the individual as a human being rather than a mere economic actor.⁵⁵

Historically, the commodification of goods and domains that were previously not objects of market exchange has given rise to the most common occasions of alienation – obstructing individual

⁴⁹ Helmut Nicolaus, *Hegel's Theorie der Entfremdung* (Manutius 1995).

⁵⁰ Karl Löwith, *From Hegel to Nietzsche* (Anchor 1967), 135-9.

⁵¹ See, Alexander Somek, 'Alienation, Despair and Social Freedom' in Ségolène Barbou des Places and Etienne Pataut Loïc Azoulai (ed), *Constructing the Person in EU Law: Rights, Roles and Identities* (Hart 2016), 36, 45.

⁵² Karl Marx, 'Economic and Philosophic Manuscripts', *Karl Marx and Friedrich Engels Collected Works*, vol 3 (International 1975). See, Georg Lukacs, *History and Class Consciousness: Studies in Marxist Dialectics* (Merlin 1971).

⁵³ Peter Furth, *Phanomenologie der Enttauschungen* (Fischer 1991), 45; Louis Althusser, *For Marx* (Verso 2005).

⁵⁴ Herbert Marcuse, *One-dimensional man* (Routledge 1994), 11-12.

⁵⁵ Jaeggi, *Alienation*, 36.

attempts to relate to goods or areas which individuals had previously used to define their selves by imposing monetary and proprietary barriers.⁵⁶

Alienation in these contexts results in a loss of individual power - alienated individuals are disempowered, not subject to their own, and vulnerable to the imposition of another's, law.⁵⁷ Alienation is thus a manifestation of a loss of individual autonomy which consequently generates negative impacts for individual liberty, on the basis that is only when individuals experience and are empowered to experience life as their own, governed by their own choices and law that they are free.⁵⁸ Under this conception, the protection and promotion of autonomy and the reduction or elimination of alienation, are not merely individual but is also a social goods, acting to ensure the individual development of personality and preference through a process of deliberative choice which is central to democratic participation and thus to democratic society.⁵⁹

As the previous chapters have explored, the rights of property and privacy within European law are both founded on deontological understandings which prioritise the rights' primacy in preserving individual dignity and securing the development of individual personality as part of individuals' self-determination⁶⁰ in a constitutional schema which privileges individual autonomy and human dignity.⁶¹ In this context, the intervention of private actors in the relationship between the State and individuals by seeking to redefine the limits and contours of the rights to privacy and property are notable for their practical reduction of the capacity of individual to interact with and exercise over the aspects of their personalities which are manifested through those rights. As such, these activities by private actors are constitutive of a reduction in autonomy and, by analogy with previous, historic examples, alienated individuals from those goods or means necessary for their self-development

Alienation as a result of private actors in market contexts was articulated most strongly by Marx in his discussion of enclosure and the alienation of the individual from their labour. In his analysis of

⁵⁶ Ibid, 4-5.

⁵⁷ Ibid, 22-23.

⁵⁸ Steven Lukes, *Marxism and Morality* (Oxford University Press 1985), 80.

⁵⁹ Raz, 'Autonomy, toleration and the harm principle', 314 noting 'the ruling idea behind the ideal of personal autonomy is that people should make their own lives.'

⁶⁰ This is a general view echoed by Gavison, Moreham and Altman in their various works. See, Gavison, 'Privacy and the Limits of Law'; Parent, 'Privacy, Morality and the Law', 446; Moreham, 'Privacy in the Common Law: a doctrinal and theoretical analysis', 626; Altman, *The Environment and Social Behavior: Privacy, Personal Space, Territory, and Crowding*. It is notable that this emphasis on privacy as control implicates questions over the capacity and potential restrictions which should be placed on self-disclosure as a threat to privacy — that an individual might reveal so much that they forfeit privacy and may indeed impact the privacy of others in doing so. Westin ultimately refrains from criticising such revelations noting that individuals themselves are best equipped to assess the appropriate disclosures relative to different classes of actors, see Westin, *Privacy and Freedom*, 52 *et seq.* Jones, *Kant's Principle Of Personality*; Radin, 'Property and Personhood'; Kommers, *The Constitutional Jurisprudence Of The Federal Republic Of Germany*, 313; Gavison, 'Privacy and the Limits of Law'.

⁶¹ Dupré, 'Human Dignity in Europe: A Foundational Constitutional Principle'.

the economic and social impacts of the eighteenth century enclosures of common land⁶² Marx suggested that as a result of enclosure, while small groups of elites gained exclusive rights in land, broader classes of individuals were deprived of means of production and subsistence. The result of that deprivation was a loss by individuals of control of their own labour with the result that they were unable to fully realize themselves as persons through their work, being obliged to work for others under conditions over which they had no control.⁶³

These patterns traced by Marx have their modern parallel, as chapter three examined, in contemporary efforts to enclosure intellectual common spaces and the resulting alienation of individuals from the resources and goods on which they relied to form and communicate creative manifestations of their personality. In the context of privacy Cohen has argued that the contemporary secrecy and lack of non-transparency surrounding the use and collection of personal data represents a similar alienation of individuals from aspects of their selves.⁶⁴

Significantly, the consequence of the intervention of market forces in cleaving individuals from and preventing their appropriation of those resources (whether institutional or intellectual) on which their development of autonomy relies, necessarily produces still more alienating impacts. In Foucault's account, following the enclosures detailed by Marx and without access to common land or control of private land, individuals were obliged to migrate and participate in workplaces characterised by embedded surveillance, punishment and discipline mechanisms designed to induce conformity and maximise productivity.⁶⁵ These mechanisms perpetuated further alienation by reducing the capacity of individuals for self-determinative expression.

In a contemporary context, Zuboff describes a similar pattern. Building on work by other scholars, Zuboff argues that the AdTech landscape uses behavioural surveillance techniques which trace their origins to two sets of mid-twentieth century research initiatives in experimental social psychology predicated on the denial of free will and concerned with behavioural tuning to modulate group behaviour in desired ways.⁶⁶ As applied to individuals these mechanisms, in combination with large scale data collection, target not only individuals' consumptive preferences but can also seek to influence their cultural, political and religious affiliations, inducing conformity and maximising industrial profit while reducing individual autonomy and divergence from the status quo.

⁶² Marx, *Capital: A Critique of Political Economy* (1887).

⁶³ Ibid.

⁶⁴ Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism*, 62-3.

⁶⁵ Foucault, *Discipline and Punish*, Part II, Article 1.

⁶⁶ Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*, 159-61 and 457-8; David Kirkpatrick, *The Facebook Effect: the inside story of the company that is connecting the world* (Simon and Schuster 2010), 213-63.

Moreover, private actors by setting normative standards as they have sought to do in respect of both privacy and property rights in the EU condition the relationship between individuals and the State and displace the legal institutions and normative authority of the State.⁶⁷ This fundamentally undermines the conceptualisation of the relationship between individuals and the State on which liberal political theory is predicated and alienates individuals from the State by seeking to condition their experience of rights, and State protection.

As a result, while private policy does not intervene directly in the relationship between the State and individuals it does interfere with the terms of the relationship by permitting State actors to bypass constitutional restraints.⁶⁸ Private actors can also interfere, indirectly, in the relationship between individuals and the State by capitalising on the capacity of private actors to set normative standards in order to subvert or influence the attention, information and activity of individuals in ways which have outcomes for the democratic process.⁶⁹ Indeed, the process of privately setting normative standards is itself inherently alienating by removing the capacity for democratic participation.

Crucially, these alienating forces are not autopoietic. Rather, as Cohen notes, features such as the exploitation of personal data require an enabling legal construct.⁷⁰ The significance of political and legal forces in permitting the perpetuation of alienating forces has been examined by Polanyi in his account of the great transformation from an agrarian system of political economy to an industrial and capitalist system identified the mismatches between demands of emerging market systems and those of human well-being.⁷¹

Tracing a similar pattern to those identified by Marx and Foucault, Polanyi identified the gradual emergence of the legal mechanisms of enclosure, appropriation of natural resources, displacement of populations and trade in resulting products as having reconceptualised the basic factors of social life as commodities resulting in conceptual shifts which disassociated social life from the economy.⁷² Polanyi's central critique centres on the loss of, or departure from the concept of embeddedness which he argues has traditionally characterised market based societies.⁷³ The term embeddedness expresses the idea that the economy is not autonomous, as it has been understood in

⁶⁷ This is also noted by Radin in her work on the impacts of boilerplate contractual clauses in the United States. See, Radin, *Boilerplate: the fine print, vanishing rights and the rule of law*, 33.

⁶⁸ See, chapter five.

⁶⁹ *Ibid.*

⁷⁰ Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism*, 49-51.

⁷¹ Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, 45 *et seq.*

⁷² *Ibid.*, 171 *et seq.*

⁷³ *Ibid.*, xxiii.

neoliberal and ordoliberal theory, but is and should be subordinated to politics, religion and social relations.

Modern economic thought, Polanyi argues, has been and is premised on an understanding of the economy as an interlocking system of markets that automatically adjusts supply and demand through the price mechanisms, independent of and unrelated to social factors. This understanding, he argues, fails to reflect the reality of societies throughout recorded human history in which the economy has existed as a socially embedded mechanism not an independent one whose operation was held in tension to social objectives – an understanding which only shifted with the radical works of Malthus and Ricardo.⁷⁴

The result, in Polanyi's account, has been instead of economy being embedded in social relations, social relations are embedded in the economic system. As part of this re-orientation the system for social ordering has been required to accommodate private economic activity rather than the reverse as was historically the case. In a European context, as this work examines, a similar emphasis on social ordering accommodating economic ordering is evident.

The context within the Union is to be differentiated on the basis that the Union has ever held itself out as an economic and trade body and only recently embraced a more explicit role in social ordering through the Charter. However, it remains the case that this dis-embedding as part of neoliberal and ordoliberal attitudes results in a context in which individuals are susceptible to alienation as a result of market forces and the intervention of private actors in their relationship both with the State as well as those resources on which they depend to actualise their autonomy. In considering how State actors should respond to such threats, and harms, to autonomy, the primary logical obstacle is how and whether intervention directing certain actions or restraint from action is reconcilable with autonomy.

4.5 Fundamental Rights and Autonomy

As chapter two discussed, European law endorses an understanding of privacy as fundamentally related to the development of personal identity, and the preservation of human dignity, acknowledging that the capacity for individual self-determination diminishes as privacy does.⁷⁵

⁷⁴ Ibid, 257.

⁷⁵ Citizenship, in a European context, is understood as more than a status, as a set of social practices whose fulfilment includes voting, public debate, and political opposition which are influenced by institutional mores. See, Commission Communication, 'The Commission's Contribution to the Period of Reflection and Beyond: Plan D for Democracy, Dialogue and Debate' COM (2005) 494, 2-3; Andrew Williams, *The Ethos of Europe: Values, Law and Justice in the EU* (Cambridge University Press 2010), 154-156.. See also, Ireneusz Pawel

At the most basic level privacy rights enable democratic participation through the protection of the secret ballot and the restraint of state surveillance. More fundamentally, however, the right to privacy seeks to secure those areas which enable the development, expression and consideration of views, opinions and actions which contribute to political thought, and democratic opposition.⁷⁶ This view of the necessity of privacy to democratic governance permeates the decisions of the ECtHR⁷⁷ and CJEU⁷⁸ and is at the core of liberal political theory which assumes that a good life for the individual must include areas of interest apart from political participation.

Crucially, the right to privacy also enables political engagement by providing a protected space in which speech, association and thought cannot be policed.⁷⁹ Privacy thus functions, in Westin and Shils' account, to ensure the 'strong citadels' which are a prerequisite for liberal democratic society.⁸⁰ Though Westin and Shils were writing in a North American context their arguments are no less true in a European setting as Hijmans has noted.⁸¹

Permitting the growth of the integrated surveillance infrastructures which the AdTech market has enabled thus impacts not only are the rights to privacy of individuals reduced but erodes individual autonomy and in turn undermines the operation of democratic participation with consequences for the health of the Rule of Law, which the following chapter examines. This was, belatedly, acknowledged following the Cambridge Analytica investigation, which revealed that company and indeed Facebook itself, had targeted individuals with politically based information and advertising,⁸² in a manner which interfered with democratic elections. However, the contributory role of privacy in militating against such democratic undercutting has yet to be recognised. Nor has the EU seriously reckoned with the potential of data brokers such as Facebook and Google, as well as digital actors more generally, to aid State actors in bypassing constitutional controls.⁸³

Karolewski, *Citizenship and Collective Identity in Europe* (Routledge 2010), 108-112 on the shift from a model of caesarean effective citizenship to one based on a deliberative model.

⁷⁶ Westin, *Privacy and Freedom*, 24.

⁷⁷ See *X v Iceland*; *Niemietz v Germany*; *X v Germany*; *X and Y v The Netherlands*; *Dudgeon v United Kingdom*; *Gaskin v United Kingdom*; *Stjerna v Finland*; *Ciubotaru v Moldova*; *Karashev v Finland*; *Klass and Others v Germany*; *Kopke v Germany*; *Barbulescu v Romania*.

⁷⁸ *Sayn Wittgenstein*; *Malgozata Runevic-Vardyn*.

⁷⁹ Edward Shils, *The Torment of Secrecy* (Free Press 1956), 219-220.

⁸⁰ Westin, *Privacy and Freedom*, 24.

⁸¹ Hielke Hijmans, *The European Union as Guardian of Internet Privacy: The Story of Article 16 TFEU*, vol 31 (Law, Governance and Technology Series, Springer 2016), [5.10.12]; David Edward, 'In Europe, History is the Unseen Guest at Every Table' (2018) 55 *Common Market Law Review* 251.

⁸² Office, *Investigation into the use of data analytics in political campaigns*; In March 2019 the EU adopted new rules to 'prevent misuse of personal data by European political parties.' The move comes ahead of the European Parliament elections, which will take place across the continent in May 2019, Council of the European Union, *EU set to adopt new rules to prevent misuse of personal data in EP elections* (2019).

⁸³ Chapter five.

Similarly to privacy and as was examined in chapter three, property rights are integral to securing individual autonomy by delineating a zone of exclusion, in which individuals are free to develop their identity as well as affording to individuals protection of those resources on which their self-determination and their development of self necessarily relies. Traditionally twinned with contract, property has been seen by some, most notably Epstein, as an essential element of individual autonomy and as demarcating a constraint on governmental authority.⁸⁴

The social function of property is thus twofold; enabling individuals to control those things which contribute to their self-determination and autonomy and empowering individuals to control the capacity of others to threaten or limit such values.⁸⁵ These functions appear, in some ways, radically opposed, however, in practice this means that individuals enjoy the ability to exclude others from their property or in the context of intellectual property, to impose limits on how individuals may deal with the content or goods they purchase. The problem arises when, as in this case, actors use this latter function of property to actively erode the rights of other individuals rather than merely asserting their own rights.

The development of DRM based limitations on the capacities of individuals as consumers to interact with and establish control over the resources on which this self-determination and development rely manifests this very concern. At present, private policy effectively limits the capacity of individuals to exercise property rights in digital goods or content sufficient to enjoy the zone of autonomy which property rights should protect while also interfering with the capacity of individuals to develop themselves through their relationship and interaction with their property.

The result is a reduction of the autonomy the right to property is intended to protect and a consequent reduction in the capacity of individuals for democratic participation. This is particularly the case where, as examined in chapter three, reductions in property rights have been used to perpetuate further reductions in privacy and the autonomy that rights seeks to protect.

4.6 Reconciling Autonomy and Intervention

Paternalism, most commonly manifested as a matter of policy in the form of formal or legal rules provided for by government intervention in the form of regulation, *prima facie* offends against autonomy. Permissible interventions that can be reconciled with individual autonomy are thus identified not by the acts which they involve but by the justifications on which they are premised.

⁸⁴ Richard A Epstein, *Design for Liberty: Private Property, Public Administration, and the Rule of Law* (Harvard University Press 2011).

⁸⁵ L.T. Hobhouse, 'The Historical Evolution of Property, In Fact and in Idea' in Richard A Epstein (ed), *Liberty, Property and the Law* (Garland 2000), 376.

While respect for autonomy should prohibit paternalistic interventions by the State on the basis that such intervention involves a judgment that individuals are unable to assess how best to pursue their own good, the understanding of autonomy adopted by this work is not hostile to regulatory intervention *per se*.

Rather, in accordance with Raz's view, the State may in fact play a role in preserving individual autonomy, by taking such positive action as is necessary to enhance the freedom of individuals.⁸⁶ This echoes the view articulated by Polanyi that as market freedom expands so too must the capacity to ensure the social aims of society are met through the protection of areas of individual autonomy, if necessary by means of regulation. In this respect this work's argument is that the imposition of a regulatory schema to ensure the protection of fundamental rights, and in turn vindicate individual autonomy and liberty is justified in the context of the rise of public policy which actively utilises coercive and manipulative tactics to influence individual choice and diminish fundamental rights in circumstances where meaningful alternatives for individuals are not present.

Of course, this approach raises the potential criticism that, in seeking to reduce the concentration of power among private actors, the solution advocated by this work necessarily increases the power enjoyed by the European Union as the intervening paternalistic actor. In response to this criticism three arguments may be made.

The first, is that fundamental rights act as effective limits on the activities of the European Union through their function as constitutional controls. The EU's power is therefore already restricted from an expansion which would prove threatening to the rights examined here. Relatedly, and given the mechanisms of constitutional avoidance discussed in the following part, limits on private power, can also function as limits on the Union's (and State) power by depriving public actors of 'backdoors' to activities or information which constitutional protections would otherwise prevent them from engaging in or with.

The second argument is that coercion by a State actor to alter or otherwise regulate individual behaviour or activity can be compatible with individual autonomy where the targeted conduct which the intervention seeks to reduce or eliminate is harmful to others, or threatens fundamental social goods.⁸⁷ Autonomy and the Rule of Law satisfy this requirement in that they are social goods while, as chapters two and three note, the harms occasioned to individual privacy and property rights also impact third parties who do not assent to the contractual terms and practices described

⁸⁶ Raz, 'Autonomy, toleration and the harm principle', 427.

⁸⁷ Mill, *On Liberty*.

yet nevertheless face adverse impacts as a result of the accession of other individuals to such agreements and attendant reductions in their rights.

Thirdly, and finally, the solution proposed by this work, and which forms part of a broader suite of measures necessary to redress the impact of private standard setting in the digital market on public, normative standards, is cognisant of the character of the Union. This work does not advocate for the creation of a new European contract law, the imposition of horizontal effect for fundamental rights, or the creation of a new Union competence in the area of fundamental rights.

Rather, this work proposes a return to the idea of the consumer as both a social and market actor, and advocates for the adoption of a rights-oriented understanding of consumer protection. While such measures are ideologically purer than a market-based solution to a social problem they all involve a fundamental change to the character of the Union which would see it gain a degree of control over national social orders and constitutional values that would sit uncomfortably with national sovereignty and the Union's non-federal design. Moreover, the practical contribution of such unrealistic proposals would be questionable.

4.7 Conclusion

The rights considered by this work have been interpreted by the CJEU and ECtHR as being centrally concerned with preservation and promotion of a strong or ideal account of individual autonomy. In this respect the understanding of autonomy which underpins both fundamental rights can be said to be an ideal or strong account of autonomy which mirrors the account offered by several authors but most notably Raz. This Razian account of autonomy includes within its remit an idea of alienation. As has been explored alienation resulting from autonomy reductions is an established feature of market changes no less so in the digital market where private policy has intervened in the relationship between the individual and the State, and has removed from individual control the resources necessary for the development of the autonomous self.

Significantly, the strong or ideal account of autonomy which this work adopted, and the alienating potentials of private policy have an impact not only at an individual but also at a societal level as strong or ideal conceptions of autonomy are linked fundamentally to the promotion of democratic participation in liberal political theory. This connection between the rights examined, autonomy and democracy is examined further in the proceeding chapter.

CHAPTER FIVE

PRIVATE POLICY, DEMOCRATIC PARTICIPATION AND THE RULE OF LAW

5.1 Introduction

As the previous chapters have established, a combination of brittle constitutionalism, preferences for market oriented secondary laws and a deference to freedom of contract have resulted in private actors enjoying the capacity to redefine the contours of the rights of privacy and property in the digital market. Having charted the content and theory of the Rule of Law present in the European legal order in part two, this chapter continues, in part three, to examine the primacy of the rights to privacy and property in securing the Rule of Law.

Building on the understanding of autonomy outlined in chapter four, this chapter argues that the rights of privacy and property ground the Rule of Law's fundamental aim of promoting individual liberty, by providing a constitutionally mandated restriction on State interference with individual autonomy, and thus securing a minimal, non-reducible zone of autonomy which contributes to the attainment of democratic participation. The chapter further argues that private policy and what Leiser has referred to as 'private jurisprudence' which in turn undermines the Rule of Law by perpetuating a system in which fundamental rights enforcement is unpredictable, unequal and is conducted without the accountability necessary for democratic legitimacy and the Rule of Law.

The chapter specifically argues that private standard setting in respect of fundamental rights enforcement has allowed State actors to rely on the activities of private actors to obtain private information which State actors are constitutionally restrained from accessing or compiling. Ultimately, the chapter argues that the provision of these constitutional avoidance mechanisms, the rise of private jurisprudence and the reductions of individual autonomy and threats to democratic participation occasioned by private policy harm the Rule of Law as it is understood within the European constitutional order.

5.2 Defining the Rule of Law in the European Union

The central principle on which the Rule of Law is premised is that the State must be required to wield its power subject to the law.¹ In keeping with this definition the Rule of Law has historically been understood and applied in a State centric fashion. Yet, while the Rule of Law has its origins

¹ Joseph Raz, 'The Rule of Law and its Virtue', *The Authority of Law* (Oxford University Press 1979).

in a theory concerned with State legal orders, there is nothing to prevent its reach from being extended to supranational, or sub-national, legal systems. Indeed, the principles that animate the Rule of Law are reproduced in the conceptions of natural justice which pervade administrative decision making at a subnational level in common law legal systems² and find a place in the founding statutes of numerous international organisations and legal systems.³ This capacity of the Rule of Law to extend beyond its limited origins as applicable onto to State actors in national settings has been succinctly articulated by the United Nations which understands the Rule of Law as referring

to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.⁴

Thus, the ECHR states that the Rule of Law is a framing value of the Convention's contents. This has been affirmed by the ECtHR in its jurisprudence which has prioritised legality⁵ and the prevention of arbitrariness as the central characteristics required by the Rule of Law.⁶ The Court has emphasised that legitimate restrictions of human rights must be based on laws which are accessible, and which serve a 'legitimate aim,' are 'necessary' and 'proportionate' to that aim and are thus 'compatible with the Rule of Law.' This has been read as requiring compatibility with the

² See, Paul Craig, *Administrative Law* (8th edn, Sweet & Maxwell 2016), Pt 2.

³ Declarations on Principles of International Law, Friendly Relations and Cooperation among states in accordance with the Charter of the United Nations 1970 (which is often seen as clarifying the terms of the UN Charter) referred to the 'paramount importance of the Charter of the United Nations in the promotion of the Rule of Law among nations.' See also the implicit efforts of other international orders and institutions, Judge Peter Tomka, *The Rule of Law and the Role of the International Court of Justice in World Affairs* (Stockholm Centre for International Law and Justice 2013); James Bacchus, 'Groping toward Grotius: The WTO and the International Rule of Law' (2003) 44 *Harvard International Law Journal* 533; Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law*, vol Oxford University Press (Oxford 2010).

⁴ UN Secretary-General's report 'The Rule of Law and transitional justice in conflict and post-conflict societies', S/2004/616 (23 August 2004), [6], at: (<www.unrol.org/doc.aspx?n=2004+report.pdf>) accessed 30 July 2019. For further references and more on the UN's extensive work on the Rule of Law, see (<www.un.org/en/ruleoflaw/>) accessed 30 July 2019.

⁵ *The Sunday Times v The United Kingdom (No 1)* App no 6538/74 (ECHR, 26 April 1979).

⁶ *Silver v The United Kingdom* App no 27273195 (ECHR, 25 March 1998) 'neither are laws giving unnecessary discretion'; *Petra v Romania* App no 27273/95 (ECHR, 23 March 1998) and *Malone v United Kingdom* App no 8691/79 (ECHR, 2 August 1984) 'Especially where a power of the executive is increased in secret the risks of violations are evident.'

general scheme of the Convention, including its prohibition on discrimination, and, as requiring that such laws possess safeguards against arbitrariness, excessive discretion and that there is an ‘effective remedy,’ preferably a judicial one, against any (alleged) violation of a Convention right.

Within the Union, the Rule of Law exists in various forms in the jurisprudence of the Member States and has been repeatedly proffered as a foundational value of the European project as part of a cluster of ideals constitutive of European political morality, the others being human rights, democracy, and the principles of the free market economy.⁷ Indeed, the Rule of Law is generally traced to specifically European origins, finding its roots in classical thinking but finding its more substantive articulation in the constitutional orders of Germany, France and the United Kingdom from the eighteenth century onwards.

5.2.1 *Tracing the Genesis of the Rule of Law: from substantive to formal and back again*

The Rule of Law is traced by some scholars⁸ to classical Greece and later to Roman law though it fell from use with the decline of the Roman Empire only gradually re-emerging during the Middle Ages in the form from which modern articulations are drawn.⁹ Against this record of emergence and retreat, a coherent theory of the Rule of Law was substantively and specifically articulated only in the early nineteenth century with the work of Kant who is recognised as having ‘fathered the idea of the Rule of Law or a juridical state, the *Rechtsstaat* which flows from the ‘innate right to freedom.’¹⁰

However, while Kant may have fathered the term ‘*Rechtsstaat*’ the more notable and lengthy elaboration on the concept were provided by the later work of Robert von Mohl. Mohl rejected the idea of a divine right to rule and justified government by reference to the rights of individuals, describing the promotion of liberty and recognition of property as the chief aims of government. In Mohl’s account the constituent elements of the Rule of Law which would secure such ends as including the presence of representative government, the separation of powers and the protection of basic civil liberties which were justified by reference to the ultimate aim of ensuring such individual liberty.¹¹

⁷ Waldron, ‘The Concept of the Rule of Law’.

⁸ Brian Z Tamanaha, *On the Rule of Law: History Politics and Theory* (Cambridge University Press 2004).

⁹ *Ibid*, 25.

¹⁰ On Kant’s doctrine of right see, B Sharon Byrd and Joachim Hruschka, *Kant’s Doctrine of Right: A Commentary* (Cambridge University Press 2010).

¹¹ Robert von Mohl, *Die deutsche Polizeiwissenschaft nach den Grundsätzen des Rechtsstaates* (Vero Verlag 2017); Robert von Mohl, *Das Staatsrecht des Königreichs Württemberg* (Laupp 1829).

Liberal articulations continued to dominate early Rule of Law theories during the remainder of the nineteenth and early twentieth centuries. Schmitt devoted Part II of his treatise *Constitutional Theory* to an exploration of the idea of the ‘bourgeois *Rechtsstaat*,’ linked to the constitutional ideal of bourgeois individualism which prioritised the protection of personal freedom, private property, contractual liberty, and the freedoms of commerce in which the State appears as the strictly regulated servant of society.¹²

Indeed, the similar French concept of *l'état de droit* which had been specifically introduced by post-revolutionary French jurists as a normative principle to highlight the need to orientate the government around a legislative power¹³ was also influenced by the work of early German Rule of Law thinkers. Raymond Carré de Malberg, drawing on the work of Gerber and Laband in Germany, argued that the concept of *état de droit* should be centred on the protection of human rights, an argument subsequently reflected in institutional changes in that jurisdiction.¹⁴

These European theories of the Rule of Law can be characterised as substantive in as much as they include the protection of human rights or principles of justice as one of the requirements of the Rule of Law - what Dworkin refers to as the ‘rights’ conception of the Rule of Law which assumes ‘that citizens have moral rights and duties with respect to one another, and political rights against the State as a whole. This view insists that moral and political rights be recognized in positive law, so that they may be enforced upon the demand of individual citizens through courts or other judicial institutions of the familiar type, so far as this is practicable.’¹⁵

Subsequent to the development of these substantive, European, accounts A.V. Dicey in *The Law of the Constitution*¹⁶ articulated what has become the most influential theory of the Rule of Law in

¹² Carl Schmitt, *Constitutional Theory* (Duke University Press 2008).

¹³ Michael Troper and Georges Burdeau Francis Hamon, *Droit Constitutionnel* (LGDJ 1999), 74-76.

¹⁴ Christian Dadamo and Susan Farran, *Introduction to the French Legal System* (Sweet & Maxwell 1993), 108-9; Francis Hamon, *Droit Constitutionnel*, 714; Jean Rivero and Jean Waline, *Droit Administratif* (21 edn, Dalloz 2006), 277.

¹⁵ Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1986), 11; Ronald Dworkin, 'Political Judges and the Rule of Law' (1978) 64 *Proceedings of the British Academy* 259, 262; Alastair Macintyre, 'Theories of Natural Law in the Culture of Advanced Modernity' in E.B. McLean (ed), *Common Truths: new perspectives on natural law* (ISI Books 2004). Despite controversy over which, if any, rights should be included in these ‘rights’ based or substantive conceptions of the Rule of Law, substantive conceptions continue to enjoy support. TRS Allan has argued in favour of a substantive or thick understanding of the Rule of Law which constitutes a corpus of the basic principles and values of a legal order, ‘an amalgam of standards, expectations and aspirations’ which incorporates guarantees of individual liberty and natural justice as well as more general requirements of justice and fairness in the relations between government and governed. See, TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford University Press 1993), 21-22.

¹⁶ Albert Venn Dicey, *The Law of the Constitution* (Oxford University Press 2013).

English speaking jurisdictions.¹⁷ Structured as a tripartite definition his account requires, first, that no individual is punished except as a result of a breach of law established in the ordinary legal manner before the courts.¹⁸ Secondly, Dicey's account requires that all individuals be subject equally to the jurisdiction of the courts.¹⁹ Together, these first two characteristics are referred to as the requirements for legal predictability and equality before the law. Finally Dicey's account argues that the Rule of Law is best secured by common law system which, as a result of cumulative judicial decisions secure individual rights and are less subject to erosion than civil law guarantees which have only legislative footing and are thus too easily subject to amendment and repeal.²⁰

Dicey's theory is the earliest of what are referred to as formal theories of the Rule of Law which emphasise the accessibility, predictability, publicity, and generality of law as the preconditions for the Rule of Law, and eschew inclusions of substantive, rights-based concerns - what is sometimes referred to as the 'no-rights' theory of the Rule of Law. The basic argument undergirding these formal theories is that rights-based, substantive theories by exceeding the basic formal theories, commentators confuse the Rule of Law with the rule of *good law* and thus risk muddying a purely legal issue with political concerns.

Largely based on this criticism, formal theories gained considerable traction in the early twentieth century, following Dicey's work. Of the formal theorists, Hayek is perhaps the most congruent in his account with Dicey, understanding the Rule of Law as requiring that law be general, equal and certain in application such that 'government in all its actions [must be] bound by rules fixed and announced beforehand rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.'²¹

Hayek also asserted, like Dicey, that the common law was the bastion of liberty and the Rule of Law, applying the idea of the invisible hand (more commonly used in market analogies) to the common law and arguing that the common law, like free markets, is a self-correcting, spontaneously evolving order that develops to accommodate the common good while simultaneously being independent and free from the allegation that it is the intentional product of any one actor.²²

¹⁷ Dicey identified three characteristics of the Rule of Law though the term pre-dated this formulation with Blackburn J noting in 1866 'it is contrary to the general Rule of Law not only in this country but in every other to make a person a judge in his own cause' leading Bingham J to note Dicey did 'not apply his paint to a blank canvas.' See, Tom Bingham, *The Rule of Law* (Penguin 2011).

¹⁸ Dicey, *The Law of the Constitution*.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ Friedrich Hayek, *The Road to Serfdom* (2nd edn, Routledge 2005), 75.

²² Friedrich Hayek, *Law, Legislation and Liberty*, vol 2 (Routledge 2003), vol 1, 38; vol 3, 1-19.

Most significantly, Hayek argued that the goals of substantive equality and distributive justice pursued by substantive theories are inherently inconsistent with the Rule of Law because they require that different individuals or classes of individuals be treated differently.²³ As a result, Hayek argues, there is no mechanism of establishing a consistently applicable prospective law, nor is there a means of determining a fair distribution in such circumstances.²⁴ This argument is somewhat naïve and in a European context specifically inapplicable given the agreed definitions of equality, and the incorporation of both equality of application and substantive equality within the Rule of Law as the proceeding part examines.²⁵

Despite these shortcomings, Hayek did agree with earlier continental theorists and identified the Rule of Law as the cornerstone of liberty, emphasising the connection between the growth of ‘a measure of arbitrary administrative coercion and the progressive destruction of the cherished foundation of ... the Rule of Law.’²⁶ Raz has criticised Hayek for exaggerating the contribution of the Rule of Law to the protection of freedom and thus elevating the Rule of Law to such a high status that it interferes with the pursuit of major social goals²⁷ when it should, instead, be understood as an essentially formal doctrine as part of a purer, formal theory.²⁸ Raz thus considers that ‘[t]he Rule of Law means literally what it says: the rule by laws. Taken in its broadest sense this means that people should obey the law and be ruled by it.’²⁹

According to Raz, the features of the Rule of Law include requirements that, all laws be prospective, open and clear; that the law be stable; the system by which laws are made be guided by open, predictable and clear rules; the independence of the judiciary be guaranteed; the principles of natural justice be observed; the courts possess review powers; the courts be accessible; and that the discretion of crime prevention agencies should not be allowed to pervert the law.³⁰ Raz then continues to explain the value of these features, namely, that they constrain arbitrary power, protect freedom, respect human dignity, and thus contribute to securing individual autonomy.³¹

²³ Hayek, *The Road to Serfdom*, 80-111.

²⁴ John Gray, *Hayek on Liberty* (Routledge 1998), 72-75.

²⁵ On the definition of equality in EU law and the relevant thresholds for differentiated treatment see, *Burden v the United Kingdom* App no 13378/05 (ECHR 29 April 2008), [60] and *Guberina v Croatia* App no 23682/13 (ECHR, 22 March 2016), [69] and Rodderick Liddell and Michael O’Flaherty, *Handbook on European non-discrimination law*, 2018), 94-101. On the inclusion of equality as an aspect of the Rule of Law see the remarks of Advocate General Cosmas in Case C-50/96 and Joined Cases C-234/96 and 235/96 *Deutsche Telekom* EU:C:2000:73, [80].

²⁶ Hayek, *The Road to Serfdom*, ch. 16.

²⁷ Raz, ‘The Rule of Law and its Virtue’, chapter 11.

²⁸ *Ibid.*

²⁹ *Ibid.*, 210.

³⁰ *Ibid.*

³¹ *Ibid.*

In viewing autonomy, dignity and freedom as positive results rather than internalised aims of his theory, Raz thus maintains an apparent allegiance to formal theories of the Rule of Law. Yet, it is notable that these same outcomes – the promotion of individual autonomy, liberty and dignity are those expressed by the European Union in its understanding of the Rule of Law as a substantive theory. Indeed, by framing his account by reference to values traditionally considered part of the substantive theories, Raz undermines his own analytic contention that as a matter of clarity the Rule of Law should be understood as a formal concept held apart from aims of democracy, human rights and social justice.³² As a result, it is not clear that Raz is not offering a substantive account of the Rule of Law after all.

In response to the shortcomings in attempts like Raz's to delineate a purely formal account of the Rule of Law, there has been a return to theories of the Rule of Law which mirror the original thesis advanced by European theorists. This movement has been represented, most prominently, by Bingham, who has called for a traditional, liberal account of the Rule of Law which includes respect for human rights as a prominent feature. Critiquing the pure formalist accounts, Bingham argued they permit a,

... non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution [which] may, in principle, conform to the requirements of the Rule of Law better than any of the legal systems of the more enlightened Western democracies ... It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity with the Rule of Law ... The law may ... institute slavery without violating the Rule of Law.³³

Bingham, in his account, notes that while not all human rights form part of the Rule of Law, no human right could be enforced effectively, nor an appropriate remedy to its infringement provided, without the Rule of Law. Bingham thus articulated the Rule of Law as mandating Dicey's three classical requirements as well as eight further sub-requirements.³⁴ However, he also argued that the Rule of Law must also afford protection to human rights, in an argument that chimes with Bedner's

³² Ibid.

³³ Ibid, 211, 221.

³⁴ Bingham, *The Rule of Law*. These are; the accessibility of law, that the law should not be discretionary, equality of application, good faith exercise of ministerial and governmental power, the law must afford adequate protection of fundamental human rights, means must be provided for efficiently resolving bona fide civil disputes which the parties themselves are unable to resolve, any such adjudicative procedures should be fair and the State should comply with its obligations in international law as in national law.

proposition that ‘other parts of the Rule of Law can only function effectively if social rights are fulfilled.’³⁵

This genealogy - moving from Kant through Mohl and Schmidt to Dicey and then most recently to Bingham (with Carré de Malberg coming to a similar conclusion at an earlier stage) is significant. The first notable feature of the chronology is that the Rule of Law as conceived of to some degree by Kant but specifically by early theorists of the Rule of Law as a standalone subject, notably Mohl and Schmitt, has been consistently conceived of as a ‘thick’ or ‘substantive’ theory which incorporates rights.

It was only in the latter nineteenth century and in the explicitly common law setting of Dicey’s articulation that this changed, and the impression emerged that the Rule of Law was a theory exclusive of rights concerns. More recently, as the following part examines, the Rule of Law within the European constitutional schema has embraced a substantive concept inclusive of personal liberty concerns as well as the agreed critique of arbitrary authority, and has been regarded as effectively requiring a representative democratic state based on the separation of powers and which respects individual rights.

The second trend identifiable in this chronology is that the European tradition of the Rule of Law as a substantive theory has been fostered as part of a political context defined by market-based individualism. The common thread of theories of the Rule of Law as they reached their zenith during the late nineteenth and early twentieth centuries was that they were championed by liberal jurists concerned with the impact of law on individual liberty in the context of expanding governments with increasing regulatory capacity.

In the twentieth and twenty first centuries this liberal concern has been re-articulated to emphasise not only the need for restrictions on State power to preserve individual liberty but also to enable compatibility with the modern welfare state and the function of fundamental rights, as part of a substantive theory of the Rule of Law, in achieving these ends. In the European Union the development of a substantive theory of the Rule of Law compatible with traditional understandings of the need to limit State power as well as with the social outcomes sought by the welfare state has been particularly apparent.

5.2.2 *The Emergence of a Substantive Rule of Law in the EU Constitutional Schema*

³⁵ Adriaan Bedner, 'An Elementary Approach to the Rule of Law' (2010) 2 Hague Journal of the Rule of Law 48.

The history of the Rule of Law within the European Union is one of transition as the Rule of Law has, over time, moved from a tool of political and largely superficial rhetorical value, towards its current status as an orienting value of the Union given practical force through concrete legal and justiciable standards.

When the EEC was established in 1957 the Rule of Law was not explicitly mentioned in its founding documents. It was only with the 1963 decision of the CJEU in *Van Gend en Loos*³⁶ that a Union committed to the Rule of Law - though absent any explicitly articulated commitment as to its content or the requirements for its promotion emerged. In *Van Gend en Loos*, the Court held that the European Community constituted ‘a new legal order of international law’ for the benefit of which the Member States had limited their sovereign rights and whose subjects comprised not only Member States but also their nationals. The ruling, though controversial, was crucial to the development of the Rule of Law, by establishing the right of individuals to secure recognition and enforcement of their rights in the national courts.

The primacy of Community law, which was recognised by the decision in *Van Gend en Loos*, was explicitly laid out in the *Costa v ENEL* in 1964.³⁷ However, while these judgments contributed to a diminution in the potential for arbitrary or unequal enforcement of EU law, and therefore indirectly promoted greater compliance with the Rule of Law, neither explicitly articulated a commitment to the Rule of Law or a particular vision of its constituent elements. Indeed, such an articulation of the Union’s commitment remained absent until the CJEU’s 1986 judgment in *Les Verts*.³⁸

In *Les Verts* the CJEU was asked to rule on whether the European Parliament could act as a respondent in annulment proceedings initiated by a private party. In *Les Verts*, the green party of France challenged the allocation of political party funding by the European Parliament claiming the system disadvantaged newer parties and sought a declaration that the EC was not entitled to give such funding.³⁹ In the course of its ruling the court noted that the European Community, as it then was, was ‘a community based on the Rule of Law’ in as much as neither its members nor its institutions could avoid a review of the measures adopted by them for conformity with the basic constitutional charter.⁴⁰ Further comment regarding the conception of the Rule of Law endorsed

³⁶ Case C-26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* EU:C:1963:1. The case centered on whether a specific Treaty provision could be enforced in the national courts in the face of conflicting national legislation.

³⁷ Case C-6/64 *Flaminio Costa v ENEL* EU:C:1964:66.

³⁸ Case C-294/83 *Parti écologiste ‘Les Verts’ v European Parliament* EU:C:1986:166.

³⁹ *Ibid.*, 3.

⁴⁰ *Ibid.* Similar statements are in evidence in Opinion 1/76, ‘On the Draft Agreement establishing a European laying-up fund for inland waterway vessels’ [1977] ECR I-741, [12]; Case C-314/91, *Beate Weber v European* EU:C:1993:109, [8]; Case C-2/88 *Imm Zwartfeld and Others* EU:C:1990:440, [16]; Opinion 1/91,

within the Union's schema was absent from the judgment. Indeed, the Court failed to include any substantive support for their statement which, on a common law reading, were arguably made *obiter dicta*.⁴¹

Subsequent to *Les Verts*, the Charter of Paris for a New Europe in 1990 adopted the Rule of Law as one of the three principles on which the New Europe was founded, alongside human rights and democracy.⁴² In 1992 this commitment was reinforced by attempts to secure inclusion of references to the Rule of Law in the proposed text of the TEU during the negotiation of the Maastricht Treaty. This ultimately led to the inclusion of references to the Rule of Law in the preamble to the TEU, in Article 11 TEU as well as in Article 177(2) EC which assigned the European Union's foreign and security policy as well as the Union's policy on development co-operation the express objective of developing and consolidating democracy and the Rule of Law. In 1997 a fourth reference was added with Art 6 TEU which provided the '[U]nion is founded on ... the Rule of Law, principles which are common to the member states.'⁴³ However, in none of these instances was the Court's silence in *Les Verts* resolved, and no elaboration of a theory of the Rule of Law or substantive commitments on its achievement were provided.

Despite this uncertain footing, in 1997 the Amsterdam Treaty inserted Article 49 TEU which obliged states seeking accession to the European Union to comply with the Rule of Law. The inclusion ostensibly elevated the importance of the principle of the Rule of Law still further as a central characteristic obligatory for Union membership. Indeed, the Article might, understandably, have been read as an indication that the Union was poised to enumerate a substantive commitment to the Rule of Law.⁴⁴

In 2007, the Lisbon Treaty amended Article 6 TEU, now Article 2 TEU to provide that the Rule of Law is a founding value of the Union, alongside respect for human dignity, freedom, democracy,

⁴⁰ On Draft agreement between the Community, on the one hand, and the countries of the European Free Trade Association, on the other, relating to the creation of the European Economic Area [1991] ECR I-6079, [21].

⁴¹ There is a further critique of the deployment of the language of the Rule of Law by the CJEU in *Les Verts*, couched in the lack of congruence between French and English language used to describe the principle invoked, with the English text stating the Rule of Law and the French text naming the principle not as *état de droit*, the more commonly accepted translation for the Rule of Law in France, but as *communauté de droit*. For a discussion of this difference and its possible implications see, Laurent Pech, 'A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU law' (2010) 6 European Constitutional Law Review 359, 365.

⁴² Available at (<<http://www.osce.org/mc/39516?download=true>>) accessed 30 July 2019.

⁴³ Available at (<http://www.europarl.europa.eu/hearings/20000222/libe/art6/default_en.htm>) accessed 30 July 2019.

⁴⁴ Available at (<<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12012M049>>) accessed 30 July 2019.

equality, and respect for human rights, including the rights of persons belonging to minorities.⁴⁵ In addition, Article 19 TEU was amended to provide that the CJEU is now empowered to ensure that in the interpretation and application of the Treaties the law is observed, a provision which has been read as including within the remit of the Court the power to ensure the Rule of Law is observed.

From these foundations the Venice Commission in 2011 sought to offer a working definition of the Rule of Law for the European Union, developing six legal principles required to establish the existence of the Rule of Law.⁴⁶ The criteria are, legality (which implies a transparent, accountable, democratic and pluralistic process for enacting laws); legal certainty; prohibitions on the arbitrary use of executive power; independent and impartial courts; effective judicial review (including respect for fundamental rights) and equality before the law.

This theory of the Rule of Law adopted can be characterised as belonging to the trend epitomised by Bingham which signifies a return to the traditional articulations of the Rule of Law developed in continental legal thinking, combining formal restraints on State power with a substantive commitment to judicial review and respect for fundamental rights. Yet it is also notable that the Union's constitutional footing in Article 2 TEU bears a resemblance to Raz's ultimately substantive but allegedly formal conception by associating the Rule of Law with dignity and liberty. This statement found further support in the opinion of Advocate General Cosmas in *Deutsche Telekom* noting that, '[i]n a community governed by the Rule of Law, which respects and safeguards human rights the requirement of equal pay for men and women is founded mainly on the principles of human dignity and equality between men and women and on the precept of improving working conditions not on objectives which are economic in the narrow sense.'⁴⁷

Moreover, while Article 2 TEU, while a late arrival in recognising the Union's commitment to the principles and later values⁴⁸ as having central constitutional standing, linked the Rule of Law and fundamental rights to each other alongside the achievement and maintenance of democratic government. Indeed, the CJEU, following *Les Verts*, has interpreted the TEU broadly to overcome its procedural limits and ensure effective judicial review of fundamental rights. This commitment is

⁴⁵ Available at (<<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:12012M/TXT>>) accessed 30 July 2019.

⁴⁶ European Commission for Democracy Through Law, *Report on the Rule of Law*, (2009).

⁴⁷ Case C-50/96 and Joined Cases C-234/96 and 235/96 *Deutsche Telekom* EU:C:1998:467, [80]

⁴⁸ It is beyond the scope of this work to engage substantively with the possible implications of this change in language for the justiciability of the values.

seen in particular in remarks by Justice Laenerts that the CJEU's approach is that 'judicial protection and the Rule of Law go hand in hand: you can't have one without the other.'⁴⁹

Konstadinides has argued, drawing on Nic Shuibhne's work, that the choice of language in Article 19 TEU which establishes the jurisdiction and powers of the CJEU implicates broader considerations of justice and the general principles of law, including the Rule of Law can be included within the jurisdiction of the Court.⁵⁰ Wennerström argues that this interpretation cannot be read as including a substantive version of the Rule of Law inclusive of fundamental rights protections,⁵¹ however, this is not to say that the Rule of Law as endorsed by the Union is not a substantive version. Thus, while the Court may be limited as a matter of jurisdiction to a formalist conception of the Rule of Law, the institutional commitment within the Union more broadly is to an understanding that is substantive.

The work of the Venice Commission as well as the jurisprudence of the Charter and ECHR endorse a view of the Rule of Law as inter-related with and mutually complementary to fundamental rights. In the case of the ECHR in particular, the preamble provides that '[w]hereas it is essential if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law' and notes that the Rule of Law as an aspect of the common heritage of European countries was one of the motivations for the signatory governments to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration.

In the context of the European Union, while the Charter's preamble takes a similar constitutional stance to the TEU, positioning the Rule of Law as a shared value of the peoples of Europe, a series of recent cases linked to the ongoing concerns surrounding the Rule of Law in Poland have leant further weight to the suggestion implicit in Article 2's grouping of the Rule of Law with democracy and fundamental rights that the theory endorsed by the Union is a substantive one.

In *LM*⁵² the Irish High Court sought a preliminary ruling on the test to be applied where a Court requested to render an individual under a European Arrest Warrant found that the Rule of Law had been breached by legislative changes in the Member State to which surrender was sought.⁵³ In *LM*

⁴⁹ Koen Lenaerts, 'The Rule of Law as the Backbone of the European Union' (2007) 44 *Common Market Law Review* 875.

⁵⁰ Theodore Konstadinides, 'Constitutional Identity as a Shield and as a Sword: The European Legl Order within the Framework of National Constitutional Settlement' (2011) 13 *Cambridge Yearbook of European Legal Studies* 195, 17 and 73-4; Niamh Nic Shuibhne, *The Coherence of the European Union's Free Movement Law: Constitutional Responsibility and the Court of Justice* (Oxford University Press 2013), 2.

⁵¹ Erik O Wennerstrom, *The Rule of Law and the European Union* (Iustus Förlag 2007), 131.

⁵² Case C-216/18 *LM* EU:C:2018:586.

⁵³ *Minister for Justice v Celmer (No 2)* [2018] IEHC 153, (Donnelly J) .

the High Court had concerns that there was a real risk of a denial of the respondent's Article 6 ECHR rights should he be extradited to Poland for trial.⁵⁴ In its decision on the reference the CJEU noted that,

the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the Rule of Law, will be safeguarded.⁵⁵

This practical function of the Rule of Law as the ultimate safeguard of individual fundamental rights has stemmed in part from the Union's commitment to a substantively enforced standard for its Member States in respecting the Rule of Law at a national level contained in Article 7 TEU. Article 7 provides that the EU may adopt preventative sanctions where there is 'a clear risk of a serious breach' of the EU values (including the Rule of Law) by a member state.⁵⁶

On previous occasions breaches of the Rule of Law under Article 7 have been identified in circumstances including the rights of minority groups,⁵⁷ the protection of asylum seekers,⁵⁸ threats to media pluralism⁵⁹ and judicial independence.⁶⁰ This is a clear endorsement of a substantive theory of the Rule of Law though an official triggering of the Article 7 enforcement mechanism is considered a final resort - an attitude testified to by the long running absence of any invocation of the Article prior to 2017.⁶¹

⁵⁴ Subsequent to the reference in *LM*, Donnelly J in *Minister for Justice v Celmer (No. 5)* [2018] IEHC 639 found that the deficiencies in the independence of the Polish judiciary did not meet the threshold for refusal of surrender.

⁵⁵ Case C-216/18 PPU *Minister for Justice and Equality* EU:C:2018:586, [48].

⁵⁶ European Commission 'Rule of Law: European Commission acts to defend judicial independence in Poland' 20 December 2017, at (<http://europa.eu/rapid/press-release_IP-17-5367_en.htm>) accessed 27 February 2019.

⁵⁷ See, Dimitry Kochenov and Laurent Pech, 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' (2015) 11 *European Constitutional Law Review* 500.

⁵⁸ *MMS v Greece and Belgium* App no 30696/09 (ECHR, 21 January 2011); Joined Cases C-411/10 and C-493/10 *NS and ME* EU:C:2011:865.

⁵⁹ European Parliament Briefing, 'Member States and the Rule of Law Dealing with a Breach of EU Values' March 2015.

⁶⁰ See, Laurent Pech and Kim Lane Scheppele, 'Illiberalism within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3.

⁶¹ Article 7 was triggered for the first time against Poland on 20 December 2017, and again on 12 September 2018 against Hungary. See, European Parliament, *Rule of law in Hungary: Parliament calls on the EU to act* (2018); European Commission, 'Rule of Law: European Commission launches infringement procedure to protect judges in Poland from political control' (2019).

The concrete realisation and enforcement of the Rule of Law through Article 7, and the substantive, rights-inclusive vision it endorses finds further support in the Union's secondary law. Numerous implied commitments to the Rule of Law are manifested in the constitutional and administrative principles which underpin the EU legal order.⁶² In particular, the principles of consistency, legitimate expectations and legal certainty,⁶³ as well as the principle of legality,⁶⁴ and the principle of proportionality⁶⁵ all act as guarantees of a substantive conception of the Rule of Law in which laws are predictable, public and equally applied while they also seek to ensure effective judicial review and thus, the enforceability of fundamental rights.

5.2.3 *The Impact of Private Policy on the Rule of Law*

The Rule of Law in the context of this work is thus understood as a substantive or thick concept constitutive of the limitations and principles of equality of application, public promulgation and prospectivity of formal theories as well as of fundamental rights. In light of this framing the question then becomes what impact private policy can have on the Rule of Law in particular in as much as the rights of privacy and property considered by this work are concerned.

How then does the rise of private policy examined by this paper affect the Rule of Law. The answer is threefold. First, as chapters two and three have examined the rights to privacy and property examined by this work as examples of private policy are oriented towards the preservation and maximisation of individual autonomy. The redefinition and reduction of these rights protective capacities thus reduce the individual autonomy they seek to protect. Given the centrality of autonomy to democratic participation as explained by the previous chapter the result is a negative reduction of the capacities of individuals to engage in the democratic process. Within the European Union, the Rule of Law has been repeatedly understood as constitutive of and necessary for the maintenance of democratic governance. A reduction in democratic participation thus impacts the Rule of Law.

Secondly, the rise of private policy has enabled the development of mechanisms of constitutional avoidance, permitting State actors to circumvent traditional constitutional restraints on their actions or activities, a trend most notable in the context of the third party doctrine in the United States, though parallel potentials exist within European Member States. This undermines the Rule of Law by permitting State actors to violate the constitutional restraints intended to bind them.

⁶² Konstadinides, *The Rule of Law in the European Union*, 84 *et seq.*

⁶³ *Ibid*, 91.

⁶⁴ See, Edoardo Chiti and Bernardo Giorgio Mattarella, *Global Administrative Law and EU Administrative Law: Relationships, Legal Issues and Comparison* (Springer 2011), 403.

⁶⁵ See, Evelyn Ellis, *The Principle of Proportionality in the Laws of Europe* (Hart 1999).

Finally, the development of a private jurisprudence undermines the Rule of Law by permitting private actors to develop opaque standards for the definition and enforcement of fundamental rights which lack equality and predictability of application and the accountability necessary under the Rule of Law.

5.3 The Rule of Law and Democratic Participation

The difficulty with the substantive theory of the Rule of Law adopted by the European Union is that its boundaries are difficult to draw. Quite apart from the contested nature of fundamental rights within the Union's constitutional documents⁶⁶ and the CJEU's jurisprudence,⁶⁷ their normative content is rarely amenable to bright line delineation and is instead characterised most frequently by competing moral claims, as well as the complexities which are raised by positive obligations in respect of fundamental rights that seek to promote greater liberty through State intervention through regulation.

Certainly, the Union's legal schema evidences a lack of conceptual clarity in its understanding of fundamental rights which makes it challenging to differentiate between principles and rights in the Union's legal order,⁶⁸ and just what rights, being so recognised, would be included within the Rule of Law. However, in light of the autonomy based understandings of the rights examined in this work and the relationship of the concept of autonomy to democratic participation it can be said that, at a minimum, the Rule of Law within the EU legal order seeks to democratic governance and the account of the Rule of Law endorsed by the Union should necessarily encompass those rights necessary to protect that end.

In this respect it should be borne in mind that, stripped of all technicality, the Rule of Law seeks to ensure that the government, in all its actions, is bound by publicly announced, previously fixed rules – rules which enable citizens.⁶⁹ It is a political ideal which requires that individuals shall be ruled by and subject to the law, and that in return the State shall be similarly bound.⁷⁰ The virtue underpinning all of these points is a fundamental conception of a democratic social contract.

While the EEC was not established to promote democratic government its implicit aim in promoting the economic interdependence which might in turn produce peace, foresaw democratic governance

⁶⁶ See part 1.5, page 7.

⁶⁷ Chapter 7, page 213.

⁶⁸ See part 1.5, page 7.

⁶⁹ Friedrich Hayek *The Road to Serfdom* (Routledge 1944) at 54.

⁷⁰ Joseph Raz, 'The Rule of Law and Its Virtue' in Joseph Raz *The Authority of Law* (Oxford University Press, 1979) at 211- 212.

as a desirable outcome. Indeed, the economic bonds created by the Union at its outset represented an attempt to secure peace within Europe and to immunise the continent against a resurgence of fascism or an emergence of communism through the promotion of trade driven adoption of democratic social models of the state.⁷¹ In both these respects individual autonomy secured through democratic governance was, and continues to be, viewed as the natural outcome of economic cooperation, whose resulting prosperity and unity reinforced geopolitical independence and stability as part of the European social model.⁷²

While absent from the Treaty of Rome in 1957, the affirmations of the Paris Conference in 1972 referred to democracy 'as well as other values' as pre-conditions for the development of a European community and democracy currently enjoys a place alongside the Rule of Law and human rights in the founding values of the Union.⁷³ In addition to this status within the Treaties, democracy functions after all as the necessary condition for the limitation of rights within the ECHR and is explicitly averred to in the preamble of Charter alongside the Rule of Law in the context of the Union's values. Indeed, democratic values are consistently reflected in the EU's institutional structure and the layered democratic processes within the Union,⁷⁴ a value orientation which assumes democracy as a common element of Member States' constitutional traditions.⁷⁵

The European social model has thus promoted a positive notion of what is sometimes averred to as liberty but what is more specifically understood as autonomy that seeks to achieve the deepest condition of freedom for the greatest number of citizens. While the Union has progressed in fits and starts towards an, as yet partial, realisation that the market alone will not achieve this goal the model provides a consistent, orienting focus on individual autonomy, the cultivation of social solidarity and the protection of vulnerable populations through the provision of a model of social and economic citizenship rights, supplemented by fundamental rights under the Charter.⁷⁶ The result, is the creation of a layered, constitutional conception of the Rule of Law as premised on the existence of a robust protection and vindication of individual autonomy which is fundamentally constitutive

⁷¹ Enzo Moavero-Milanesi Giuliano Amato, Gianfranco Pasquino, Lucrezia Reichlin, *The History of the European Union: Constructing Utopia* (Hart 2019), ch.1

⁷² Fritz W Schaff, 'The European Social Model: Coping with the Challenges of Diversity' (2002) 40 *Journal of Common Market Studies* 645; Jon Erik Dølvik and Andrew Martin, *European Social Models From Crisis to Crisis* (Oxford University Press 2017).

⁷³ Williams, *The Ethos of Europe: Values, Law and Justice in the EU*, 165.

⁷⁴ Which works on a proxy democracy as noted by *ibid*, 192.

⁷⁵ See, Giuliano Amato, *The History of the European Union: Constructing Utopia*; Craig Parsons, 'Showing Ideas as Causes: The Origins of the European Union' (2002) 56 *International Organisation* 47.

⁷⁶ Anthony Giddens, *Europe in the Global Age* (Polity Press 2007), 2; Grainne De Burca, 'Towards European Welfare' in Grainne De Burca (ed), *EU Law and the Welfare State: In Search of Solidarity* (Oxford University Press 2005) 1, 4.

of democratic governance in a broader, political, context. In this context the rights of privacy and property examined by this work are particularly important.

5.3.1 *The Significance of Privacy and Property Rights*

Privacy and property protections are found in a majority of the constitutional texts of Member States and as well as existing in distinction are also frequently comingled as concepts in the protection of privacy. In a survey of the Union's current Member States more than half have constitutional documents or national legal codes which contain tripartite guarantees which mirror the contents of Article 8 ECHR and Article 7 of the Charter protecting individual privacy in the context of the person, home and papers of the individual. Belgium, Denmark, Estonia, Finland, Italy and Sweden all reproduce a neat tripartite protection while Hungary, Latvia, Lithuania, Malta, Poland, Portugal and Slovenia emphasise property and papers with references to individual liberty recognised elsewhere.⁷⁷

The association between privacy, property and autonomy can be charted through history, an association commonly expressed in the modern maxim that every man's home is his castle. While the pattern may be attributable in part to a natural human desire for privacy and territorial control, or a shared emphasis on hospitality and shelter an attempt to trace the historical origins and boundaries of such practices is beyond the scope of this work.⁷⁸ What is ascertainable, however, is an ongoing emphasis from early accounts of legal texts⁷⁹ through to specifically recorded Roman law, on the home as an area from which the State was excluded and over which the individual (historically the male individual) had sole dominion absent specific, and narrow circumstances.

Roman law, in particular, drawing on strong links between ancestor worship and the physical area of a home regarded an individual's dwelling as a space of personal autonomy.⁸⁰ Cicero thus noted 'What is more inviolable, what better defended by religion than the house of a citizen ... This place of refuge is so sacred to all men, that to be dragged from thence is unlawful.'⁸¹ This attitude to privacy linked to property in Roman law influenced later, continental, traditions but is also ascertainable, in a somewhat diluted form, in Anglo-Saxon England where the law recognised the

⁷⁷ Róisín Áine Costello, 'The Need for a Constitutional Prohibition on Unreasonable Search and Seizure in a Digital Age' (WG Hart Legal Workshop); Stephen C Thaman (ed), *Exclusionary Rules in Comparative Law* (Springer 2013).

⁷⁸ See, Barrington Moore, *Privacy: Studies in Social and Cultural History* (Routledge 1984).

⁷⁹ Joshua 7:10-26; Lasson discusses further Biblical examples see, Nelson B Lasson, *The History And Development Of The Fourth Amendment To The United States Constitution* (De Capo Press 1970), 14-15.

⁸⁰ See, Larry Siedentop, *Inventing the Individual: The Origins of Western Liberalism* (Penguin 2015), 7-33.

⁸¹ See also, JB Moyle, *Imperatoris Iustiniani Institutionem* (Oxford University Press 1923), 515; Lasson, *The History And Development Of The Fourth Amendment To The United States Constitution*, 15-17.

right of the individual not to have his home invaded⁸² as well as recognising the crime of forcible entry into a man's dwelling.⁸³

Subsequently, however, protections of privacy and the inviolability of individual property declined.⁸⁴ In their absence political suppression was achieved largely as a result of the violability of the dwelling and the emphasis on individual liberty within the constitutional schema of many jurisdictions was, in practice, outweighed, by a pronounced tendency toward the suppression of the press and political dissent in the service of maintaining political, cultural and religious conformity under English law.⁸⁵ This suppression was achieved largely through the imposition of licensing requirements and laws governing seditious libel (speech that criticised the government of its officials) the enforcement of which depended in part on searches of individual dwellings and of the person as well as seizures of personal papers.⁸⁶

This pattern of invasion of privacy and property persisted until the seventeenth century⁸⁷ leading to significant restrictions on political speech both in England proper and in her colonies.⁸⁸ The colonies were often exposed to more punitive measures with a view to suppressing independence movements.⁸⁹ In this context, the development of the US constitution's tripartite prohibition on infringement of the privacy of the individual, their papers or their property has been traced to three episodes of controversy regarding the powers of search and arrest exercised by the colonial government prior to the American Revolution.⁹⁰ The first, was the use of general writs in Boston by customs officials as authority to search imported goods.⁹¹ The second was the use of general

⁸² John Reeves, *History of English Law* (Finlason 1880), I, lxii ff.

⁸³ Benjamin Thorpe, *Ancient Laws and Institutes of England* (The Commissioners of the Public Records of the United Kingdom 1840), II.

⁸⁴ On the decline in England see, William J Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602-1791* (Oxford University Press 2009), 43 *et seq*; In a European context see the remarks of the delegates to the First Consultative Assembly of 1949 collected in William A Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015), 360.

⁸⁵ Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602-1791*, 151.

⁸⁶ Fredrick Seaton Siebert, *Freedom of the Press in England* (University of Illinois Press 1952), 21-164.

⁸⁷ Stephen M Feldman, *Free Expression and Democracy in America: A History* (University of Chicago Press 2008), 8; Antti Tahvanainen, 'Free Election and Freedom of Speech in English Republican Thought' in Quentin Skinner and Martin van Gelderen (ed), *Freedom and the Construction of Europe: Free Persons and Free States*, vol 2 (Cambridge University Press 2013) 128, 137 *et seq*.

⁸⁸ Feldman, *Free Expression and Democracy in America: A History*, 7; An Act for Preventing the Frequent Abuses in Printing Seditious Treasonable and Unlicensed Books and Pamphlets and for Regulating Printing and Printing Presses, 14 Chas. 2, c.33 (1162); Trial of John Twyn reprinted in Thomas Bayly Howell, *A Complete Collection of State Trials and Proceedings for High Treason* (1816), 535-6.

⁸⁹ Feldman, *Free Expression and Democracy in America: A History*, 9-10; Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602-1791*, 231.

⁹⁰ Lasson, *The History And Development Of The Fourth Amendment To The United States Constitution*. Though there has been disagreement as to the relative importance of each of these issues there has been a general agreement among subsequent works that Lasson's identification of these three incidents is correct.

⁹¹ *Ibid*, 51.

warrants to search the homes and seize papers on which basis seditious libel prosecutions were initiated against political opposition candidates and their supporters.⁹²

Finally, the third, was the authorisation by the Crown of the use of general writs for customs searches in the colonies under the Townshend Acts of 1767 leading to a judicial standoff in the American colonies in which Crown officers repeatedly sought and judicial officers repeatedly denied such writs on the basis that they were illegal or contrary to the common law as they permitted unjustified interference with individual privacy, privacy of papers and privacy in respect of private homes.⁹³

While there have been some disagreements as to the relative influence of each of these three episodes, it is accepted by the leading legal historians considering the Fourth Amendment that the use of general warrants to search the homes and seize papers on which basis seditious libel prosecutions were initiated against political opposition candidates and their supporters, specifically prompted by the *Wilkes* case in England, was the single most influential source on the framing and drafting of the Fourth Amendment.⁹⁴

Against this historical background the Fourth Amendment emerged following the Constitutional Convention of 1787 and subsequent debates on the possible content of a later Bill of Rights.⁹⁵ The Fourth Amendment drafted by Madison was thus presented to Congress in 1789, its contents characterised by its author as containing one of the 'essential' rights⁹⁶ necessary for the protection of individual liberty. Contemporaneously the Fourth Amendment continues to be proffered as the central constitutional control on State invasions of individual liberty in that jurisdiction as well as a right which secures other constitutional rights such as freedom of expression, freedom of conscience and freedom of religion. The US Supreme Court has thus consistently recognised the shared history of the First and Fourth Amendments⁹⁷ as part of which freedom of speech and

⁹² And which were ultimately found to be trespass, in breach of the common law see, *ibid*, 30.

⁹³ *Ibid*, 71.

⁹⁴ *Ibid*, 43 *et seq.* It is worth noting moreover that in this context the Fourth Amendment at the time of its creation did not in fact contemplate warrantless searches and seizures at all, but rather, saw searches and seizures under a general warrant to be unreasonable. See Thomas Y Davies, 'Recovering the Original Fourth Amendment' (1999) 98 Michigan Law Review 547, 551; Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602-1791*, 439; *Marcus v Search Warrant* 367 US 717 (1961). This was further acknowledged by the Supreme Court in *Boyd v United States* 116 US 616 (1886), 626-7.

⁹⁵ Cuddihy, *The Fourth Amendment: Origins and Original Meaning 602-1791*, 670 - 678.

⁹⁶ Madison to George Eve, New York, 2nd January 1789, Madison, *Papers* (Rutland), vol 11, 404-405.

⁹⁷ See, *Stanford v Texas* 379 US 476 (1965), 482-4. See also, Philip H Marcus, 'A Fourth Amendment Gag Order - Upholding Third Party Searches at the Expense of First Amendment Freedom of Association Guarantees' (1985) 47 University of Pittsburgh Law Review 257.

freedom of the press in particular were suppressed through the extension of the search and seizure powers of Crown officials.⁹⁸

This recognition was well-articulated by Justice Douglas in *Frank v Maryland* noting, ‘the commands of our First Amendment (as well as the prohibitions of the Fourth and Fifth) reflect the teachings of *Entick v Carrington*.⁹⁹ These three amendments are closely related, safe-guarding not only privacy and protection against self-incrimination but conscience and human dignity and freedom of expression as well.’¹⁰⁰ During the 1960s and 1970s the US Supreme Court again, repeatedly stressed the close historical relationship between government surveillance and suppression of dissent.

In *Stanford v Texas* the authorities utilised a broad search warrant to search the defendant’s home and seize a large number of the defendant’s books and papers. The Supreme Court held the search to be unconstitutional noting that the ‘constitutional requirement that warrants must particularly describe the things to be seized is to be accorded the most scrupulous exactitude when ‘things’ are books’ noting their centrality to conceptions of individual liberty and self-development.¹⁰¹ Similarly, in *Stanley v Georgia*¹⁰² the Supreme Court forbade the government from restricting the material (in that case books) that an individual may consume in the privacy of his own home noting once more the importance of the Fourth Amendment to individual liberty and the capacity to development one’s self.

In accordance with both the historical context of its development and its applied jurisprudence the Fourth Amendment thus protects a zone of individual liberty by securing not only a substantive restriction on arbitrary exercise of State powers, as its constitutional origins suggest, but also by securing a physical and psychological zone of autonomy, permitting the development of political, religious and creative difference.

The emergence of tripartite guarantees almost identical in form to the Fourth Amendment in European human rights documents following the Second World War is hardly a coincidence and is evidenced most prominently in the text of the ECHR and in the Charter, where the privacy

⁹⁸ See, *Abrams v United States* 250 US 616, 630 (1919) Holmes J (dissenting); *Near v Minnesota* 283 US 697 (1931); *Marcus v Search Warrant* 367 US 717 (1961); *Stanford v Texas* 379 US 476 (1965); *Roaden v Kentucky* 413 US 496 (1973). Ibid, 260-262; Siebert, *Freedom of the Press in England*; Laurence Hanson, *Government and the Press 1695-1763* (Clarendon Press 1936).

⁹⁹ *Entick v Carrington* 19 Howell’s St Jr 1029, 1073 (KB 1765).

¹⁰⁰ *Frank v Maryland* 359 US 360, 376 (1959) as approved in *Stanford v Texas* 379 US 476 (1965), 482-4.

¹⁰¹ 379 US 476 (1965), 485.

¹⁰² *Stanley v Georgia* 394 US 557 (1971). Though it is unclear how this applies in a digital context, see Marc Jonathan Blitz, ‘Stanley in Cyberspace: Why the Privacy Protection of the First Amendment Should be More like that of the Fourth’ (2010) 62 *Hastings Law Journal* 357.

provisions in Article 7 and Article 8 seek to protect privacy in the context of family life, home and communications though there is a notably less individualistic emphasis in the neglect of person in favour of ‘family life.’

While American representatives acted only in an observer capacity at the Congress of Europe¹⁰³ the ECHR, and later the Charter, were drafted in broad terms similar to the US Bill of Rights whose structure and content of which had inspired the French Declaration of Rights of Man¹⁰⁴ and, following the end of the Second World War, the German Basic Law the drafting of which did have distinct North-American involvement.¹⁰⁵ More particularly, the influence of North American constitutional traditions manifested in the text of UNDHR and its similar tripartite formulation of privacy did guide the work of the drafters of the ECHR the subsequently the development of the Charter.¹⁰⁶

5.3.2 *The Role of Privacy and Property in Securing the Exercise of Further Rights*

Like the United States Supreme Court, the jurisprudence of the ECtHR and the CJEU, has emphasised the role of privacy as enabling freedom of expression¹⁰⁷ as part of the maintenance of a democratic society. In the European case the maintenance of a democratic society is specifically codified in the text of the ECHR as a condition for the restriction of fundamental rights, operating as the functional control on how and in what circumstances they may be circumscribed. However, while both the CJEU¹⁰⁸ and the ECtHR¹⁰⁹ have considered the tensions between tripartite privacy

¹⁰³ Council of Europe, ‘*Congress of Europe, May 1948*’ (1999).

¹⁰⁴ Rett R Ludwikowski, ‘The French Declaration of the Rights of Man and Citizen and the American Constitutional Development’ (1990) 38 *The American Journal of Comparative Law* 445.

¹⁰⁵ Richard L Merritt, ‘American Influences in the Occupation of Germany’ (1976) 428 *The Annals of the American Academy of Political and Social Science* 91.

¹⁰⁶ See, Schabas, *The European Convention on Human Rights: A Commentary*, 358-9; Louis Henkin, ‘The Universal Declaration and the US Constitution’ (1998) 31 *Political Science and Politics* 512; Michael D Goldhaber, *A People’s History of the European Court of Human Rights* (Library of Congress 2007), 1; On the origins of the ECHR and its development generally see, Ed Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press 2010).

¹⁰⁷ Before the ECHR see, *Handyside v United Kingdom* App no 5493/71 (ECHR, 7 December 1976); *Sunday Times v United Kingdom* App no 6538/74 (ECHR, 26 April 1979). Before the CJEU see, Steve Peers (ed), *The EU Charter of Fundamental Rights: A Commentary*, 291, 311.

¹⁰⁸ Case C-70/10 *Scarlet Extended* EU:C:2011:771; Case C-360/10 *SABAM v Netlog* EU:C:2012:85 concerning competing rights of intellectual property, freedom of expression and privacy. Case C-131/12 *Google Spain* EU:C:2014:317 indexing of information and rights of removal. Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland* EU:C:2014:238 conflicts between data retention and freedom of expression as a corollary issue to the primary privacy harm in dispute.

¹⁰⁹ In the jurisprudence of the ECHR these cases have arisen largely in the context of journalistic activities *Shabanov and Tren v Russia* App no 5433/02, (ECHR, 14 December 2006), [46]; *Hachette Filipacchi Associés v France* App no 40454/07 (ECHR, 14 June 2007), *Von Hannover v Germany* App no 59320/00 (ECHR, 24 June 2004).

protections and freedom of expression, neither court has demonstrated any recognition of the mutual interdependence of these rights as the US Supreme Court has.¹¹⁰

And yet, no less than in the United States, privacy and property function to protect a zone of individual liberty that enables the enjoyment of those activities or actions protected by other fundamental rights and which are necessary in a democratic society. As a result, the rights to privacy and property, though individually exercised, cumulatively operate to secure the preservation of a zone of individual liberty within society as a whole which enables democratic participation, and which lies at the heart of the Rule of Law.

Ultimately, in the European Union as in the United States, rights of freedom of expression,¹¹¹ freedom of conscience and religion¹¹² and individual liberty are inherently reliant on the demarcation of the zones of personal autonomy constructed by the rights to privacy and property. These rights also contribute to the maintenance of cultural, religious and linguistic diversity¹¹³ and a more general shield from discriminatory practise through their provision of a veil behind which retreat is possible.¹¹⁴

In this way, the rights of property and privacy operate as ‘anchor rights’ from whose protective zone these other rights may be exercised without fear of reprisal. Through their capacity to protect diversity of identity and belief, as well as political dissent these rights promote and protect individual autonomy but also provide a space for democratic participation which is central to the European conception of the Rule of Law.

Freedom of expression is a utile example of the importance of anchor rights for the promotion of democracy, and thus the Rule of Law. Freedom of expression does not exist in private spaces and yet it is the existence of private spaces that commonly enables the existence of those dialogues from which dissent grows,¹¹⁵ when the public square has fallen to autocracy, or where social or economic restrictions make public dissent hazardous.

Indeed, in Habermas’ account of the importance of the public sphere it is notable that private spaces – coffee houses most prominently – are the venues for the development of much of the democratic

¹¹⁰ *Bartnicki v Vopper* 532 US 514.

¹¹¹ Article 10 of the Charter.

¹¹² Article 11 of the Charter.

¹¹³ Article 22 of the Charter.

¹¹⁴ Article 21 and 23 of the Charter.

¹¹⁵ Jurgen Habermas, *The Structural Transformation Of The Public Sphere: An Inquiry Into A Category Of Bourgeois Society* (Polity 1992).

dissent and social progress which his theory values.¹¹⁶ Freedom of speech thus functions not merely to promote democracy but, more fundamentally, to enable individuals to participate in the creation and perpetuation of a democratic culture which fosters self-development as part of the ideal of individual liberty and which, through mutual communication and influence, allows individuals to participate in the production and exchange of the information necessary to facilitate democratic self-government.¹¹⁷ Thus, freedom of speech does not seek only to secure individual liberty but also aims to ensure an informed public, equipped to participate in democratic processes.¹¹⁸

The autonomy that the rights of property and privacy protect is itself necessary for the promotion of democratic participation which the Rule of Law in the European Union is oriented towards achieving. However, the rights are also significant in securing the spaces within which further rights necessary for and inherently connected with democratic governance can be exercised.

5.4 Constitutional Avoidance and ‘The Invisible Handshake’

In addition to the context examined above the Rule of Law is affected by private actors through ‘constitutional avoidance,’ by which this work refers to the development by State institutions, notably the judiciary, of limitations to or exemptions from the protective remit of fundamental rights which permit the State to access and use information disclosed to private actors in a manner not subject to the fundamental rights restraints that would otherwise be present. Notably this mechanism has developed only in relation to privacy rights, however, the existence and potential of similar threats to other rights is not unrealistic.

5.4.1 *Formal Constitutional Avoidance*

The most prominent example of formal constitutional avoidance which has particular relevance in the digital context examined by this work in the third-party doctrine in the United States, which offers State actors the ability to access information disclosed to private actors without recourse to the privacy protections offered by the Fourth Amendment.

¹¹⁶ Ibid.

¹¹⁷ Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Oxford University Press 1960), 24-27; Owen M Fiss, *The Irony of Free Speech* (Harvard University Press 1996); Cass R Sunstein, *Democracy and the Problem of Free Speech* (Free Press 1995); Owen M Fiss, ‘Why the State?’ (1987) 100 *Harvard Law Review* 781.

¹¹⁸ Robert Post, ‘Meiklejohn’s Mistake: Individual Autonomy and the Reform of Public Discourse’ (1993) 64 *Colorado Law Review* 1109; Meiklejohn, *Political Freedom: The Constitutional Powers of the People*, 26, 55.

5.4.1.1 The United States and the Third-Party Doctrine

The United States Supreme Court in *Katz v United States*¹¹⁹ established the reasonable expectation of privacy test which formed the root from which the third party doctrine would subsequently emerge. In *Katz* the appellant had used a public phone booth to communicate illegal gambling wagers across state lines which was a federal offence. His conversations conducted from the booth, of which the illegal communications formed a part, were recorded by federal authorities using a wiretap and used to convict the appellant. Overturning the precedents which had been established in *Olmstead v United States*¹²⁰ and *Goldman v United States*¹²¹ the Court found that the Fourth Amendment could extend to those areas beyond the home in which an individual maintained a reasonable expectation of privacy.

The *Katz* test was affirmed by the Court's decision in *Miller*¹²² where the Court held that the respondent's bank records were not protected by the Fourth Amendment noting,

...the depositor takes the risk in revealing his affairs to another that the information will be conveyed by that person to the government ... the Fourth Amendment does not prohibit the obtaining of information revealed to a third party ... even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.¹²³

This decision was retrenched in *Smith v Maryland*¹²⁴ which established the doctrine which is now commonly referred to as the 'third party doctrine' holding that an individual could not maintain a reasonable expectation of privacy and the associated Fourth Amendment protections where they disclosed information to a third party, in that case a pen-register (a record of numbers dialled and called).¹²⁵ In that case a pen register (a record of the numbers called by a particular telephone number) had been compiled by the appellant's service provider. The majority found that in voluntarily disclosing this information to third party the appellant had forfeited any privacy interest in the information such that he could not claim the protection of the Fourth Amendment.

¹¹⁹ *Katz v United States* 389 US 347 (1967).

¹²⁰ *Olmstead v United States* 277 US 438 (1928).

¹²¹ *Goldman v United States* 316 US 129 (1942).

¹²² *United States v Miller* 425 US 435 (1976).

¹²³ 425 US 435 (1976) at 425.

¹²⁴ *Smith v Maryland* 442 US 735 (1979).

¹²⁵ *Ibid*, 743.

The decision in *Smith* was heavily criticised, perhaps most presciently by Justices Marshall and Brennan who, dissenting from the majority opinion, condemned the Court for depriving citizens of Fourth Amendment protections is so broad a range of activities that they could avoid the abrogation of their privacy only where they abstained from the use of services which were ‘a personal and professional necessity.’¹²⁶

After a period of relative calm, the case of *United States v Jones*¹²⁷ offered an apparent indication from the bench that the third party doctrine might be incompatible with the proliferation of modern technologies which require extensive disclosures of ostensibly private information. In that case, police investigators had attached a GPS device to the appellant’s vehicle and monitoring his movements using information it gathered. While the majority found that the placement of the GPS device did attract Fourth Amendment protection Justice Sotomayor in her concurrence, speaking *obiter*, questioned whether,

‘More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.’¹²⁸

Despite this suggestion that a change to the doctrine in the digital age, in two subsequent cases the Court, presented with facts which would have permitted them to strike down the doctrine declined to do so.¹²⁹ However, in *Carpenter* the Supreme Court augmented the test established in *Katz*, creating a three factor threshold for the application of the doctrine and, in doing so, have arguably extended the reach of the Fourth Amendment to cover commercial databases previously outside the reach of the Amendment’s protection.¹³⁰

Despite the controversial status of the doctrine, neither doctrine’s critics nor those who seek to extol its necessity¹³¹ have considered the implications of the doctrine’s restriction of the Fourth Amendment’s privacy protections for the Rule of Law. Rather, they have emphasised the nature of

¹²⁶ *Ibid*, 751.

¹²⁷ *United States v Jones* 565 US 400 (2012).

¹²⁸ 565 US 400 (2012) at 5.

¹²⁹ *Reilly v California* 573 US (2014); *Carpenter v United States* 585 US (2018).

¹³⁰ On the changes introduced by the decision in *Carpenter* and their likely impacts on the protective scope of the Fourth Amendment see, Paul Ohm, “The Many Revolutions of *Carpenter*” (2019) 32 *Harvard Journal of Law and Technology* 357. On implementing an understanding of the scope and content of a post-*Carpenter* understanding of Fourth Amendment protections see, Jack Balkin, “The Fiduciary Model of Privacy” (2020) 11 *Harvard Law Review* 11, 18.

¹³¹ Orin S Kerr, 'The Case for the Third-Party Doctrine' (2009) 107 *Michigan Law Review* 561.

the disclosures and parties involved,¹³² and the disputed definitions of public and private which underlie much of the debate.¹³³ This seems particularly unusual given the historical context of the drafting of the Amendment.

In effect, the third party doctrine operates to create a carve out from the protection of the Fourth Amendment which is increasingly damaging to constitutional privacy protections of US citizens as increasing proportions of quotidian social and economic participation requires the disclosure of significant amounts of data to third parties in the digital market. By providing that such data are outside the protection of the Fourth Amendment the doctrine, in practice, offers the State a means of circumventing constitutional restrictions, and negating the constitutional restraints otherwise imposed by law.

5.4.1.2 The Potential for a Third-Party Doctrine in the European Union

Unlike the US Supreme Court, neither the CJEU nor the ECtHR have developed an explicit doctrine which permits the bypassing of the fundamental rights considered by this work. Neither does either court employ a clear distinction as between when information voluntarily disclosed to a private party may and may not lose the protections afforded by their respective texts.

While Article 8 rights may be limited where the individual seeking to exercise such rights does so in the service of shielding illegal activity from view,¹³⁴ a view which is similarly adopted by the GDPR and the Charter, the ECtHR has ruled that the absence of judicial authorisation will not *per se* lead to a breach of Article 8 where sufficient safeguards are in place¹³⁵ and has found that the

¹³² Orin Kerr and Greg Nojeim, 'The Data Question: Should the Third-Party Doctrine be Re-visited' (2012) ABA Law Journal

¹³³ Woodrow Hartzog, 'The Public Information Fallacy' (2019) 99 Boston University Law Review 459, 465.

¹³⁴ *KU v Finland* App no 2872/02 (ECHR 2 December 1984), [84]. In *Benedik v Slovenia* App no 62357/14 (ECHR, 24 April 2018), examined below, the existence of a reasonable expectation of privacy was queried by Judge Vehabovic who noted he was unable to agree with the majority that the subjective perception of the applicant should be considered given that criminal activity, by its nature, seeks to disguise its existence and could thus not be considered reasonable, particularly in circumstances where the activity had taken place through a public network visible to others and which the appellant ought reasonably to have known conferred no anonymity. See also, *Uzun v Germany* App no 35623/05 (ECHR 2 September 2010), [44]; *Peck v The United Kingdom* App no 44647/97 (ECHR 28 January 2003), [77]; *Herbecq and the Association Ligue des droits de l'homme v Belgium* App no 32200/96 and 32201/96 (ECHR 14 January 1998), 92.

¹³⁵ *Société Colas Est and Others v France* App no 37971/97 (ECHR 16 April 2002), [48]; *Klass and Others v Germany* App no 5029/71 (ECHR 6 September 1978); *Rotaru v Romania* App no 28341/95 (ECHR 4 May 2000), [59]. In such circumstances the Court will impose a heightened standard of scrutiny, see *Colon v The Netherlands* App no 49458/06 (ECHR 15 May 2012), [74]; *Gillan and Quinton v The United Kingdom* App no 4158/05 (ECHR 12 January 2010), [83]-[86].

disclosure of records made by private actors for billing purposes does not constitute an automatic breach of Article 8.¹³⁶

These issues were examined in the recent decision of *Benedik v Slovenia*,¹³⁷ in which the appellant was accused of possessing and sharing child pornography subsequent to the identification of an IP addresses linked to the property where he was resident.¹³⁸ The association of the applicant's IP address with his physical address was accomplished by obtaining and cross-matching records held by private actors without obtaining judicial authorisation.¹³⁹ Before the national courts, the appellant argued the evidence subsequently obtained during the search of his home should be excluded as it constituted a breach of his Article 8 ECHR rights.¹⁴⁰

Citing *Barbulescu's* finding that a reasonable expectation of privacy,¹⁴¹ though significant, was not conclusive in determining violations of Article 8,¹⁴² the Court accepted that the appellant, when exchanging files online expected, from a subjective perspective, that his activity and identity would not be disclosed.¹⁴³ The Court further found the respondent's actions in obtaining the appellant's address had a basis in domestic law but noted that the law offered 'virtually no safeguards' against arbitrary interference as required under Article 8(2), thus concluding the applicant's rights under Article 8 had been breached.¹⁴⁴

Significantly, for the purposes of the development of a mechanism of constitutional avoidance, the Court in *Benedik* declined to consider the degree of voluntary disclosure which would negate a reasonable expectation of privacy such that the protections of Article 8 was forfeit, instead reiterating its previous finding that a reasonable expectation of privacy is merely a contributory rather than determinative factor.

¹³⁶ *Klass* (1978); *Malone v The United Kingdom* App no 8691/79 (ECHR 2 August 1984), [84]; *Lambert v France* App no 46043/14 (ECHR 5 June 2015), [21]. Though the use of telephone data for the purposes of an investigation by a private actor which will constitute a breach of Article 8, following the decision in *Malone v United Kingdom* (1984).

¹³⁷ *Benedik v Slovenia*.

¹³⁸ *Ibid*, [6].

¹³⁹ *Ibid*, [7]-[10].

¹⁴⁰ *Ibid*, [25].

¹⁴¹ Prior to the decision in *Benedik* the language used by the ECtHR had largely mirrored that of the US Supreme Court, with a repeated reference to an objective test based on 'reasonable expectations of privacy.' *Benedik*, however, confirmed that a strict construction of reasonable expectations of privacy is not to be adopted, raising the implication that the CJEU will adopt a similar stance and follow the US in moving toward a subjective test which would permit the emergence of a European equivalent of the third party doctrine *Ibid*, at [115]-[118].

¹⁴² *Ibid*, [101]. See *Barbulescu v Romania* App no 61496/08 (ECHR 5 September 2017); *Copland v United Kingdom* App no 62617/00 (ECHR 3 April 2007).

¹⁴³ *Ibid*, [116].

¹⁴⁴ *Ibid*, [129].

The result, in combination with the Court's existing jurisprudence, and the limits of Article 8 protections permissible under Article 8(2),¹⁴⁵ is that in fact the emergence of a jurisprudential approach similar to the US's third party doctrine is not only possible but permissible under the ECHR as long as it is provided by law and enforced in a manner which is accessible, foreseeable and is not arbitrary – a standard which the third party doctrine as it is constituted in US jurisprudence would arguably satisfy. This potential is only reinforced by the decisions of the Court to date that criminal activity may not enjoy the protection of Article 8, a perplexing stance given the traditional function of such guarantees in protecting all individuals, and not merely those engaged in legitimate activity, from private infringements by State actors.

The CJEU has endorsed the approach of the ECtHR¹⁴⁶ providing that compatibility with Articles 7 and 8 of the Charter requires that the measure at issue be provided for by law, pursue a legitimate purpose and be proportionate,¹⁴⁷ restraints which similarly leave space for the development of a means of constitutional avoidance where an individual has disclosed information to a third party. The Opinion of Advocate General Øe in *Ministerio Fiscal* indicated the emergence of a line of reasoning similar to the third-party doctrine is unlikely, at least in so far as the CJEU is concerned by requiring that judicial authorisation and safeguards be in place.

In *Ministerio Fiscal* the CJEU was asked to decide whether the contents of a pen register held by a private service provider could be accessed in the course of criminal investigations. In his opinion the Advocate General found that this would be permissible only given the presence of a court review and procedural safeguards and was required to be targeted both in time and manner.¹⁴⁸ However, in its judgment¹⁴⁹ the CJEU noted that while the access of public authorities to data constituted an interference with Articles 7 and 8 of the Charter,¹⁵⁰ the data concerned, without being cross-referenced with further data (which was not held by the private actor) did not permit precise conclusions to be drawn concerning the private lives of the individuals concerned.¹⁵¹ In those circumstances, the Court did not consider access to the data to be an interference with the rights protected by Articles 7 and 8,¹⁵²

¹⁴⁵ Restrictions on the right to respect for private and family life are permissible under Article 8(2) where they are, in accordance with law; as necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals; for the protection of the rights and freedoms of others.

¹⁴⁶ Case C-419/14 *WebMindLicenses Kft v Nemzeti Adóés Vámhivatal Kiemelt* EU:C:2015:832.

¹⁴⁷ Case C293/12 *Digital Rights Ireland* EU:C:2014:238; Case C-203/15 *Tele2 and Watson and Others* EU:C:2016:970 ;Case C-419/14 *WebMind Licenses Kft v Nemzet* United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*) EU:C:2015:606.

¹⁴⁸ Case C-207/16 *Ministerio Fiscal* EU:C:2018:300.

¹⁴⁹ Case C-207/16 *Ministerio Fiscal* EU:C:2018:788.

¹⁵⁰ Case C-207/16 *Ministerio Fiscal* EU:C:2018:300, [51].

¹⁵¹ *Ibid*, [60].

¹⁵² *Ibid*, [61].

The implication appears to be that certain data does not require a judicial authorisation and may simply be accessed on request where that data alone if cannot identify an individual. This has a reduced potential towards the development of a formal mechanisms of constitutional avoidance. However, the obligation of Article 52 of the Charter to afford a parallel scope and protection to the rights protected under that document and in the ECHR offers the potential that a position more akin to that in the US may emerge in the ECtHR's jurisprudence compelling an accommodation of such a mechanism by the CJEU, though of course neither court adheres to a strict doctrine of precedent.

5.4.2 *Informal Constitutional Avoidance*

In addition to formal mechanisms for bypassing constitutional privacy protections such as the third-party doctrine there has been growing attention in recent years to voluntary disclosure or agreements to share data between private and State actors. Often referred to in privacy literature as the 'invisible handshake' these informal processes take place out of sight with the result that they are rarely, if ever, challenged.¹⁵³

Ireland, as the location of the European headquarters and data centers for a significant number of the world's largest digital undertakings plays a disproportionate role in the perpetuation of these agreements within the European Union. In a 2016 report the Council of Europe Cybercrime Convention Committee, examining the law enforcement guidelines of Apple, Facebook, Google, Microsoft, Twitter and Yahoo the terms of all documents were found to recognise Irish law as applying to these portions of their activities.¹⁵⁴ Of those terms of service the majority in their terms of service permitted the company to share information with law enforcement authorities.

This contractual permissibility is reinforced by s. 41 of the Data Protection Act 2018, which provides that processing personal data and special categories of personal data for purposes other than those for which they were collected is permissible where it is necessary, proportionate and is conducted to prevent a threat to national security, defence or public security or is for the purposes of preventing, detecting, investigating or prosecuting criminal offences. The provision has been

¹⁵³ Examples of such agreements are examined in Michael D Birkenhack and Niva Elkin-Koren, 'The Invisible Handshake: The Reemergence of the State in the Digital Environment' (2003) 8 *Virginia Journal of Law and Technology* 6

¹⁵⁴ Cybercrime Convention Committee Cloud Evidence Group, 'Criminal Justice Access to Data in the Cloud: Cooperation with 'Foreign' Service Providers.'

deemed by the Data Protection Commission to provide a legal basis for voluntary disclosure to police.¹⁵⁵

This reality has led some to remark that private surveillance *is* State surveillance in as much as private actors may simply act as constitutionally unrestrained proxies for State collection of data through allowing this voluntary sharing. This potential for States to use private actors as proxies is also notable in State use of private actors for outsourcing. The most publicised iterations of this form of constitutional avoidance come from the United States. For example, Palantir, a technology company specialising in data analytics, created an investigative case management system for the US Immigration and Customs Enforcement, which is also used by police departments in New York, New Orleans, Chicago and Los Angeles to create ‘digital dragnets’ to track the behaviour of individuals and build cases for deportation hearings and to predict likely offenders and crime patterns respectively.¹⁵⁶

These functions are enabled by the aggregation of all information which can be purchased concerning an individual through data brokers and other commercial sources, a majority of which is compiled by actors as part of the AdTech market described in chapter two.¹⁵⁷ Of more concern, is that Palantir and similar undertakings when constructing the databases and building the analytic structures on which they run can map possible relatives and associates of the individuals they are targeting through a practice referred to as a secondary surveillance.¹⁵⁸ In the context of Palantir in particular, where their service is specifically designed to identify individuals breaking laws, this raises further concerns for the Rule of Law as it maps not only individual data where a person is suspected of criminal activity but also relationships to those not so suspected, creating a situation in which the entire population, can potentially be mapped through their relationships.

This type of activity is not restricted to a US context though such activities have garnered relatively less popular attention in the EU. Within the European Union the most significant concern regarding the impacts of the digital market on the Rule of Law have focused on the uses of data for political rather than law enforcement purposes with the Cambridge Analytica scandal which exposes how the intimate portraits of individual characteristics built by the AdTech market enable State actors to purchase information they are otherwise constitutionally restrained from collecting.

¹⁵⁵ Data Protection Commission, ‘Guidance for Drivers on Use of ‘Dash Cams,’’ The Guardian (2018), (<<https://www.dataprotection.ie/guidance-landing/guidance-drivers-use-dash-cams>>) accessed 8 February 2020.

¹⁵⁶ Caroline Haskins, ‘300 California Cities Secretly Have Access to Palantir’ *VICE Motherboard* (<https://www.vice.com/en_us/article/neapolis/300-californian-cities-secretly-have-access-to-palantir> accessed 16 August 2019.

¹⁵⁷ *Ibid.*

¹⁵⁸ Sarah Byrne, ‘Big Data Surveillance: The Case of Policing’ (2017) 82 *American Sociological Review* 977.

The Cambridge Analytica revelations, while they should have been of little surprise to anyone familiar with the expansive terms of the privacy policy in use by Facebook or the functioning of the AdTech market nevertheless offer a useful example of the manner in which the Union's deference to normative standard setting by private actors harms the Rule of Law.

In 2018 it was revealed that Cambridge Analytica had obtained an initial data set of an unknown quantity of users from Facebook without the consent of the users. Once obtained the data set was combined with information from other commercial sources in the AdTech ecosystem to build a data rich system that could target the Facebook users whose data had been obtained as well as their extended networks of friends with personalised political advertisements based on their psychological profile with expressed intention of seeking to influence the way individuals voted in elections.¹⁵⁹

The targeting system was the sold by the company to interested actors and was bought and used by candidates for the Republican presidential nomination in the United States as well as by the Trump Presidential campaign.¹⁶⁰ A similar system was employed during the Brexit referendum by Leave.EU¹⁶¹ and allegations have been made in relation to Cambridge Analytica's sales through partners, consultants and affiliated entities in elections in jurisdictions including Brazil, India, Kenya, Nigeria and Mexico.¹⁶²

The result of these mechanisms – formal constitutional avoidance, the invisible handshake and the simple possibility that State actors may purchase information compiled by the AdTech market all create a context in which the power of constitutional restraints on State action (in the context of privacy rights) are fundamentally undermined. The result is that those restraints are not predictably applied by law but are also fundamentally ineffective both of which are outcomes harmful to the Rule of Law.

5.5 A Private Jurisprudence

¹⁵⁹ Cadwalladr, 'I made Steve Bannon's psychological warfare tool': meet the data war whistleblower'.

¹⁶⁰ Ibid.

¹⁶¹ Hearn, 'Cambridge Analytica did work for Leave.EU, emails confirm: Parliamentary committee told work went beyond exploring potential future collaboration'.

¹⁶² Tactical Tech Report forthcoming: *The Influence Industry: The Global Business of Using Your Data in Elections* quoted in Stephanie Hankey, *Data and Democracy in the Digital Age*.

The final mechanisms which is enabled by the rise in private policy examined thus far is the emergence of what Leiser has described as ‘private jurisprudence.’¹⁶³ Private jurisprudence is used by Leiser, specifically in the context of the enforcement of the Right to be Forgotten, to refer to the process by which private actors have been dealt with the process of enforcing fundamental rights in the digital environment in circumstances where they find such powers effectively delegated to them by the European Court.

Leiser’s analysis derived from the fallout of the CJEU’s decision in *Google Spain* in which the CJEU, through its recognition of a right for which no provision had thus far been made in law, effectively outsourced both the determination of the right’s content and enforcement to private actors. Leiser notes that the decision effectively required Google in particular to become the *de facto* arbiter of the content of the right and its enforcement through its internal standards and review mechanisms in accordance with which the company makes assessments of whether the right has been breached.

Absent guidance from the CJEU Google was faced with the task of establishing a system and standards against which requests to it by users seeking to exercise their new right could be assessed. Google chose not to use lawyers in this assessment process instead creating a ‘removals’ team to handle simple requests with only those requests deemed more complex being passed to a team of paralegals prompting concern about the integrity of the process and standards of review.¹⁶⁴

Beyond this minimal information the system of assessing and deciding complaints remained opaque reportedly overseen by a large group of ‘lawyers, paralegals and engineers.’¹⁶⁵ The use of these classes of reviewer without distinction is problematic, a paralegal, a lawyer and an engineer all having vastly different understandings of certain concepts based on their training, or lack thereof. Moreover, the information released on the system of review noted that it was premised on the identification of keywords rather than comprehensive analysis of complaints in their entirety.¹⁶⁶

Unsurprisingly, as Leiser notes, Google has been accused of developing a system of review which deliberately favours the development of a conservative status quo which favours risk minimisation over progressive realisation of rights standards. As well as this obvious manipulation of the enforcement thresholds for its own purposes, the deliberation process which produces these

¹⁶³ Leiser, 'Private jurisprudence and the right to be forgotten'.

¹⁶⁴ *European Privacy Requests for Search Removals*, GOOGLE, <https://www.google.com/transparencyreport/removals/europeprivacy>

¹⁶⁵ Goodman, E. & Powles, J. (2015). Open letter to Google from 80 Internet Scholars: Release RTBF Compliance Data, Available at (<<https://medium.com/@ellgood/open-letter-to-google-from-80-internet-scholars-release-rtbf-compliance-data-cbfc6d59f1bd>>), accessed 1 May 2019.

¹⁶⁶ *Ibid.*

decisions also lacks legitimacy. Google's Advisory Council which it established to help in establishing how to enforce the decision in *Google Spain* has been described by Chenou and Radu as questionable in terms of the independence of its members¹⁶⁷ and lacked transparency in its conduct and the development of the guidelines it recommended to Google.¹⁶⁸ This mattered little as events transpired as Google adopted few of the Council's recommendations and proceeded to promote its public profile as a 'truthful' search engine without disclosing information about how it reached its decisions on the right to be forgotten.¹⁶⁹ To counter criticism about its lack of transparency, Google began to publish information outlining the percentages of de-linking requests it complied with in its 'Transparency Reports,' however, these reports failed to remedy the lack of transparency about the criteria for the decisions themselves.¹⁷⁰

While subsequent developments saw the development of more substantive guidance from the Article 29 Working Party on the application of a balancing test in cases involving the right to be forgotten¹⁷¹ Google's implementation of those guidelines remain opaque. Google's lack of accountability in its design and implementation of the thresholds and criteria which must be satisfied in order to successfully establish a breach of the right to be forgotten and the lack of transparency in how it makes decisions based on those thresholds and criteria have effectively created a private jurisprudence, as Leiser argues. The results for the Rule of Law even in a conservative, formal account are significant in that the State is effectively displaced as lawmaker and the law as promulgated (i.e. the right to be forgotten) suffers a reduction in both the predictability and equality of its application.

Nor is this instance of private jurisprudence a singular example. After successive years of controversy there is now increasing attention on the role of social media platforms in creating, in effect, a private jurisprudence of free speech.¹⁷² While not the result of judicial delegation as in the case of the right to be forgotten, freedom of expression on social media nevertheless bears examination as a potential example of private jurisprudence though, admittedly, this must be weighed as against the argument that freedom of expression has not to date been considered a

¹⁶⁷ Jean-Marie Chenou, and Roxana Radu, "The "Right to Be Forgotten": Negotiating Public and Private Ordering in the European Union" 58Güneş Acar1, *Facebook Tracking Through Social Plug-ins Business & Society* 2019, 74, 91.

¹⁶⁸ *Ibid*, at 89.

¹⁶⁹ *Ibid*.

¹⁷⁰ Google's Transparency Report, Available at, (<<https://transparencyreport.google.com/eu-privacy/overview?hl=en>>), accessed 01 May 2019.

¹⁷¹ Article 29 Working Party on the implementation of the Court of Justice of the European Union judgment on *Google Spain* (2014), at 8.

¹⁷² For a helpful overview of the context and some of the responses to harmful speech on social media see, Amélie Heldt, 'Let's Meet Halfway: Sharing New Responsibilities in a Digital Age' (2019) 9 *Journal of Information Policy* 336.

horizontally applicable right in the United States (where the right is given pre-eminence) nor in the European Union (where it exists in a more qualified but more autonomy centric form).

The response of social media platforms, most notably Facebook, to ongoing criticism of their policing of speech on their platform and in the absence of horizontal restraints has been to develop an explicit system of private jurisprudence. In Facebook's case this has taken the form of the Facebook Oversight Board.¹⁷³ The Board, dubiously referred to as Facebook's 'Supreme Court'¹⁷⁴ is in effect an internal appeals system which will be used to determine 'hard cases' drawing on a board of independent experts. The process for the development of the board and the safeguards to ensure the independence and expertise of its membership¹⁷⁵ has endeavoured to improve on previous attempts at private governance mechanisms.

What is effectively occurring through this appeals process is the development of a parallel and competing understanding of what constitutes freedom of expression which lacks a parallel predictability and equality of application as can be ensured through formal, State overseen legal mechanisms. Moreover, there is a valid concern that given the significance of Facebook as a venue for political and social discourse, and democratic participation the control of a private actor (even through an independent appeals system) remains insufficient proportionate to the potential threat to democratic participation 'wrong calls' can produce. This is, of course, in addition to the fact that only 'hard cases' reach this appeals process with its relatively more systematised system for assessment and decision. The vast majority of complaints about speech on the platform are decided by algorithms and content monitors who similarly to Google scan for keywords, and lack legal training.¹⁷⁶ Admittedly as against a background where a horizontal right has not been recognised, there is nevertheless a legitimate concern over the development of this private jurisprudence on the Rule of Law given its centrality to democratic participation for many citizens.

5.6 Conclusion

The substantive vision of the Rule of Law endorsed by the Union's constitutional documents and policies is directed to ensuring democratic governance a vision which relies on robust protections of the individual autonomy on which democratic participation relies. The rights of privacy and

¹⁷³ See, Facebook 'Bylaws' (2020) available at (<https://about.fb.com/wp-content/uploads/2020/01/Bylaws_v6.pdf>) accessed 26 March 2020.

¹⁷⁴ Thomas Kadri, 'How Supreme a Court' *Slate* (<<https://slate.com/technology/2018/11/facebook-zuckerberg-independent-speech-content-appeals-court.html>> accessed 24 May 2019.

¹⁷⁵ Facebook, 'Global Feedback and Input on the Facebook Oversight Board for Content Decisions' (2019) available at (<<https://fbnewsroomus.files.wordpress.com/2019/06/oversight-board-consultation-report-2.pdf>>) accessed 20 March 2020.

¹⁷⁶ Evelyn Mary Aswad, 'The Future of Freedom of Expression Online' (2018) 17 *Duke Law and Technology Review* 26.

property are crucial to enabling the development and maintenance of individual autonomy and thus to ensuring the health of the Rule of Law within the Union by securing constitutionally protected areas which facilitate the enjoyment not only of those rights but also of further fundamental rights central to democratic participation. Reductions of these rights as discussed in chapters two and three thus function to proportionately reduce the capacity for democratic participation and the health of the Rule of Law

In addition to the *prima facie* harm resulting from the interdependency of these rights and the Rule of Law the digital market in particular in the context of privacy has enabled the development of mechanisms of constitutional avoidance which permit State actors to bypass constitutional controls on their collection of private information by using private actors as surveillance proxies through both informal and formal mechanisms. Finally, the deference to private jurisprudence has generated a digital marketplace in which private actors control the enforcement and thus act as normative standard setters for fundamental rights.

CHAPTER SIX

THE LIMITS OF HORIZONTAL EFFECT & CONTRACTARIAN THEORIES IN EU LAW

6.1 Introduction

Gearty has described the focus on State rather than private power as one of the three challenges facing human rights in the twenty first century¹ and, as the preceding chapters have examined, the negative impacts for fundamental rights occasioned in the digital market have resulted to a significant extent from the activities of private actors.² Despite this capacity, the activities of private actors have traditionally been held to be outside the scope of constitutional controls, including controls in the form of supranational fundamental rights guarantees, as a result of reluctance to extend the horizontal effect of fundamental rights.

This reluctance is justified largely by reference to established contractarian theories which hold that the State draws its authority, and thus its power, from the consent of individual citizens and that, reciprocal (constitutional) restraints on the manner in which the State may use its power are justified on the basis of this contractual relationship as well as the disproportionate power of the State to subvert the consent of its citizens and operate in ways to which they have not consented – what is popularly referred to as the social contract. In contrast, private actors draw their authority from individual, private contracts and should be governed according to a similar deference to the consent of the parties involved. Political and legal theory has thus traditionally considered that, as non-parties to the contractual relationship between individuals and the State, private actors are not bound by the constitutional restraints which govern that relationship.³

This chapter outlines the origins and acceptance of these contractarian theories and their manifestation in the limited scope of modern European fundamental rights documents. The chapter argues that contractarian justifications for opposing the expansion of constitutional restraints to cover the activities of private actors no longer enjoy the political and moral force which framed their development but contextualises such arguments within the institutional structure and competences of the European Union.

¹ Conor Gearty, 'Is the human rights era drawing to a close' (2017) 5 *European Human Rights Law Review* 425

² This is not to say that there are not State perpetrated harms implicated in the broader discussion of fundamental rights and digital technologies but rather that they are beyond the scope of the present work.

³ The secondary justification of freedom of contract, based on arguments of individual autonomy is beyond the scope of this present chapter.

6.2 Contractarian Theories of State and the Origins of Vertical Restraints

The idea of a social contract can be traced to the writings of Epicurus⁴ and later Aristotle who, though in principle he favoured monarchy, endorsed the right of individual members of society not only to elect their leader but also to call him to account.⁵ This idea of authority based on the consent of the governed subsequently oriented the writings of philosophers through the Middle Ages. The fidelity to a contractually oriented understanding of State authority, during the Middle Ages in particular, is not wholly surprising given the pattern of contractual relationships and affirmations which characterise religious accounts of divine interactions with humanity in Roman and Greek law, as well as in the later, founding Judeo-Christian texts,⁶ and indeed the origins of the mundane authority of the Jewish kings in the Old Testament.⁷

Within the Middle Age's understanding of social contract Aquinas' theory of social contract was premised on the Roman law maxim *quod principi placuit legis habet vigorem*⁸ which held that those laws passed by the ruler were legitimated by the authority conferred upon him by the people. Aquinas drew a particular, ad further, distinction between three ideas of authority, namely *principum*, *modus* and *exercitium*⁹ and argued that while the *principum* or essential substance of authority is ordained by God its *modus* or constitutional form is determined by the people and that its *exercitium* or actual enjoyment is conferred and may also be withdrawn by the people.¹⁰

6.2.1 *The Shift Away from Natural Law*

The contractarian theory of State authority rooted in natural law proposed by Aquinas became common in the Middle Ages and descended through the work of Hooker¹¹ and Filmer.¹² The subsequent endurance of the contractual understanding of authority, even following the rejection of its natural law roots as articulated by Aquinas and subsequent jurists is unsurprising given its

⁴ John Thrasher, 'Reconciling Justice and Pleasure in Epicurean Contractarianism' (2013) 16 *Ethical Theory and Moral Practice* 432.

⁵ Aristotle, '*Politics*' III, 9, s.8.

⁶ See the Edenic covenant Genesis 1:28-30; Noahic covenant 9:8-17, Genesis 12-17; Abrahamic covenant Genesis 12-17 and recurring throughout; Mosaic covenant Exodus 12-24; See also, Harold J Berman, 'The Religious Sources of General Contract Law: An Historical Perspective' (1986) 4 *Journal of Law and Religion* 103.

⁷ Most prominently the Davidic covenant, Samuel 2:7; Jeremiah 33:17-22.

⁸ That which pleases the ruler has the force of law (authors own translation).

⁹ R.W. Dyson (ed), *Aquinas: Political Writings* (Cambridge Texts in the History of Political Thought, Cambridge University Press 2002), 5 *et seq.*

¹⁰ *Ibid.*

¹¹ Richard Hooker, *Of the Lawes of Ecclesiastical Politie* (1597 (1594)).

¹² JP Sommerville, 'From Suarez to Filmer: A Reappraisal' (1982) 25 *The Historical Journal* 525.

capacity to be deployed in support of the later feudal (nominally contractual) State.¹³ Hobbes' Leviathan and Rousseau's Social Contract are notably instances in the shift of social contract theory towards more positivistic accounts subsequently built on by Grotius¹⁴ and Pufendorf.¹⁵

The rejection of the natural law theory of *principum* is most notably associated with Hobbes who rejected the theory of the divine right of Kings (though he also rejected the early democratic view that power should be shared between Parliament and the King) and argued that political authority and obligation are based on individual self-interests which must be collectively ceded to a single sovereign to ensure a civil society conducive to the self-interests of each individual and thus to escape the state of nature.¹⁶ Rousseau's Second Discourse gives an account of the moral and political evolution of man towards civil society,¹⁷ however, it is his normative theory of social contract, expounded in a text of the same name,¹⁸ that Rousseau offers the prescriptive articulation of the function and justification of social contract which has been most influential in liberal political theory.

Rousseau argues that though individuals are and were essentially free in the state of nature, the progress of civilisation has displaced this freedom and replaced it with subservience in the form of dependence, comparison and economic and social inequality.¹⁹ However, as a return to the state of nature is neither feasible nor desirable, the social contract intervenes to assure a State which enables freedom and minimises subservience through the force or coercion of others.²⁰

Like Hobbes and Locke before him, Rousseau premised his argument on the equality of all individuals, this equality resulting in the conclusion that no individual has a natural right to govern others, and that authority can therefore be conferred on the State only as a result of agreements. The most basic of these agreements is the social contract pursuant to which individuals form a sovereign society which, once formed, pursues the common good- a vision which is founded on reciprocal

¹³ Sir Ernest Baker, 'Introduction' in Sir Ernest Baker (ed), *Social Contract: Essays by Locke, Hume and Rousseau* (2nd edn, Oxford University Press 1978), ix. Interestingly social contract theories continued to demonstrate a religious influence into the sixteenth century even as their natural law foundations began to give way See, Ernest Baker, 'The Authorship of the *Vindiciae Contra Tyrannos*' (1930) 3 *The Cambridge Historical Journal* 164; Baker, 'Introduction'.

¹⁴ Hugo Grotius, *Opera Omnia Theologica*, vol. III, 187.

¹⁵ Samuel Pufendorf, *Commentariorum de rebus Suecicis libri XXVI ab expeditione Gustavi Adolphi Regis in Germaniam ad abdicationem usque Christinae*, Ultrajecti, Ribbii (1686).

¹⁶ Hobbes, *Leviathan*.

¹⁷ Jean Jacques Rousseau, *The First and Second Discourses* (Yale University Press 2002 [1761]).

¹⁸ Jean Jacques Rousseau, 'The Social Contract' in Sir Ernest Baker (ed), *Social Contract: Essays by Locke, Hume and Rousseau* (Oxford University Press 1960) 237.

¹⁹ *Ibid*, 244 - 248.

²⁰ *Ibid*.

duties. The sovereign is obliged to pursue the common good of those individuals who constitute it while each individual constituent is likewise committed to the good of the whole.²¹

The theory of social contract which began to emerge with Hobbes and finds its expression in the work of Rousseau can be characterised as proposing the existence of not one but rather two contracts. The first is the theory of a contract of government – the idea that the authority of the State is based on a contract between ruler and subjects. The second, is the theory of a contract of society which ultimately is a prior condition for the contract of government, and which requires an organised community in order for agreement between a ruler and this group of subjects to emerge.

Subsequent to Rousseau, theories of social contract fell out of favour but were revived by Kant whose works provided two distinct discussions²² of social contract, the most relevant of which considers the *a priori* restrictions on the legitimate policies a sovereign may pursue. In Kant's account the sovereign must recognize the 'original contract'²³ on which basis laws must be enacted in a manner, and contain provisions, which 'could have arisen from the united will of a whole people and to regard each subject, insofar as he wants to be a citizen, as if he has joined in voting for such a law.'²⁴

Crucially, in Kant's theory, the original contract is an idea of reason rather than a historical event. Rights and duties flow from the original contract not because of their particular historical provenance, but as a result of the relational consent embodied in the original contract²⁵ which is turn based on the rational, possible unanimity as between members of society.²⁶ Kant's theory of social contract mirrors Hobbes' in several respects.

The first is that in both accounts the social contract is not a historical document or act but rather functions as a justification for the legitimate, current exercise of State power and its restriction.²⁷ Kant and Hobbes' theories also share a common understanding that the social contract is not

²¹ Ibid, 384.

²² Immanuel Kant, *gesammelte Schriften* (de Gruyter 1900), volume 6, 245 *et seq.*

²³ Ibid, volume 8, 297.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Kant draws two historical examples to illustrate this point, the first is a law that would provide hereditary privileges to members of a certain class of subjects. This would be unjust because it would be irrational for those who would not be members of this class to agree to accept fewer privileges than members of the class. The second example is a war tax which, if administered fairly, would not be unjust because, even where some citizens disagreed with the war, the war might be waged for legitimate reasons known to the state but not her citizens and which information if revealed to citizens might cause all citizens to approve the law. In both examples, the conception of 'possible consent' abstracts from actual desires individual citizens have not based upon a hypothetical vote given actual preferences but on a rational conception of agreement given any possible empirical information. Ibid, volume 6, 256, 318.

²⁷ Kant, *gesammelte Schriften*, volume 6, 256.

voluntary²⁸ though their accounts differ substantially in the reasons for individuals entering the contract whether or not voluntarily. While Hobbes based his argument on the benefit each individual receives from the contract, Kant based his argument on Right itself as part of an argument influenced more by Rousseau's idea of the General Will.²⁹

6.2.2 *Modern Theories of Social Contract*

In the twentieth century, Rawls revived Kantian understandings of individual capacity in his work on social contract.³⁰ Rawls, like Kant, understands individuals as possessing the capacity to reason from a universal point of view.³¹ As a result, they can assess principles from an impartial standpoint - Rawls' 'original position,' which is characterised by the epistemological limitation of the veil of ignorance.³² From their position behind the veil, the two principles of justice emerge and determine the distribution of both civil liberties and social and economic goods.³³ The first principle provides that each individual is to have as much basic liberty as possible, provided all individuals are granted the same liberties. The second principle (the difference principle) provides that while social and economic inequalities can be just, they must be available equally and to the advantage of all individuals.³⁴

Having argued that a rational person inhabiting the original position behind the veil of ignorance can discover these two principles of justice, Rawls proceeded to construct an abstract theory of social contract which, rather than demonstrating that individuals would or have acceded to a contract to establish society, instead argued that individuals, as rational actors, must be willing to accept such a contract in order to be constrained by justice and therefore capable of living in a well ordered society.³⁵

Under this view Rawls' principles of justice are fundamental to the social contract – constraining its development and limits as part of what might be considered a substantive theory of social contract in as much as it incorporates normative aims which the contract must realise rather than merely providing a theory for the legitimacy of the social ordering which the presumed contract has generated.

²⁸ Ibid, volume 6, 318.

²⁹ Philip J Kain, 'Rousseau, The General Will and Individual Liberty' (1990) 7 *History of Philosophy Quarterly* 315.

³⁰ Rawls, *A Theory of Justice*.

³¹ Ibid.

³² Thomas Nagel, *The View from Nowhere* (Oxford University Press 1986).

³³ Rawls, *A Theory of Justice*, 42-44.

³⁴ Ibid.

³⁵ Ibid, 68-69.

6.3 Contractarian Theory and its Discontents

The theories proffered by Hobbes, Locke, and Rousseau are centrally premised on the idea of consent with contractarian theorists supposing that individuals possessed basic normative powers over themselves (self-ownership) which pre-exists their entry into the social contract.³⁶ Locke in particular notes that only the ‘consent of free-men’ could legitimise government.³⁷ The contractual setting for such consent, however, has been repeatedly queried. Hume objected to normative theories based on a historical contract, noting that ancestral consent could not bind future generations³⁸ and contemporary political philosophers have raised similar concerns with Gauthier contending that, because the agreement in social contract theory is *hypothetical* it cannot in fact be considered an agreement at all.³⁹

In response to objections to the use of a hypothetical contract, theorists including Rousseau, Kant and Rawls defend the hypothetical contract on a heuristic basis, as a device that seeks not to directly bind the contractors but instead acts as a thought experiment to enable discovery of the requirements of practical rationality.⁴⁰ Yet even this hypothetical understanding of the social contract has been challenged. Alternative contractarian theorists like Pateman and Mills read social contract theories as historical devices which establish and maintain oppressive institutions of racial, gendered and socio-economic dominance – whether heuristic or practical.⁴¹

Indeed, a cursory reference to the historical context of the deployment of the constitutional restraints which contractarian theory enables supports, at a minimum, the argument that social contract theories have been deployed to support colonial expansion and racial hierarchy. This is seen most fundamentally in the invocation of the concept of *terra nullius*⁴² by colonial powers based on the existence of foreign lands as uncultivated wildernesses without sovereign government or the potential for its creation.⁴³ Hobbes, in particular, considered that many parts of North America had ‘no government at all’ while Locke like Grotius, though he recognised the existence of native

³⁶ David Hume, 'Of the Independency of Parliament' in Eugene Miller (ed), *Essays Moral, Political, and Literary* (Liberty Fund 1985 [1741]), 42–46.

³⁷ John Locke, *Second Treatise of Government* (1690), 283–446, s.117.

³⁸ David Hume, 'Of the Original Contract' in Sir Ernest Baker (ed), *Social Contract: Essays by Locke, Hume and Rousseau* (2nd edn, Oxford University Press 1978).

³⁹ Ronald Dworkin, 'The Original Position' in Norman Daniels (ed), *Reading Rawls* (Basic Books 1975).

⁴⁰ David Gauthier, *Morals by Agreement* (Oxford University Press 1986), chapter 7.

⁴¹ Charles Mills, *The Racial Contract* (Cornell University Press 1997); Carole Pateman and Charles Mills, *Contract and Domination* (Polity Press 2007); Teresa Brennan and Carole Pateman, 'Mere Auxiliaries to the Commonwealth: Women and the Origins of Liberalism' (1979) 27 *Political Studies* 183.

⁴² Carole Pateman, 'The Settler Contract' in Carol Pateman and Charles W Mills (ed), *Contract and Domination* (Polity Press 2007) 35, 36.

⁴³ This thinking was explicitly rejected by the Australian High Court in *Mabo v the State of Queensland* (1992) 175 CLR 1, though it endures, albeit implicitly in the constitutional orientations of other former colonies including the United States, and Northern Ireland.

government in North America and the West Indies, considered that it provided only ‘a very moderate sovereignty.’⁴⁴

Indeed, while a contractarian understanding of constitutional restraints premised on the consent of the population may be historically justifiable in the context of a hypothetical contract entered between Parliament (representing the people) and the sovereign in British history⁴⁵ and in French history as between the National Constituent Assembly and the sovereign,⁴⁶ the export of those constitutional restraints to a broader empire through the principle of *terra nullius*, fundamentally undermines theories which base the normative legitimacy of the State in consent based contractarian theories.

The still more fundamental weakness identified in contractarianism, is its unique emphasis on public, State actors and its consequent failure to accommodate the capacity of private, non-state actors to impact individual freedoms in a capacity equal to that enjoyed by States. The traditional articulation of the justification for the social contract’s application to State actors offered by Locke was premised on the power differential between subjects and rulers in which the ruler has the power of law and is thus a ‘lion among foxes.’

In this context, to permit the lion, to exercise its proportionately greater power without restraint is to allow its subjects (the foxes in Locke’s account) to be devoured.⁴⁷ The concern of Locke’s social contract is thus to what extent, and by what means, the State must be restrained to afford protection to the populace.⁴⁸ In this context, constitutional guarantees have been the *de facto* model of restraint adopted by States – a model whose scope and content have, in the twentieth century, been replicated in international and European human rights documents.⁴⁹ This historical framing of constitutional restraints as applying exclusively to State actors ignores the capacity of private actors to exercise powers equivalent to the State, most notably in the cases of the Dutch and British East India Companies.⁵⁰

⁴⁴ Locke, *Second Treatise of Government*, volume II, s.108.

⁴⁵ Though even this context admits significant criticism given its predication on the assent of a limited rather than a representative group.

⁴⁶ Bronislaw Baczko, 'The Social Contract of the French: Sieyès and Rousseau' (1988) 60 *The Journal of Modern History* S98.

⁴⁷ Locke, *Second Treatise of Government*, 50.

⁴⁸ Jean Thomas, *Public Rights, Private Relations* (Oxford University Press 2015), 1.

⁴⁹ See, Universal Declaration of Human Rights, Preamble; European Convention of Human Rights, Preamble; Charter of Fundamental Rights of the European Union, Chapter VII.

⁵⁰ The early British discovery of North America by Walter Raleigh is similar in its use and continued reliance on private actors as *de facto* sovereign for the early Virginian colonies. See, Wesley F Craven, *The Virginia Company of London 1606-1624* (Genealogical Publishing Company 1993); Joseph Stancliffe Davis, *Essays in the Earlier History of American Corporations*, vol IV (The Lawbook Exchange 2006), 3.

6.3.1 *Private Actors Exercising Powers Equivalent to State Actors*

The Dutch East India Company was an early multi-national corporation founded by an amalgamation of several rival Dutch trading companies in 1602, which was subsequently granted a 21 year government monopoly on the Dutch spice trade with India and Southeast Asia.⁵¹ However, the VOC's activities were more diversified than the mere exercise of its monopoly. While the company engaged in broad international trade in goods and ship building,⁵² it also issued bonds and shares to the general public becoming the world's first formally-listed public company.⁵³ Moreover, from its inception the VOC operated not only as a commercial concerns but also as an instrument of war (in particular in the Dutch Spanish wars) and acted as a *de facto* enforcer of colonial expansion - establishing the Dutch presence in Indonesia with the creation of Batavia (now Jakarta) which it used to gradually expand its control of Indonesia through a network of trading posts.⁵⁴

In the territories which it controlled, the VOC possessed *de facto* State powers, exercising the powers to wage war, imprison and execute individuals, negotiate treaties, mint its own currency, and further establish its territory.⁵⁵ As part of its expansion the VOC funded exploratory voyages, including those led by Willem Janszoon, and Abel Tasman and brought Suriname and modern Manhattan under the control of the Dutch empire.⁵⁶ As a result, the VOC - a private actor - was as, if not more, influential than the Dutch state, operating as what Weststeijn has referred to as a company-state.⁵⁷

The VOC served as a direct model for the restructuring of the British East India Company (EIC) as a joint stock company in 1657.⁵⁸ The EIC, which was originally created by a Royal Charter from Queen Elizabeth the First in 1600.⁵⁹ Significantly, the Royal Charter did not imply a body or person was an agent or emanation of the State. Rather, the Charter was an instrument of incorporation

⁵¹ Oscar Gelderblom, 'The Formative Years of the Modern Corporation: The Dutch East India Company VOC, 1602–1623'.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ Adrian Vickers, *A History of Modern Indonesia* (Cambridge University Press 2005), 10.

⁵⁵ Glenn J Ames, *The Globe Encompassed: The Age of European Discovery, 1500–1700* (Pearson 2008), 102–103; Nigel Worden, 'Below the line the devil reigns': death and dissent aboard a VOC vessel' (2009) 61 *South African Historical Journal* 701; Jaap R. Bruijn and Femme Gaastra, *Ships, sailors and spices: East India companies and their shipping in the 16th, 17th and 18th centuries* (NEHA 1993).

⁵⁶ Kees Zandvliet, 'Golden Opportunities in Geopolitics: Cartography and the Dutch East India Company during the Lifetime of Abel Tasman' in William Eisler and Bernard Smith (ed), *Terra Australis: The Furthest Shore* (International Cultural Corporation of Australia 1988), 67—82.

⁵⁷ Arthur Weststeijn, 'The VOC as a Company-State: Debating Seventeenth-Century Dutch Colonial Expansion' (2014) 38 *Itinerario* 13.

⁵⁸ Niall Ferguson, *Empire: The Rise and Demise of the British World Order and the Lessons for Global Power* (Basic Books 2004), 4.

⁵⁹ Privy Council, 'Chartered Bodies' (<<https://privycouncil.independent.gov.uk/royal-charters/chartered-bodies/>>) accessed 23 May 2019.

granted by the sovereign which conferred independent legal personality on an organisation or person - much as modern incorporation affects companies.⁶⁰

The EIC was initially formed to trade in the Indian Ocean though its activities later expanded to include Southeast Asia and China and would eventually account for half the world's trade.⁶¹ Like the VOC, the EIC's focus gradually shifted to include within its trade activities, territorial expansion and during the eighteenth century with the decline of the Mughal Empire and ongoing clashes with French East India Company⁶² the Company gained control of Bengal, from where it expanded its control in the coming century across the Indian subcontinent.

As with the VOC, the EIC enjoyed effective sovereignty within the territories in which it operated. From 1757 until 1803, at the height of its power in India, the EIC controlled a private army of some 260,000 individuals,⁶³ almost twice the number of troops of the British state's army⁶⁴ and exercised powers within its territories equivalent to any State - as was the case with the VOC. In fact, the EIC's control of India ended only with the introduction of the Government of India Act 1858 following which the British government took direct control of the subcontinent⁶⁵ shortly before the Company was dissolved following financial difficulties.⁶⁶ The powers of the VOC and the EIC highlight the very real failure of contractarianism, is its emphasis on public, State actors to appreciate the capacity of private actors to impact individual freedoms in a capacity equal to that enjoyed by States.

In questioning the applicability of contractarian justifications for the limitation of constitutional restraint to State actors it is thus necessary, in light of Locke's justifications, to distinguish whether lions (the State) are constrained because they are lions (and thus enjoy a degree of naturally occurring power) or whether their restraint is necessary because of the acquiescence of the population and the disproportionate power this gives the lion who is 'made licentious by impunity.'⁶⁷

⁶⁰ Ibid.

⁶¹ Anthony Wild, *The East India Company: Trade and Conquest from 1600* (Lyons Press 2000), 5 *et seq.*

⁶² Jim Philips, 'A Successor to the Moguls: The Nawab of the Carnatic and the East India Company, 1763-1785' (1985) 7 *The International History Review* 364.

⁶³ William McElwee, *The Art of War: Waterloo to Mons* (Purnell Book Services 1974), 72.

⁶⁴ Nick Robins, *The Corporation that Changed the World: How the East India Company Shaped the Modern Multinational* (Pluto Press 2006).a

⁶⁵ See, *ibid.*

⁶⁶ East India Stock Dividend Redemption Act 1873.

⁶⁷ Locke, *Second Treatise of Government*, 51.

The first justification – that Lions should be subject to restraint because of their natural accumulation of power- is challenging to sustain in the face of evidence that private actors both historically (as the examples above illustrate) as well as in a modern context have possessed power equivalent to States to impact individuals. The accession to this reality in modern law has been that when a private actor exceeds a certain threshold of power it will be subject to restraint. This is, in essence, the motivation behind modern competition law which seeks to limit the capacity of one private actor to dominate a market such that it sets the conditions for entry to the market and access to its offerings.⁶⁸

The second justification, that Lions should be restrained because they accumulate power through the acquiescence of the population is premised on the idea that relations between the ruler and the ruled in the form of social contract theory⁶⁹ is more problematic. It could be claimed that such potential in the context of non-State actors is mirrored, in a private context, by the law of contract which imposes a parallel private law consent requirement and permits individuals to assent to those terms which they deem acceptable in order to regulate their experience subject to those protections provided through consumer protection law. Yet, as the analysis in the previous chapters illustrate there is an absence, or a failure in EU law, to institute appropriate constraints to ensure such consent is premised on the existence of freely given, and genuine consent.

The State through public law finds itself regulated by the constitutional controls which (in theory) emanate from the social contract while private actors through private law are regulated by competition law and the law of contract. However, in circumstances where the power exercised by modern private actors has not been effectively restrained by existing mechanisms it is necessary to look further and examine whether and why more robust public law constraints may be extended to cover the activity of private actors.

Private actors in this context occupy an ideological middle ground in which they do not enjoy the moral authority of the State yet are privy to equal, if not in some respects greater, power over the lives of individuals. Adopting the imagery used by Locke, private actors can thus be considered tigers,⁷⁰ as actors which, though they possess power and destructive capacities equivalent to lions operate independently and are characterised by their predatory but largely unobserved nature rather than their vocal and social existence.

⁶⁸ See generally, Oles Andriychuk, *The Normative Foundations of European Competition Law* (Edward Elgar 2017).

⁶⁹ Baker, 'Introduction'.

⁷⁰ The use of tiger here seems appropriate given the animals' solitary nature and their use of silent stalking and ambush tactics.

In this circumstance the first and second justifications offered for the restraint of State actors remain applicable. Private actors (tigers) enjoy a degree of naturally occurring power due to their capacity to control the market and thus the conditions of individual existence. Private actors also enjoy a degree of power as a result of the acquiescence of the population to this power which may, as is the case with State actors, be ‘made licentious by impunity’ such that increased social acquiescence increases private power. In such circumstances, the question thus becomes not whether a tiger *should* be subject to similar constitutional restraints- on the understanding that such restraints derive their legitimacy and their power from the necessity based on the destructive capacities of the lion- but rather whether a tiger *can* be subject to such laws. Can public law be extended to govern the activities of private actors?

6.4 Extending the Horizontal Effect of Fundamental Rights

The contractual practices which currently mediate individuals’ interaction with the digital market in combination with the trends discussed in the preceding chapters function to afford private actors control over fundamental rights and, as the previous chapter examined, over the relationship between the individual and the State through its impacts on democratic participation and its negative impacts on the Rule of Law.

6.4.1 *Concerns Regarding the Extension of Constitutional Restraints to Private Actors*

There are functional concerns about how public law structures designed to function vertically in bifurcated spheres of public versus private law could be adopted to horizontal contexts.⁷¹ However, there is also a concern, articulated by Clapham, that the application of fundamental rights obligations to private actors ‘trivialises, dilutes and distracts from the great concept of human rights’ and that it ‘bestows inappropriate power and legitimacy on such actors.’⁷² Tushnet has thus expressed concern that the horizontal application of fundamental rights will reduce them to little more than private law claims thus depriving them of their normative and symbolic value.⁷³

Yet this concern that the horizontal application of fundamental rights will deprive such rights of their normative and symbolic value is not sustainable. In particular, given the content of chapters two and three, it is questionable how a parallel reduction of rights to nothing but symbols, due to

⁷¹ A Barak, 'Constitutional Human Rights and Private Law' in D Friedman and D Barak-Erez (ed), *Human Rights in Private Law* (Hart 2001), 17; Thomas, *Public Rights, Private Relations*.

⁷² Andrew Clapham, *Human Rights Obligations of Non-State Actors*, vol XV/1 (The Collected Courses of the Academy of European Law, Oxford University Press 2006), 58.

⁷³ Mark Tushnet, 'The issue of state action/ horizontal effect in comparative constitutional law' (2003) 1 *International Journal of Constitutional Law* 79, 244.

inaction is preferable to their dilution through horizontal application. Moreover, in the European context fundamental rights have been extended to include horizontal application albeit in an unprincipled manner as the following chapter examines. Where rights are impotent to restrain the actual harms they are intended to protect against simply because those harms flow from actors classified as private rather than public it is not clear that the rhetoric of proliferation alone is sufficient, though as chapter seven examines, there are legitimate concerns about how sustainable and principled horizontal application can be achieved.

Moreover, in contexts where fundamental rights are recognised as possessing a normative mandate which renders their content too important to individual liberty to allow their enforcement or protection to be left to the political process it is unclear why it is permissible that their protection and enforcement should be left to market forces and private enforcement. This potential of fundamental rights to fall between two stools as a result of the bright line delineation between private and public law resulting in crucial interests remaining unprotected, results in the fundamental shortcoming of traditional contractarian theories - what Thomas calls the 'vulnerable valuable interest' problem.⁷⁴ It is this concern, to protect fundamental rights as against private actors which underlies the arguments surrounding initiatives like the Ruggie Principles⁷⁵ and other efforts toward achieving corporate responsibility in a context where international human rights continue to bind only State actors.⁷⁶

6.4.2 *Extensions of Constitutional Restraints to Private Actors in National Law*

Despite the challenges and critiques associated with the horizontal application of fundamental rights, the extension of public rights to private actors has been justified, and achieved, in several jurisdictions and within the jurisprudence of the CJEU in limited circumstances. The context in which such extension has been most readily achieved has been in the context of private actors exercising public functions⁷⁷ as evidenced by the US' state action doctrine⁷⁸ and the governmental action doctrine in Canada.⁷⁹ Both doctrines, broadly, provide that where a private actor acts in a

⁷⁴ Thomas, *Public Rights, Private Relations*, 11.

⁷⁵ See, (<<https://www.business-humanrights.org/en/un-secretary-generals-special-representative-on-business-human-rights/un-protect-respect-and-remedy-framework-and-guiding-principles>>) accessed 27 May 2019.

⁷⁶ See, Cristina Chiomenti, 'Corporations and the International Criminal Court' in Oliver De Schutter (ed), *Transnational Corporations and Human Rights* (Hart 2006); Fiona McLeay, 'Corporate Codes of Conduct and the Human Rights Accountability of Transnational Corporations: A Small Piece of a Larger Puzzle' in Oliver De Schutter (ed), *Transnational Corporations and Human Rights* (Hart 2006); Alston (ed), *Non-State Actors and Human Rights*.

⁷⁷ Thomas, *Public Rights, Private Relations*, 10.

⁷⁸ *Shelley v Kraemer* 334 US 1 (1948).

⁷⁹ Gordon P Crann, 'How far does the Charter reach? A theoretical review of the section 32(1) debate and Canada's emerging governmental action doctrine' (1998) 47 *University of Toronto Faculty Law Review* 56.

manner which, if mirrored by the State, would constitute an infringement of a constitutional restraint, the court will look to whether some fact or agreement could lead to the attribution of the act to the State itself.

A similar doctrine has emerged in English and Welsh law in the ‘public function’ test⁸⁰ while in the European Union, following criticism of the reasoning of the CJEU in *Marshall* has developed a range of sub-doctrines including the doctrine of ‘emanations of the state.’⁸¹ Thus, in *Foster v British Gas*⁸² the CJEU adopted a position similar to the state action doctrine in the United States noting that ‘a body, whatever its legal form, which has been made responsible ... for providing a public service under the control of the state and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals, is included ... among the bodies against which ... direct effect may be relied upon.’⁸³

In addition to these, realised, arguments that the actions of private actors may be attributable to a public actor is the related, but more abstract, argument that the enforcement of private law by the courts itself constitutes a state action which ought to bring private law within the remit of public law rights - what Thomas in his work refers to as the failure of constitutional scrutiny.⁸⁴ This is the approach to the application of public law rights to private law disputes which has predominated in continental Europe in the jurisprudence of Member States⁸⁵ following the emergence of the German doctrines of direct and indirect effect.⁸⁶

The concept of direct effect for certain rights in German law was advocated first by Dürig⁸⁷ and later by Nipperdy who emphasised both as an academic and a Judge, that human rights had undergone a functional change after 1949 and should be understood in a post-war society not only as protections for individual liberty as against the State but also as constituting general guidelines

⁸⁰ See, the public function test in English and Welsh law, Kris Gledhill, 'The public function test: have we been asking the right question?' (2015) 20 *Judicial Review* 73.

⁸¹ Case C-188/89 *Foster v British Gas* EU:C:1990:313.

⁸² *Ibid.*

⁸³ *Ibid.*, [18]-[19].

⁸⁴ Thomas, *Public Rights, Private Relations*, 10.

⁸⁵ While certain arguments in the United States concerning reform of the state action doctrine take this view, that Courts should be viewed as agents of the State when they enforce legal rules, Seana Shiffrin has argued in a similar way that due process requirements should be applied to contract law, Seana Valentine Shiffrin, 'Are credit card late fees unconstitutional' (2006) 15 *William and Mary Bill of Rights Journal* 457.

⁸⁶ *Mittelbare Drittwirkung der Grundrechte - Mittelbare* meaning direct, *Drittwirkung* meaning the effect (*wirkung*) and *unmittelbare Drittwirkung* referring to indirect effect.

⁸⁷ Dürig's major concern which led him to reject the idea of the direct effect of constitutional rights in private law and to opt for an intermediary solution, which he saw in the idea of indirect effect, was the concern about the preservation of the principle of party autonomy and the independence of private law G Dürig, 'Grundrechte und Zivilrechtsprechung' in T Maunz (ed), *Vom Bonner Grundgesetz zur gesamtdeutschen Verfassung* (Isar-Verlag 1956), 157.

for the organisation of social life.⁸⁸ In accordance with this view Nipperdy argued that fundamental values which bind the State such as dignity, equality and liberty and which reflect foundational constitutional choices must also find expression in private contexts.⁸⁹

Ultimately this view did not prevail, and German constitutional law instead adopted a more moderate doctrine of indirect horizontal effect following the 1958 decision in *Luth*.⁹⁰ In that case the defendant, Luth, had criticised the plaintiff for his collaboration with the Nazi government in the production of anti-Semitic propaganda in 1940. Following this criticism, the plaintiff sought and secured an injunction preventing further repetition of the comments by the defendant. In response, Luth filed a constitutional complaint alleging that the injunction obtained by the plaintiff infringed his right to freedom of speech under Article 5 of the German Basic Law.

The Court of first instance distinguished two possible positions. The first, was the accepted position that the public and private law spheres are entirely separate and must develop independently of one another so that constitutional law could have no bearing on private law. The second view was a departure from this position, and provided that fundamental rights could apply directly to private parties so that constitutional rights and obligations could also operate to govern the relationship between private actors as part of a system of ‘direct effect’ as advocated by Nipperdy.

Ultimately, the Court adopted neither position, instead articulating a compromise pursuant to which fundamental rights protect all private parties but restrict only the State. However, pursuant to the Court’s decision this restriction should find expression not only in legislative but also in judicial actions. Under this view where judges are tasked with balancing competing private interests, private law is not determinative. Instead, in interpreting open terms such as ‘reasonableness,’ ‘legitimate interests’ and ‘good faith’ the Court must turn to the constitution which provides the overarching value system which permeates all areas of law. On this basis, in *Luth*, the injunction granted to the plaintiff was found to be contrary to the private law principle of good faith when interpreted in light of the constitutional values of human dignity and individual liberty to develop within society. The court’s decision emphasised that these values should inform and direct secondary laws, as well as judicial decisions such that no private law rule conflicted with them.

⁸⁸ Hans Carl Nipperdy and L Enneccerus, *Allgemeiner Teil Des Bürgerlichen Rechts* (15 edn, 1959), s15 II 4 c; Hans Carl Nipperdy, *Grundrechte Und Privatrecht* (1961), 15.

⁸⁹ See decision in *BAG*, BAGE 1, 185, 193; Case 1 AZR 249/57 of 10 May 1957 (*Zölibatsklausel*).

⁹⁰ On the German position in general see, Jörg Fedtke, ‘Drittwirkung in Germany’ in Dawn Oliver and Jörg Fedtke (ed), *Human Rights and the Private Sphere: A Comparative Study* (Routledge 2007); BVerfG 15 January 1958, BVerfGE 7, 198 Sagra Svensson, *The Emerging Right to Repair legislation in the EU and the US*; *ibid*.

Following a period during which German courts recognised only this indirect horizontal effect, in *Handelsvertreter*⁹¹ the German Constitutional Court broadened the scope of the ‘state duties to protect constitutional rights’ (*grundrechtliche Schutzpflichten*) which had previously applied only in the context of public law. By extending this concept to private law the Constitutional Court followed the theory developed by Canaris who saw in it a new legal basis for the effect of constitutional rights in private law when deployed in concert with indirect effect.⁹²

Handelsvertreter arose from a dispute between a wine company (the principal) and their commercial agent who undertook to sell wines for the principal as well the principal’s competitor in breach of a non-competition clause. When the agent’s activity came to the attention of the principal, the principal terminated their contract with immediate effect and applied for an injunction restraining the agent from working for their competitor. At first instance the injunction was granted on the basis that the agent had been free to weigh the risks and advantages of the contract and exercise his discretion in choosing to enter it. On appeal, however, the Constitutional Court overturned this ruling, finding that by granting an injunction prohibiting the appellant from working for the principal’s competitors the lower court had violated the appellant’s basic right to freedom of profession under Article 12 of the German Constitution.

The Constitutional Court noted that the decision of the trial court had restricted the agent’s freedom to practice a profession and thus constituted a limitation of a basic right, though not as a result of State action. While the agent had consented to the non-competition clause and thus exercised his personal autonomy in entering an agreement which should be respected by the State, the Court noted that private autonomy within the confines of private law, could not be contrary to the principles embodied in basic rights.

The theory of state duties to protect constitutional rights established in *Handelsvertreter* was re-affirmed in *Bürgschaft*.⁹³ In that case the respondent offered the applicant’s father a loan on the condition that the applicant signed the loan contract as a surety. The applicant, whose intellectual capacity was limited, was informed her signature would not create any important obligation for her. The applicant’s father subsequently experienced financial difficulties and the respondent sought to hold the applicant liable under the contract. After a series of decisions of the lower courts, the applicant, in a final appeal to the Constitutional Court, claimed her constitutional right to dignity had been violated by the contract.

⁹¹ BVerfG 7 February 1990, BVerfGE 81, 242 (*Handelsvertreter*).

⁹² W Canaris, 'Grundrechte und Privatrecht' (1984) 184 *Archiv für die civilistische Praxis* 201, 225 *et seq.*

⁹³ BVerfG 19 October 1993, BVerfGE 89, 214.

The Constitutional Court found that, in cases where a structural imbalance of bargaining power led to a contract which imposed particularly onerous requirements on the weaker party, civil courts were obliged to intervene. In the instant case the Constitutional Court found that such an imbalance was generated under the terms of the contract and based its intervention on the provisions of the German Civil Code⁹⁴ regarding good morals and good faith and autonomy in conjunction with the principle of the social state which generated a duty to protect the basic rights of the individual.

While in practice it is not clear that German law continues to follow the theory of indirect effect of constitutional rights in private law the impact of these decisions on the conceptualisation of fundamental rights is striking – subjecting the State to a positive obligation to protect such rights in private settings. As a result of the recognition of fundamental rights as constituting an ‘objective system of values,’ private law cannot escape the influence of the values which underpin such rights which must be given effect in private law. Yet while the CJEU has clearly adopted the language of direct and indirect horizontal affect in its jurisprudence, the understanding of the need to extend the values which fundamental rights protect into private contexts has not travelled with the language which the German courts have developed to describe it.

Germany is not alone in extending horizontal effect to fundamental rights. Denmark has implicitly recognised the capacity of fundamental rights to apply to private law relations,⁹⁵ while Spain, like Germany, recognises that fundamental rights have both an objective and subjective function and can have a direct impact on private relationships as ‘constitutionally reinforced’ subjective or individual rights.⁹⁶ Favilli and Fusaro note that the Italian courts have employed an interpretative approach in line with the German doctrine of direct effect and, in a more limited set of cases, of indirect effect drawing on provisions derived from international treaties on human rights.⁹⁷

French law has similarly applied the rights protected by the ECHR and certain other international treaties ratified by the State horizontally through Article 55 of the Constitution.⁹⁸ In Greece the most recent Constitution acknowledges direct effect in respect of constitutional rights stating in

⁹⁴ Namely, s.138 and s.242 Civil Code.

⁹⁵ Jonas Christoffersen, 'Drittwirkung and Conflicting Rights - Viewed from National and International Perspectives' in Dawn Oliver and Jorge Fedtke (ed), *Human Rights and the Private Sphere: A Comparative Study* (Routledge 2007) 27.

⁹⁶ Andrea Rodriguez Liboreiro, 'A Jurisdiction Recognising the Direct Horizontal Application of Human Rights' in Dawn Oliver and Jorge Fedtke (ed), *Human Rights and the Private Sphere: A Comparative Study* (Routledge 2007) 378, 388.

⁹⁷ Chiara Favilli and Carlo Fusaro, 'The Protection of Constitutional Rights in the Private Sphere' in Dawn Oliver and Jorge Fedtke (ed), *Human Rights and the Private Sphere: A Comparative Study* (Routledge 2007) 276, 278.

⁹⁸ See, Frédéric Sudre, 'La Dimension Internationale Et Européenne Des Libertés Et Droits Fondamentaux' in Rémy Cabrillac (ed), *Libertés et droits fondamentaux* (23 edn, Dalloz 2017), 35-56; Myriam Hunter-Henin, 'France: Horizontal Application and the Triumph of the European Convention on Human Rights' in Dawn Oliver and Jorge Fedtke (ed), *Human Rights and the Private Sphere: A Comparative Study* (Routledge 2007)

Article 25 that '[t]hese rights also apply to the relationship between individuals'⁹⁹ while in Ireland the Supreme Court has indicated in its previous decisions that it is prepared to disapply or interpret secondary laws in a manner that ensures individual rights are afforded effective protection.¹⁰⁰

Public law norms in the form of rights-based protections are thus recognised as radiating into private law in many Member States. Moreover, the CJEU itself as well as the ECtHR have developed a distinct body of jurisprudence recognising the horizontal effect of fundamental rights.

6.4.3 *The Horizontal Effect of Fundamental Rights in EU Law*

Frantziou has argued that, as the preamble to the Charter states that the rights recognised entail both responsibilities and duties to other individuals, the community and future generations, fundamental rights under the Charter are thus capable (in principle) of creating obligations between private parties in EU law.¹⁰¹ This echoes the Opinion of Advocate General Cruz in *AMS*¹⁰² who noted that the fact that the provisions of the Charter are not addressed to individuals in the text, is not indicative of a context in which the Charter cannot have horizontal effect.¹⁰³

Advocate General Cruz's reasoning counters the previous assertions of Advocate General Trstenjak in *Dominguez*¹⁰⁴ that in accordance with the interpretative maxim *expressio unis exclusio alterius* Article 51 precludes horizontal application of the Charter. Indeed, Trstenjak went further, noting that the inability of individuals to satisfy the legislative proviso contained in Article 52 that any limitation of the exercise of the rights and freedoms under the Charter must be provided for by law, further excluded an inference of horizontal effect, while the ECHR's system of fundamental rights protection demonstrated it is not essential for fundamental rights to bind private individuals to guarantee reasonable protection.¹⁰⁵

⁹⁹ See generally, Christina Akrivopoulou, 'Taking Private Law Seriously in the Application of Constitutional Rights' in Dawn Oliver and Jörg Fedtke (ed), *Human Rights and the Private Sphere: A Comparative Study* (Routledge 2007) 157.

¹⁰⁰ Colm O'Conneide, 'Ireland: Irish Constitutional Law and Direct Horizontal Effect - A Successful Experiment?' in Dawn Oliver and Jörg Fedtke (ed), *Human Rights and the Private Sphere: A Comparative Study* (Routledge 2007) 213, 219; *East Donegal Co-Op Livestock Mart v Attorney General* [1970] IE 317, [368]-[369]. See, *Meskeil v Córás Impair Éireann* [1973] IR 121; *Glover v BLN Ltd* [1973] IR 388.

¹⁰¹ Eleni Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis* (Oxford Studies in European Law, Oxford University Press 2019), 2.

¹⁰² Case C-176/12 *AMS* EU:C:2014:2.

¹⁰³ Case C-176/12 *AMS* EU:C:2013:491 [28]-[30].

¹⁰⁴ Case C-282/10 *Dominguez*.

¹⁰⁵ Opinion C-282/10 *Dominguez* EU:C:2011:559, [84].

Advocate General Cruz, while not addressing these latter points in his Opinion, did comment on the problematic nature of assertions that while fundamental freedoms could be horizontally enforced, fundamental rights could not and observed it would be paradoxical if the incorporation of the Charter into primary law changed the status of the horizontal effect of fundamental rights for the worse by limiting their reach to vertical matters only.¹⁰⁶ Moreover, the assertion that Article 52 precludes the recognition of horizontal effect based on a similar preclusion under the ECHR, is correct only where the initial assertion of *expressio unis* holds true, an argument which seems challenging to support in light of the horizontal effect granted the Court's discovery of 'new' horizontally effective rights under Article 8 absent legislative basis, notably the right to be forgotten.

The *expressio unis* argument also, necessarily, requires the adoption of a highly restricted view of Article 52 which must be read as excluding horizontal effect for the Charter's provisions because it permits limitations on Charter rights only where and in such manner as the legislature provides, on the understanding that the power to legislate is a public one. Yet this does not necessarily follow. In fact, an *expressio unis* reading of Article 52 in fact leads to the conclusion that where rights under the Charter can be limited only by legislative provision, they cannot be abrogated or otherwise altered by private actors through contractual practices either, thus permitting a view of the Charter as permitting horizontal effect.¹⁰⁷

Similarly, Trstenjak's assertion that the ECHR has not found it necessary to employ horizontal effect to protect rights is not entirely correct, the Court having recognised the right to data protection, which is horizontally effective, under Article 8 as well as acknowledging other, admittedly limited, instances where horizontal effect will apply.¹⁰⁸ More fundamentally, where the question is, 'is horizontal effect necessary to protect fundamental rights?', it would hardly be material that another Court had failed to protect human rights by recognising their horizontal effect – a shared failure, after all. is not the same thing as a success.

Indeed, it appears increasingly clear that a limited doctrine of horizontal effect does exist in the CJEU's fundamental rights jurisprudence parallel to the horizontal effect of fundamental freedoms. Moving from the recognition of fundamental freedoms as horizontally applicable in *Walrave*¹⁰⁹ the

¹⁰⁶ Ibid, [34].

¹⁰⁷ This argument will be examined further in Chapter 5.

¹⁰⁸ In particular, the existence of positive obligations under the ECHR as held in *Marckx v Belgium* 2 EHRR 330, [31]; *Airey v Ireland* 2 EHRR 305, [32]; *X and Y v Netherlands* 8 EHRR 235, [23] as well as the inclusion within the ambit of the Convention of privatised public functions, see *Costello-Roberts v United Kingdom* 19 EHRR 112; *Wos v Poland* App No 22860/02 (2005), [75].

¹⁰⁹ Case C-36/74 *Walrave* EU:C:1974:140, [33]-[34].

CJEU in *Defrenne*¹¹⁰ and *Angonese*¹¹¹ expanded its views to recognise the rights at issue (protections from gender and nationality based discrimination) applied equally to private and State actors as well as being inherently implicated in the ability of the Union's market to function successfully. The decision in *Defrenne* in particular has been repeatedly affirmed by the Court, however, the original judgment's central concern with fundamental rights, the improvement of living standards and the common good has been notably absent. Instead, the Court has focused in subsequent decisions on the appropriate limitations on horizontal effect.¹¹²

Significantly, the general principles of which fundamental rights form a part were specifically designed to accommodate fundamental rights reasoning outside traditional, horizontal application. In *Mangold*¹¹³ German legislation permitted the employment of workers over the age of fifty-two on fixed-term contracts of up to two years offering proportionate reductions in protection from dismissal based on the contract and terms of employment. While the stated aim of the legislation was to promote inclusion of older workers in the work force, the plaintiff contended that the legislation was discriminatory under the Equality Directive due to its less favourable protections. The CJEU agreed, noting that the protection from discrimination on grounds of age was a pre-existing general principle of EU law¹¹⁴ which the Directive had merely enshrined with the result that the right to equal treatment was directly effective.¹¹⁵

Subsequent to the entry into force of the Charter, the Court reaffirmed the findings of *Mangold* in *Kucukdeveci*.¹¹⁶ In that case the Court noted that the principle of equality which is a right under Article 21 of the Charter permeates all of EU law and is merely given expression by the Directive. The implication of this finding is wide ranging. As Peers noted at the time of the decision 'it would be absurd to privilege one particular aspect of the right to non-discrimination over other aspects of that right, other social rights,' and so the principle should logically apply whenever any general principle of EU law, as regards human rights protection, is sufficiently connected to the application of the EU Directive.¹¹⁷ Yet as this work has demonstrated the Court, in the context of rights equally implicated in private agreements have done just that elevating market-oriented aspects of the rights of privacy and property above the socially-oriented aspects of those same rights.¹¹⁸

¹¹⁰ Case C-43/75 *Defrenne* EU:C:1976:56.

¹¹¹ Case C-281/98 *Angonese* EU:C:2000:296.

¹¹² See, Case C-152/84 *Marshall* EU:C:1986:84, [48]; Case C-294/83 *Les Verts* EU:C:1986:166, [23].

¹¹³ Case C-144/04 *Mangold* EU:C:2005:709.

¹¹⁴ C-144/04 *Mangold*, [74]-[76].

¹¹⁵ This was confirmed in Case C-555/07 *Kucukdeveci* EU:C:2010:21 which was decided following the entry into force of the Lisbon Treaty.

¹¹⁶ Case C-555/07 *Kucukdeveci* EU:C:2010:21.

¹¹⁷ Steve Peers, 'Supremacy, Equality and Human Rights: Comment on *Kucukdeveci* Case C-555/07' (2010) 35 *European Law Review* 849, 855-856.

¹¹⁸ Chapter two, page 66; chapter three, page 104; chapter seven, page 212.

In seeking to resolve the inconsistencies of application which have characterised the horizontal application of fundamental rights in EU law Frantziou argues that public interest reasons should justify determinations of horizontal applicability of rights which, understood as justified by political autonomy would be appropriately limited to exclude the commodification of rights by private interests.¹¹⁹ Frantziou bases her argument on the constitutional purpose of the Union's fundamental rights framework which she identifies as the creation of the necessary conditions for democratic participation. In that context, she argues, horizontality must be embedded in the protection of fundamental rights where any private actor maintains not mere private power but political or institutional power which enables them to threaten or erode the achievement of this democratic participation and the individual autonomy it enables.¹²⁰

This work agrees with Frantziou's analysis of the constitutional character of fundamental rights within EU law and their function as part of the Union's institutional schema. Moreover, as the preceding chapters have illustrated the power exercised by private actors in the digital market not exceeds a mere competition issue and now imports not only individual harms but systemic ones through its impact on democratic participation and the Rule of Law.

6.5 The Limits of Horizontal Effect in EU Law as a Solution

While concurring with Frantziou's analysis this work does not advance an argument for horizontality as traditionally understood. Despite attention from Advocates General¹²¹ and academics,¹²² the CJEU has neglected to systemically and substantively address the matter of horizontal application. Instead addressing the occurrence of horizontal effect arguments as they arise in relation to individual rights.¹²³ As a result, a principled basis for horizontal application

¹¹⁹ Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis*, 161 *et seq.*

¹²⁰ *Ibid.*, 162.

¹²¹ Case C-447/09 *Prigge* EU:C:2011:321; Case C-176/12 *AMS* EU:C:2013:491 ; Case C-282/10 *Maribel* EU:C:2011:559.

¹²² Mirjam 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 *Maastricht Journal of European and Comparative Law* 109; Laurent Pech, 'Between judicial minimalism and avoidance: the Court of Justice's sidestepping of fundamental constitutional issues in *Römer* and *Dominguez*' (2012) 49 *Common Market Law Review* 1841; Dorota Leczykiewicz, 'Horizontal application of the Charter of Fundamental Rights' (2013) 38 *European Law Review* 479; Cian C Murphy, 'Using the EU Charter of Fundamental Rights against private parties after *Association de Médiation Sociale*' (2014) 2 *European Human Rights Law Review* 170; Sasa Sever, 'Horizontal Effect and the Charter' (2014) 10 *Croatian Yearbook of European Law and Policy* 40; Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis*.

¹²³ Joanna Krzemińska-Vamvaka and Teresa Russo Nuno Ferreira, 'The Horizontal Effect of Fundamental Rights and Freedoms in European Union Law' in Aurelia Colombi Ciacchi and Giovanni Comandé Gert Brüggemeier (ed), *Fundamental rights and private law in the European Union*, vol 1 (Cambridge University Press 2010) 8, 33-34.

remains difficult to locate in EU law. Indeed, to date the sole unifying feature in the Court's recognition of horizontal effect for fundamental rights, has been as a means of advancing integration within the common market. As the following chapter examines, the result is an unprincipled rights jurisprudence which may threaten more than secure the rights protections necessary in the context of the rise of private policy.

Moreover, in the context examined by this work the horizontal application of fundamental rights can do little to ameliorate the rights-based harms identified as a result of the contractual origins of such harms, contract law being an area in which the European Union lacks an explicit competence to act. Though such horizontal application might be accomplished through the Union's consumer protection laws, even where this was possible it is not necessarily desirable. Pursuant to Article 51 in subsection (2) the Charter does not establish any new power or task for the Community or the Union or modify any powers and tasks defined by the Treaties, a limitation mirrored in Article 6 TEU and affirmed by *Opinion 2/2013*.¹²⁴

Article 51(2) reflects the principle of 'conferral' or 'attributed powers' which restricts the EU to activities which fall within the limits of those competences conferred on it by Member States in order to achieve its objectives established in Article 3 TEU¹²⁵ codified following the Treaty of Lisbon by Articles 5(2) and 4 TEU.¹²⁶ This limitation is reinforced by Article 6 TEU which stipulates that though the Charter 'shall have the same legal value as the Treaties' the provisions of the Charter do not extend the competences of the Union as defined in the Treaties. The result is that, of those rights protected by the Charter, comprehensive rights protection frameworks have been developed, and can be developed only in respect of the rights to data protection and equality which have been given Treaty standing by Article 16 TFEU and Articles 19 and 157 TFEU respectively.

The CJEU's Article 51 jurisprudence in particular the decisions in *McB*¹²⁷ and *Pringle*¹²⁸ illustrate the Court's adherence to, and respect for, the limitations placed on the Charter by Article 6 TEU¹²⁹

¹²⁴ *Opinion 2/13* EU:C:2014:2454.

¹²⁵ These include the promotion of peace, the Union's values and the wellbeing of its people's, free movement, the establishment and maintenance of the internal market, the promotion of social justice and protection, territorial cohesion and solidarity among the Member States, the creation and maintenance of the euro, the protection of European cultural inheritance and the protection and promotion of the Union's values in 'external relations.

¹²⁶ The Shared and exclusive competences of the Union are listed in Articles 3 to 6 TFEU though in the case of shared competences the list provided is not exhaustive.

¹²⁷ Case C-400/10 *McB* EU:C:2010:582.

¹²⁸ Case C-370/12 *Pringle* EU:C:2012:756.

¹²⁹ *Ibid.*, [179]

a position reaffirmed in *Opinion 2/94*¹³⁰ that ‘no Treaty provision confers on the Community institutions any general power to enact rules on human rights.’¹³¹ Significantly, however, the Court in *Opinion 2/94* stipulated that a power may be expressly provided for in the Treaty or implied therefrom.

Several scholars have argued that *Opinion 2/94*, thus leaves open the possibility of a competence to protect fundamental rights.¹³² Indeed, Advocate General Sharpston, forwarded a similar argument in her opinion in *Zambrano* arguing that the CJEU must interpret the scope of application of EU law broadly to ensure that the fundamental rights of EU citizens are effectively protected.¹³³ This argument, though it has been opposed in some quarters as an endorsement of competence creep,¹³⁴ has been embraced by others, on various grounds, in the service of effecting a means for the Union to engage in developing a coherent fundamental rights policy.

In this vein, Kosta argues there is a fundamental rights competence within the Union under Article 352 TFEU drawing support from the Court’s consideration in *Opinion 2/94*¹³⁵ and argues that the Article should function as a gap-filler¹³⁶ in situations in which action by the EU is necessary to attain a Union objective and the Treaty does not provide the necessary powers.¹³⁷ The use of Article 352 as the basis for the development of secondary laws providing intellectual property rights within the Union, examined in chapter three, supports this argument to an extent.

Alston and Weiler have similarly pointed to Article 352 TFEU as a basis for the protection of fundamental rights¹³⁸ while Weiler has argued elsewhere with Fries that Article 114 (which permits measures to be taken to secure the establishment and functioning of the internal market) might also be used to ground a fundamental rights competence.¹³⁹ Drawing on the decisions in *Commission v*

¹³⁰ *Opinion 2/94* EU:C:1996:140.

¹³¹ *Ibid*, [27].

¹³² Weiler, *A Human Rights Policy for the European Community and Union: The Question of Competences*, 17.

¹³³ Case C-34/09 *Zambrano* EU:C:2011:124, [163].

¹³⁴ Weatherill, 'Competence Creep and Competence Control'.

¹³⁵ *Ibid*, [31].

¹³⁶ Elsewhere Lenaerts and Gutierrez-Fons in an examination of how the CJEU responds to lacunae in EU law argue that general principles of law can have three functions under EU law: as a ground for judicial review an aid to interpretation or, most significantly, as a basis for remedying lacunae in the law in cases involving fundamental rights. See, Gutierrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law'

¹³⁷ Weckhout, *External Relations of the European Union - Legal and Constitutional Foundations*, 86.

¹³⁸ Weiler, 'An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights'.

¹³⁹ Fries, *A Human Rights Policy for the European Community and Union: The Question of Competences*.

France,¹⁴⁰ *T Port v Bundesanstalt fur Ernährung*¹⁴¹ and *Cinétheque*¹⁴² they argue that respect for fundamental rights is an integral, inherent and transverse principle which permeates all the objectives and powers of the Community.¹⁴³

This argument echoes somewhat the argument that the EU enjoys ‘indirect competences,’ to protect fundamental rights when it is exercising its explicit legal powers and Von Bogdandy’s contention that the CJEU has the power to ensure fundamental rights protection in situations where the protection of the essence of fundamental rights of EU citizens is at stake.¹⁴⁴ In a similar analysis, drawing on more recent decisions of the CJEU Scharpf has claimed that a new generation of ‘expansionist’ fundamental rights cases¹⁴⁵ including *Mangold*, *Schecke*¹⁴⁶ and *Test-Achats*¹⁴⁷ represent the development of a rights-based theory of integration.¹⁴⁸ However, as chapter seven now turns to examine judicial resolutions of the Union’s fundamental rights lacuna, is not desirable, while an expansion of the Union’s competences to include contract law writ large necessarily changes the character of the Union in ways which are not compatible with the Union’s traditional character.

6.6 Conclusion

The absence of an explicit competence on which to base the development of a coherent and unified fundamental rights policy, as well as the restrictions of the Union’s competences under Articles 51(2) of the Charter and 6 TEU— thus excluding the constitutional concerns raised in this research yield two results.

The first is that a fundamental rights policy which incorporates a broader understandings of the rights considered, and indeed fundamental rights more generally, under EU law is curtailed. Despite the arguments forwarded by the academics examined here the policy and legal landscape against

¹⁴⁰ Case C-265/95 *Commission v France* EU:C:1997:595.

¹⁴¹ Case C-68/95 *T Port v Bundesanstalt fur Ernährung* EU:C:1996:452.

¹⁴² Case C-60/84 *Cinetheque* EU:C:1985:329, [26]. Fries, *A Human Rights Policy for the European Community and Union: The Question of Competences*, 10. This seems to be the converse approach from that in the US with respect to the commerce clause (the equivalent to Article 114 TFEU) which grants a positive power to promote market integration. On the basis of this positive power the SC imposed a negative obligation on the states not to interfere with interstate commerce – the (judge made) doctrine of the dormant commerce clause as in *Cooley v Board of Wardens of Port of Philadelphia ex rel Society for the Relief of Distressed Pilots* 53 US 299 (1852) 318; *Robbins v Shelby County Taxing District* 120 US 489 (1887) 493; *HP Hood & Sons Inc v Du Mond* 336 US 525 (1949) 532; *Texas Industries Inc v Radcliff Materials Inc* 451 US 630 (1981) 641.

¹⁴³ *Ibid.*

¹⁴⁴ Armin Vog Bogdandy, 'Reverse Solange: Protecting the Essence of Fundamental Rights against EU Member States'.

¹⁴⁵ Scharpf, 'Perpetual Momentum: directed and unconstrained?'.

¹⁴⁶ Case C-92/09 *Schecke* EU:C:2010:662.

¹⁴⁷ Case C-236/09 *Test-Achats* EU:C:2011:100.

¹⁴⁸ Stranz, 'Rights adjudication and constitutional pluralism in Germany and Europe'.

which the rights-based harms examined by this work have arisen is indicative of a more general hostility towards a comprehensive rights-based restriction of the activities taking place within the digital market.

The second result, is that the contract based origins of the harms examined in this research effectively place those harms beyond the reach of a solution which relied on the horizontal application of fundamental rights as the Union does not enjoy a competence in that area. As a result, even were a coherent model of horizontal application of fundamental rights to private actors to emerge it would remain limited by the Charter's application to those matters 'within the scope of EU law' – which contract law is not.

Given the absence of a contract law competence, the basis on which a doctrine of horizontal application such as *Frantziou* suggests could aid in the resolution of the contractually enabled abrogation of fundamental rights examined here is questionable. Moreover, as the proceeding chapter now turns to examine, it is not clear that a judicial solution is the optimum means of securing fundamental rights, in particular in cases involving the digital market.

CHAPTER SEVEN

JUDICIAL AND LEGISLATIVE PROTECTIONS: SECURING FUNDAMENTAL RIGHTS IN PRACTICE

7.1 Introduction

As this work has established in the previous chapters, fundamental rights in the European Union function to ensure individual autonomy and have, through different mechanisms in the cases of privacy and property rights, been partially extended (with varying degrees of success) to operate against both State and private actors.¹ However, the scope of the Charter and the limited competences of the Union to develop a fundamental rights policy mean that the Charter, at present, is ill-equipped to build a framework for its own assurance more generally.²

As long as fundamental rights are considered a primarily negative concern, and as operating only against State actors, this does not present a significant difficulty, as national courts and the CJEU can reactively redress or halt violations. However, where fundamental rights are understood, or evolve, to encompass positive and horizontal dimensions as is the case in the rights considered by this work, a reliable framework as part of an institutional means for their assurance and enforcement becomes necessary. Given the CJEU's record in addressing fundamental rights issues as they intersect with the digital market and the Union's selective extension of fundamental rights through market-oriented secondary laws there is a more basic need to assess the means by which the fundamental rights harms occasioned by private policy can be redressed.

While chapter five examined the limits of horizontal effect as a means of enforcing fundamental rights as against private actors, this chapter advances that argument a step further arguing that, a judico-centric enforcement framework of fundamental rights is inadvisable in light of the primacy it affords to the CJEU in defining fundamental rights and the scope and manner of their application. The chapter argues that this primacy would be particularly problematic in light of the Court's unprincipled understanding of the structure and application of fundamental rights, in particular in cases involving the digital market.

The chapter begins in part two by examining the CJEU's powers and record as a rights protecting

¹ Christian Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford University Press 2008), 74.

² What Leczykiewicz has referred to as 'shallow constitutionalism' see, Dorota Leczykiewicz, 'Horizontal Effect of Fundamental Rights: In Search of Social Justice or Private Autonomy in EU Law' in Ulf Bernitz (ed), *General Principles of EU Law and European Private Law* (Wolters Kluwer 2013), ch 5.

body. Part three then builds on this foundation to argue that the Court's jurisprudence – specifically as it relates to the interplay between fundamental rights and the digital market has been unprincipled, leading to a proliferation of rights and neglecting foundational, doctrinal questions concerning the structure of and relationship between fundamental rights. Finally, in part four, the chapter forwards several grounds, further developed in chapter eight, in support of the legislative solution proposed by this work, and argues that a legislative solution is not only the most practicable but also the most desirable means of limiting the growth of private policy which this work has described.

7.2 The CJEU as a Rights Protecting Body

Stone Sweet has memorably stated that '[j]udicial power is a brute fact of political life in the European Union'³ and indeed both the ECtHR and the CJEU have played remarkably dominant roles in the development of European law in the area of fundamental rights. The CJEU, in particular, has been central to the development of several of the key features of the Union's constitutional structure absent any textual basis within the Treaties including the system of state liability, the principle of direct effect of EU law, the supremacy of EU law as well as an, albeit flawed fundamental rights jurisprudence.⁴

7.2.1 *The CJEU's Development of Fundamental Rights - a Case of Teleological Activism*

The CJEU's powers are established by Article 19 TEU whose provisions were carried over from Articles 220 -224 EC (previously Articles 164 -167 EEC). Article 19 provides for the basic structure of the Court as well as providing that the Court has the powers to, ensure that the law is observed in the interpretation and application of the Treaties and that Member States provide effective legal protection within the realm of Union law.⁵ Despite the apparently narrow ambit of these powers, the Court has interpreted the Treaties as establishing a complete system of remedies in EU law⁶ with the result that few limits remain on the Court's jurisdiction.⁷ While this can be classified as a form of general activism the more significant activist role played by the CJEU in the development of EU law has been in the area of fundamental rights.

³ Alec Stone Sweet, *The Judicial Construction of Europe* (Oxford University Press 2004), 9.

⁴ Gerard Conway, *The Limits of Legal Reasoning and the European Court of Justice* (Cambridge University Press 2012), 21-49.

⁵ In this respect is held up as a practical guarantee of the Rule of Law under Article 2 TEU . See, Case C-64/16 *Associação Sindical dos Juizes Portugueses* EU:C:2018:117, [32].

⁶ Case C-294/83 *Les Verts v Parliament* EU:C:1986:166, [23].

⁷ Marcus Klamert Manuel Kellerbauer, Jonathan Tomkin (ed), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019), 174.

Under Article 19 TEU (and its predecessors) and indeed in accordance with the Treaties more generally the Union has offered no textual basis either for the CJEU's initial development of fundamental rights as a general principle nor the further development of a fundamental rights jurisprudence. Despite the absence of a Treaty basis, the CJEU has long asserted a fundamental rights jurisdiction beginning with *Stauder v City of Ulm*⁸ in which the appellants asserted their privacy rights had been violated through the imposition of a requirement that welfare recipients produce a coupon bearing their name to claim subsidised butter. Though no violation was ultimately found, the Court used the case to establish its jurisdiction to adjudicate fundamental rights as one of the unwritten general principles of Community law.⁹

The Court reaffirmed its fundamental rights jurisdiction a year later in the decision of *Internationale Handelsgesellschaft*¹⁰ in which it found that the infringement of fundamental rights was a ground for the annulment of Community acts and that the protection of such rights at Community level was 'inspired by the constitutional traditions common to the Member States.'¹¹ Subsequently, in *Nold*¹² the Court referred for the first time not only to the 'fundamental rights recognised and protected by' the constitutional traditions of Member States, but also to those human rights protected by international treaties 'on which the Member States have collaborated or of which they are signatories'¹³ and identified both sources as guiding its rights jurisprudence.¹⁴

These guides appear less than satisfactory, however, given the divergences between national constitutional traditions. Indeed, in *Hoechst*¹⁵ the Court suggested it was sufficient that a general principle be common to several national legal systems and that 'non negligible divergences' would not constitute an obstacle to the recognition of a fundamental right as one of those rights within the remit of the general principles.¹⁶ A still more liberal understanding was evidenced by Advocate General Slynn in *AM&S*¹⁷ noting that the CJEU should be free to choose from the laws of the Member States according to what it felt was suitable in the context of the case.

⁸ Case C-29/69 *Stauder v City of Ulm* EU:C:2014:57, [3], [7].

⁹ *Ibid*, 442.

¹⁰ Case C-11/70 *Internationale Handelsgesellschaft* EU:C:1970:114.

¹¹ *Ibid*, [2].

¹² Case C-4/73 *Nold* EU:C:1974:51.

¹³ *Ibid*, [13].

¹⁴ *Ibid*. In this respect the Court has, understandably, placed a particular emphasis on the ECHR see Case C-260/89 *ERT v DEP* EU:C:1991:254, [41]

¹⁵ Case C-46/87 *Hoechst v Commission* EU:C:1989:337.

¹⁶ *Ibid*, [17].

¹⁷ Case C-155/79 *AM&S* EU:C:1982:157, 1649.

The Court's apparently unprincipled attitude to the enumeration of fundamental rights under the general principles¹⁸ has been characterised by Haltern as an incident in which the Court 'invented out of thin air, unwritten European human rights.'¹⁹ While Coppel and O'Neill have argued that the decision by the Court in *Stauder* and later cases to establish a fundamental rights jurisdiction for itself, is attributable to a concern with preserving and enhancing the CJEU's power in the face of rival supremacy claims from national constitutional courts²⁰ they do not deny that the generation of a fundamental rights competence by the Court for itself constituted an incident of judicial activism.²¹ Criticisms of the Court's activism are thus neither inaccurate or undeserved.

Arnall argues that a teleological, purposive method of interpretation²² necessarily involving some degree of activism is necessary given the textual ambiguities generated by the diplomatic process of Treaty drafting.²³ Beck²⁴ similarly argues that the Court's activism results from the ambiguous and often minimal language of both the Treaties and the Charter and the resulting normative

¹⁸ Case C-144/04 *Mangold* EU:C:2005:709. See also, Roman Hertzog and Luder Gerken, 'Stop the European Court of Justice' *EU Observer* (<<https://euobserver.com/opinion/26714>> accessed 15 July 2017. Hertzog and Luder argue that the idea of a general principle of community law in that case is a fabrication as only two of the then 25 Member States (Finland and Portugal) had constitutional references to a ban on age discrimination while there was no such prohibition in any international treaty. Though a prohibition on discrimination on the grounds of age was included in Article II-81 of the Treaty establishing the Constitution of Europe however the relative novelty of the provision and the fact it is contained in an incompletely ratified treaty tends to confirm the nature of the courts conclusion. See, Klaus Hänsch, 'The Spirit of the Time: A Reply to Roman Herzog and Lüder Gerken' (2007) 3 *European Constitutional Law Review* 219. See also, Wolfgang Weiß, 'The EU Human Rights Regime Post-Lisbon: Turning the CJEU into a Human Rights Court?' in Sonia Morano-Foadi and Lucy Vickers (ed), *Fundamental Rights in the EU: A Matter of Two Courts* (Modern Studies in European Law, Hart 2015) 69, 84.

¹⁹ Ulrich Haltern, 'Integration Through Law' in Tanja Diez and Thomas Risse Antje Wiener (ed), *European Integration Theory* (Oxford University Press 2004), 183.

²⁰ Jason Coppel and Aidan O'Neill, 'The European Court of Justice: Taking Rights Seriously' (1992) 29 *Common Market Law Review* 669.

²¹ Within the context of this work the term judicial activism is used in a descriptive rather than analytical manner to describe situations and contexts in which the CJEU has taken a leading role in developing the Union's fundamental rights law. The term is not employed, as it sometimes is in a North American context, as a perjorative or political descriptor of the work and jurisprudence of the Court.

²² Neil McCormick and Luis Moral Soriano Joxerramón Bengoetxea, 'Integration and Integrity in the Legal Reasoning of the European Court of Justice' in Gráinne de Burca and Joseph Weiler (ed), *The European Court of Justice* (Oxford University Press 2001), 43. See also, Case C-26/62 *Van Gend en Loos* EU:C:1963:1 where court relied on (in order) spirit, general scheme and the wording of the provisions at issue. See also the opinions of Advocates General Lagrange and Roemer in Case C-1/54 *France v High Authority* EU:C:1954:7 and Case C-8/55 *Federation Charbonniere Belgique v High Authority* EU:C:1956:11, [271]. See also Case C-6/54 *Netherlands v High Authority* EU:C:1955:5, [125]-[126].discussed by Greaves in Rosa Greaves, 'Selected Opinions Delivered by Advocate General Legrange' (2004) 6 *Cambridge Yearbook of European Legal Studies* 83, 103. On the Court's teleological interpretation see, Anna Bredimas, *Methods of Interpretation and Community Law* (North Holland Publishing Company 1978), 179; Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* (Martinus Nijhoff Publishers 1986); Hjalte Rasmussen, 'Towards a Normative Theory of Interpretation of Common Law' (1992) *University of Chicago Legal Forum* 135, 561.

²³ A Arnall, 'The European Court and Judicial Objectivity: A Reply to Professor Hartley' (1996) 112 *Law Quarterly Review* 411.

²⁴ Gunnar Beck, 'The Court of Justice, legal reasoning, and the Pringle case - law as the continuation of politics by other means' (2014) 39 *European Law Review* 234.

uncertainty. Yet this ‘gap filling’ argument, first made by Pescatore,²⁵ does not, as Conway has noted, explain the frequency with which the Court has emphasised teleological over textual interpretations of the Treaties (or indeed the Unions constitutional or secondary laws more broadly) – a frequency which is unusual among national as well as international courts.²⁶

Some scholars have argued that the Court’s pattern of interpretation mirrors the methods of interpretation employed by civil law courts. Dehousse thus contends that the Court’s case law through its focus on teleological interpretation of the Treaties is firmly within the civil law tradition.²⁷ Similarly, Edward, while emphasising the differences between the EU legal order and continental civil law systems, states that the CJEU reflects civilian methods by ‘taking a rational overview of the law as a whole, relating one part to another so as to form a structure or system.’²⁸ Certainly, the CJEU’s interpretative approach has been influenced by the civil law tradition in the structure of its judgments which have been described by Lasser as ‘short, terse, and magisterial decisions that demonstrate tremendous interpretive confidence and suggest a certain logical compulsion.’²⁹

However, to claim that no activism is present in the Court’s jurisprudence as a result of the apparently civilian characteristics of the Court neglects the evidence which points to the deliberate creation by the Court of a specific fundamental rights jurisdiction for itself and a teleological interpretative bent which has consistently favoured a departure from the text. Indeed, in its development of a jurisprudence of fundamental rights it is notable that there was not merely a lacuna in European law and Union competences but (on a purposive reading of the Treaties at the time of *Stauder*) an explicit decision not to adopt a view of the Union as a body concerned with rights.³⁰ In a more contemporary context it is equally unclear that the continuing development of enumerated rights by the Court, as in *Google Spain*, is indeed filling a gap as much as it is an activist extension of the edifice and content of fundamental rights.

²⁵ Pescatore was among the first to seize upon this contradistinction and base his teleological, gap-filling interpretation on it stating, ‘the law created by the Treaties, and all that stems from it, is merely the nucleus of a more extensive legal order, that of ‘law’ simpliciter, observation of which the Court of Justice must ensure’. See Gutierrez-Fons, ‘The Constitutional Allocation of Powers and General Principles of EU Law’.

²⁶ Conway, *The Limits of Legal Reasoning and the European Court of Justice*, 82.

²⁷ Renaud Dehousse, *The European Court of Justice: the politics of judicial integration* (MacMillan 1998).

²⁸ David Edward, ‘Judicial Activism: Myth or Reality’ in A Campbell and M Voyatzi (ed), *Legal Reasoning and Judicial Interpretation of European Law: Essays in Honour of Lord MacKenzie Stuart* (Trenton Publishing 1996).

²⁹ Mitchell Des S.O.L’E Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* (Oxford University Press 2004), 112.

³⁰ Conway, *The Limits of Legal Reasoning and the European Court of Justice*.

Rather than deferring to gap filling or the civilian nature of the CJEU it is more objectively correct to acknowledge that as a practical and doctrinal matter, following an explicitly activist entry into the area of fundamental rights the Court has consistently deployed teleological interpretative methods in an activist manner. More specifically in cases involving fundamental rights the manner in which the CJEU has done so has been unprincipled failing to elaborate a specific approach to the recognition of fundamental rights as *Hoechst* and the Opinion of the AG in *AM&S* indicate.³¹ This is not to claim that the Court is activist in all cases. Indeed, in certain areas the CJEU has been deferential to the legislature, however, these cases are not decisions involving fundamental rights.³² The picture which results is a Court which has retreated from the forthright activism of its early cases concerning fundamental rights but has nonetheless maintained an activist bent through liberal application of interpretative methods that allow a departure from textual interpretations.

7.2.2 Criticism of the Court's Activist Role

As in similar arguments made at national level concerning activism in appellate courts, criticisms of the CJEU's activism focus to a large extent on the absence of a textual basis for the Court's decisions and concerns about legitimacy, and the Rule of Law.³³ Yet, despite the centrality of the Court in the development of the Union's legal system³⁴ and its clear deployment of activist interpretative methods, there has been a relative paucity of critical commentary on the influence of the CJEU'S activism within the Union.³⁵ This is in marked contrast to the coverage garnered by the Union's purported democratic deficit or the voluminous coverage of the interpretative methods and reasoning employed by other appellate courts, most notably the US Supreme Court.³⁶ Two notable accounts of the Court's activism have, however, been offered.

³¹ Marcus Klamert, *The Principal of Loyalty in EU Law* (Oxford University Press 2014), 267-73; Marcus Klamert, 'The Autonomy of the EU (and of EU Law): Through the kaleidoscope' (2017) 1 *European Law Review* 815, 816-818.

³² See Case C-43/75 *Defrenne* EU:C:1976:56; Joined Cases C-117/76 and C-16/77 *Ruckdeschel* EU:C:1977:160; Case C-50/00 *UPA* EU:C:2002:462, [44]; Case C-263/02 *Jégo-Quéré* EU:C:2004:210, [36]; Case C-540/08 *Mediaprint* EU:C:2010:660, [19]; Case C-282/15 *Queisser Pharma* EU:C:2017:26, [36]; Case C-316/07 *Stoß* EU:C:2010:504, [112], [116]; Joined Cases C-660/11 C-8/12 *Biasci* EU:C:2013:550, [43].

³³ T Hartley, 'The European Court, Judicial Objectivity and the Constitution of the European Union' (1996) 112 *Law Quarterly Review* 95.

³⁴ Jo Shaw, 'European Union Legal Studies in Crisis? Towards a New Dynamic' (1996) 16 *Oxford Journal of Legal Studies* 231, 237; Sweet, *The Judicial Construction of Europe*; JM Josselin and A Marciano, 'How the Court Made a Federation of the EU' (2006) 2 *Review of International Organisations* 59; Stephen Weatherill, 'Activism and restraint in the European Court of Justice' in M. Evans and S. Konstadinidis P. Capps (ed), *Asserting Jurisdiction: International and European Legal Perspectives* (Hart 2003), 255.

³⁵ JHH Weiler, 'Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration' (1993) 31 *Journal of Common Market Studies* 419, 430-1; JHH Weiler, 'Rewriting Van Gend En Loos' in O Wilkand (ed), *Judicial Discretion* (Kluwer 2003) 151.

³⁶ Rasmussen cites the work of Jean-Pierre Colin Le gouvernement des judges dans les communautés europeennes paris pichon 1965 as the first in a European context to examine the activism of the CJEU, though North American scholarship had remarked on the trend previously. See, Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking* and in the North American

Bredimas authored the first monograph on the Court's interpretative approach³⁷ offering a historical and descriptive survey of the methods of interpretation deployed by the CJEU. In her work Bredimas considered the unifying trend in the reasoning of the Court to be a preference for integration, in which context, and despite a broad international trend in opposition to it, judicial law making had become a reality with the result that the Court's 'interpretation also constitute[d] legislative work.'³⁸ However, Bredimas stopped short of a more complete critique noting that the Court had confined its ground-breaking decisions closely to the facts of the cases with which it was presented.³⁹ Given that the CJEU does not, formally, adhere to a doctrine of precedent this is, in theory, correct. However, in practice the CJEU has a consistent tendency to reaffirm its own previous decisions. Certainly, in the case of fundamental rights recognition the argument that the Court's decisions are confined to their facts is not tenable.

Rasmussen who offered the second notable account of the CJEU's activism has criticised Bredimas, noting that her account stops short of using its insights to fully analyse the extra-contextual factors in the Court's reasoning.⁴⁰ Rasmussen himself authored the primary critical work on the Court⁴¹ and in contrast to Bredimas, presented a counter-majoritarian critique, noting the Court's decisions had 'too often controlled the political process' prerogative to define the public policy priorities.'⁴² Significantly, Rasmussen did not consider creative or activist constitutional interpretation as necessarily objectionable in principle but argued that its use should be confined to cases where it was necessary to respond to legislative inertia and should not be extended beyond the point at which such legislative obstacles had ended.⁴³

context see, Martin Shapiro, 'Comparative Law and Comparative Politics' (1980) 53 *Southern California Law Review* 537. Francis Snyder, 'New Directions in European Community Law' (1987) 14 *Legal Studies* 167; Weiler, 'Journey to an Unknown Destination: A Retrospective and Prospective of the European Court of Justice in the Arena of Political Integration'.

³⁷ Bredimas, *Methods of Interpretation and Community Law*.

³⁸ *Ibid*, 179.

³⁹ *Ibid*.

⁴⁰ Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking*, 167. On the reception of the work see, Burca, *EU Law: Text, Cases, and Materials*, 74; JHH Weiler, 'The Reformation of European Constitutionalism' (1997) 35 *Journal of Common Market Studies* 104; Conway, *The Limits of Legal Reasoning and the European Court of Justice*, 53.

⁴¹ Karen J Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law* (Oxford University Press 2001), 58; Shaw, 'European Union Legal Studies in Crisis? Towards a New Dynamic', 233; H Schepl and R Wesseling, 'The Legal Community: judges, lawyers, officials and clerks' (1997) 3 *European Law Journal* 165.

⁴² Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking*, 510. Rasmussen identifies three specific scenarios of judicial activism more generally namely, judicial interpretation which operates within the text but permits judicial policy making where the text is ambiguous; lacunae or silences in the law giving rise to judgments which seek to fill gaps or resolve ambiguities; and the 'most grave' judicial policy involvement which are constituted of judicial constructions made in a manner deliberately disrespectful to the text. *Ibid*, 25-33

⁴³ *Ibid*, 72-4.

This view has been echoed in later work on the interpretative methods of the CJEU by Dehousse,⁴⁴ Scheingold,⁴⁵ and Maduro who similarly states that ‘deadlocks in the legislative process lead the Court to supplement the work of the Community legislative process.’⁴⁶ Maduro attributes the Court's teleological approach to a necessary compensation for failures of political will among the Member States consequent to which legislative capacity to respond to emerging concerns is reduced but does not seek to diminish the activism which results from such failures of will.⁴⁷

Theories of activist legitimacy premised on legislative inertia such as Maduro's are problematic because they imply that the CJEU can, and must, make a determination that the political process is experiencing such inertia, rather than simply choosing not to act or to act in a manner which does not provide the specific ends sought by an appellant. To make such a determination the Court must possess and have the capacity to articulate an understanding of the optimal legislative process and, it follows, have some conception of the appropriate values and priorities that the legislature should and was seeking to achieve despite its failure to act or act effectively.

Moreover, the Court's assumption of such a role would risk infringing the principle of institutional balance under Article 13(2) TEU in accordance with which no institution should encroach upon the powers of another.⁴⁸ It is thus for the Commission to decide whether to bring forward a proposal for a legal act, to determine its subject matter, objective and content⁴⁹ and means that in general institutions may act only within the confines of the powers enumerated by the Treaties under article 5 TEU.⁵⁰ In *Google Spain* which is discussed in the proceeding part there is therefore not only a question about the Court exceeding its powers under Article 19 TEU but also a potential infringement of the principle of institutional balance.

Rasmussen's opinions developed somewhat in his two subsequent articles⁵¹ which sketched a theory of legitimate activism in cases involving fundamental rights based on the Rule of Law.

⁴⁴ Dehousse, *The European Court of Justice: the politics of judicial integration*.

⁴⁵ Stuart A Scheingold, *The Politics of Rights* (The University of Michigan Press 2004), notes that the European Union has displayed an ‘obvious tendency to thrust upon the Court difficult jobs that the other institutions have failed to deal with in a satisfactory manner.’

⁴⁶ Miguel Poiares Maduro, *We The Court: The European Court of Justice and The European Economic Constitution* (Hart 1998), 18.

⁴⁷ *Ibid.*

⁴⁸ Case C-70/88 *European Parliament v Council* EU:C:1991:373, [21]-[22].

⁴⁹ Joined cases C-643/15 and C-647/15 *Slovak Republic and Hungary v Council* EU:C:2017:631, [54].

⁵⁰ Case C-133/06 *European Parliament v Council* EU:C:2008:257; Case C-409/13 *Council v Commission* EU:C:2015:217, [64].

⁵¹ Indeed, Rasmussen noted that such an undermining of legal certainty had already taken place as a result of the Court's activism on several occasions. Rasmussen, 'Towards a Normative Theory of Interpretation of

Rasmussen argued that activism could jeopardise the Rule of Law by undermining the certainty provided by the limits implicit within the Treaties and should be permissible only in the context of rights protection - thus bringing the CJEU within the tradition of the appellate courts of Member States in terms of legitimate judicial creativity.⁵² Yet it is not any more evident that the detriments of judicial activism identified by Rasmussen are avoided by confining activism to issues of rights protection, indeed as the proceeding part will examine, the Court's has in fact harmed the coherence and integrity of fundamental rights within EU law rather than generating a beneficial jurisprudence of protection.

Weiler has criticised Rasmussen's work on a different basis noting it fails to provide a coherent theory of interpretation and instead seeks to justify the Court's use of policy-based judicial reasoning by reference its popular acceptance.⁵³ This view is more problematic than the counter majoritarian view adopted by Rasmussen as it suggests that legitimacy is dependent on popular agreement – an argument which has concerning implications not only for judicial independence but forces the question of why judicial activism would be necessary to begin with. In a political context in which a court's decision reflected the popular will, a similar reflection in the elected branches of government would surely have rendered a decision from the court unnecessary in a majority of cases, or should at a minimum provide a legitimate expectation of policy change on which basis a Court should defer to the legislature.

Indeed, other criticism of the Court are more strident in their objection to any activism. Neill characterises the Court as an institution motivated by its own policy considerations and an élite mission⁵⁴ an argument he supports by reference to the examples raised by the critiques which had preceded him as well as those cases in which the Court extended its own jurisdiction - including in fundamental rights cases.⁵⁵ The pattern among these critiques is, an acknowledgement that the Court is an activist institution (to a greater or lesser extent) and an attempt to locate and justify the limits of such activism by reference to either the functional outcome the Court seeks to achieve

Common Law', 140-1; Hjalte Rasmussen, 'Between self-restraint and activism: a judicial policy for the European Court' (1988) 13 *European Law Review* 28.

⁵² Rasmussen, 'Towards a Normative Theory of Interpretation of Common Law', 175-6.

⁵³ JHH Weiler, 'Rewriting Van Gend en Loos: Towards a Normative Theory of ECJ Hermeneutics' in Ola Wiklund (ed), *Judicial Discretion in European Perspective* (Norstedts Juridisk Kluwer Law International 2003).. The Court's status as a counter-majoritarian institution has been considered by Patrick Neill, *The European Court of Justice: A Case Study in Judicial Activism* (European Policy Forum 1995), 5.

⁵⁴ Neill, *The European Court of Justice: A Case Study in Judicial Activism*.

⁵⁵ Case C-294/83 *Les Verts* EU:C:1986:166; Case C-70/88 *Chernobyl* EU:C:1991:373; Case C-2/88 *Zwartveld* EU:C:1990:440; Case C-192/89 *Sevince* EU:C:1990:322; Opinion 1/91; *ibid*, 47. In a response to this critique Judge David Edward argued that as long as there is nothing specifically legal to limit decisions that can be reached by ordinary intellectual discourse, see, Edward, 'Judicial Activism: Myth or Reality', 34.

through its activism (as in Rasmussen's account) or the interpretative means which are used to enable it (as in the case of Weiler).⁵⁶

However, what these accounts have failed to address is the impact of the Court's teleological activism on its jurisprudence of fundamental rights and the attendant implications for the Court's suitability as an institutional actor in the protection of those rights. The CJEU's emphasis in the decade since the Charter acquired binding force that it intends to situate the Charter at the centre of its fundamental rights decision-making⁵⁷ has only partly remediated the concerns about its unprincipled approach to fundamental rights as evidenced in its early decisions. As the next part turns to examine, during the first decade of the Charter's existence, when presented with cases involving the digital environment the CJEU has demonstrated a failure to differentiate between rights in its analysis⁵⁸ and a willingness to engage in teleological interpretations and generate new rights.⁵⁹ The result has been the creation of a fundamental rights jurisprudence characterised more by its recognition of exceptions than its adherence to rules.

7.3 Fundamental Rights in the Decisions of the CJEU – A Jurisprudence of Exceptionalism

While the concerns of legitimacy raised by Rasmussen and others in their analysis of the Court's activist and interpretative patterns are important, for the purposes of this work the task is not to locate a basis for legitimate activism on the Court's part but rather to discern whether a judicially reliant solution to the rights-based harms identified (through horizontal application of constitutional restraints) is either feasible or desirable. chapter six noted the impracticability of a judicially driven extension of horizontal effect to private parties in the European Union in the absence of a contract law competence, however, there are more fundamental reasons not to prefer a judicially driven re-assertion of fundamental rights, in particular in the context of the digital market.

The most salient of these concerns for the purposes of this work are twofold. The first, is the Court's preference (admittedly reinforced by the Union's legislative agenda) for elevating market oriented understandings and elements of rights over and above social understandings and elements of the same rights. The second, is the Court's tendency towards what this work refers to as 'unbundling.' By 'unbundling' the work refers to the use of a central fundamental right as an interpretative means of enumerating further, not explicitly recognised, rights which should more properly be understood as constituent elements or considerations in the assessment of infringements of the central right.

⁵⁶ JHH Weiler, 'Rewriting Van Gend En Loos: Towards a Normative Theory of ECJ Hermeneutics' in Ola Wilkum (ed), *Judicial Discretion* (Institute for Legal Research 2003) 151.

⁵⁷ See, Case C-617/10 *Fransson* EU:C:2013:105, [9]- [21].

⁵⁸ Most notable in the Court's decisions concerning privacy and data protection see, chapter two, page 69.

⁵⁹ As in the case of *Google Spain* considered below.

Rights proliferation, that is recognition of an ever greater number of rights, has featured throughout the Court's history in its development of the general principles, as well in the recognition of previously unenumerated rights in individual cases - such as in its development of a distinct body of law recognising intellectual property rights prior to their acceptance by secondary law within the Union.⁶⁰ This proliferation, however, has been supplemented in the Court's more recent jurisprudence with a tendency to indulge in unbundling, specifically in cases involving fundamental rights as they interact with the digital market.

The pattern of judicial unbundling is specifically discernible in the Court's confused jurisprudence on the relationship between the rights to data protection and privacy as chapter two examined as well as in the CJEU's use of the right to data protection to enumerate a distinct right to be forgotten.

7.3.1 *The Right to be Forgotten*

In *Google Spain* the eventual appellant Mr. Costeja complained to the AEPD (the Spanish data protection regulator) that a Google search of his name revealed an article from the Spanish newspaper *La Vanguardia* containing information related to the 1998 sale of his property in satisfaction of social security debts and infringed his right to be forgotten – an aspect of his right to privacy.⁶¹ The AEPD upheld Costeja's complaint and ordered Google remove the article from its returned results when Mr. Costeja's name was searched. On appeal before the Spanish High Court a preliminary referral was made to the CJEU seeking clarification in relation to three questions. Two of the questions concerned jurisdictional and classification issues under the Data Protection Directive while the third asked whether individuals had a 'right to be forgotten' by a search engine and, if so, what the scope of such a right might be.

Before the CJEU, the AEPD alleged that the availability of the contested publication in Google search results violated the rights of the original complainant under the Directive. In particular, the regulator argued that the mechanisms provided by Directive namely, the withdrawal of consent; prohibition to process excessive, inaccurate or incomplete data; the right of rectification, erasure, blocking and objection should together be read purposively as constituting a right to be forgotten.⁶²

⁶⁰ See, chapter three page 106, 127.

⁶¹ Case C-131/12 *Google Spain* EU:C:2014:317.

⁶² This was, however, one of a series of cases under Spanish law which has been ongoing for a significant period, for a discussion of the Spanish case law see, Artemi Rallo, *The Right to be Forgotten on the Internet: Google v Spain* (Electronic Privacy Information Centre 2014), 30 *et seq.*

The CJEU agreed with the AEPD's argument, departing from the Opinion of the Advocate General, and found that a 'right to be forgotten' existed under Articles 12(b) and 14(a) of the Directive.⁶³ In acknowledging the right, the Court held the data protection interests of the individual would 'as a rule' outweigh the interests of internet users in finding information, and Google's economic interests in returning comprehensive results, but noted the right was not absolute.

The Advocate General emphasised, in his Opinion, however, that the measure '[did] not purport to represent a codification of existing law, but an important legal innovation.'⁶⁴ Indeed, several issues with this use of the Directive and in turn of Articles 7 and 8 to enumerate the 'new' right emerge from the judgment. The primary issue is that it is not clear, as the Advocate General noted, that either of the provisions of the Directive relied on in fact offered a textual basis on which to enumerate a right to apply to a private actor for the delisting of certain search results. Rather, they provided for rights of rectification, erasure and blocking of data under Article 12(b) in particular where such data was incomplete or inaccurate and the right to object to processing under Article 14(a) of the Directive.⁶⁵

While such provisions thus provide for corrections and removals of data points from records, neither provide for a delisting right in the manner before the Court. The right to be forgotten thus conflates the right to correct records or to have such records erased, with the right of an individual to edit the availability of publications concerning them, regardless of their accuracy. This differentiation was implicitly recognised by the Advocate General in his opinion, which urged the court not to permit the development of an *ad hoc* system for the resolution of such conflicts, noting that such a development would likely lead to the 'automatic withdrawal of links to any objected content or to an unmanageable number of requests handled by the most popular and important Internet search engine service providers.'⁶⁶

More significantly, both the Advocate General, and the Court declined to explain how the interest recognised constituted an independent right normatively differentiated from either Articles 7 or 8 of the Charter. To unbundle from the Directive (under the interpretative guiding start of Article 8) a right to be forgotten – which is articulated as functioning as a limit on the broadcast of private facts (as an aspect of Article 7) without an explanation of the normative basis for recognising that

⁶³ Case C-131/12 *Google Spain*, [94], [96].

⁶⁴ *Ibid*, [110].

⁶⁵ *Ibid*, [108], [111], [138].

⁶⁶ *Ibid*, [133]. What is not averred to by either the Advocate General or the Court, but which would have resolved the matter still further is the social context of the Spanish case, which resulted from what Rallo terms a uniquely Spanish problem - that is the digitisation and indexation of public gazettes containing administrative resolutions, decisions and penalties. See, Rallo, *The Right to be Forgotten on the Internet: Google v Spain*, 47.

independent rights leaves the right to be forgotten with a murky pedigree albeit one which shares its questionable parentage with the right to data protection which is more correctly understood as an aspect of the right to privacy.

7.3.2 *Unbundling as a Jurisprudence of Exceptionalism*

The lack of clarity surrounding the normative basis for unbundled rights like data protection and the right to be forgotten not only generates uncertainty in respect of the scope of the unbundled right, and how it can or should be balanced as against other fundamental rights including its “parent” right, it also raises more fundamental concerns for rights theory within the Union.

While it is generally uncontroversial to characterise the source of fundamental rights within the Union as being a democratic model of popular consent in line with a liberal political idea of constitutionalism⁶⁷ unbundling tests the limits of this by generating new rights external to the democratic processes through which they are legitimately enumerated as part of the liberal political model. Unbundling results in a fundamental rights proliferation and while this is not harmful in itself what is concerning is that such proliferation appears, in a EU context, to be symptomatic of an underlying failure to develop a principled understanding of fundamental rights, their scope and their content. In this manner unbundling heralds the development of a jurisprudence of exceptionalism in which new iterations or contexts prompt the CJEU to enumerate *ad hoc* standards elevated to the status of rights to deal with new cases.

In this respect it is notable that in *Google Spain*, the issue itself was not new. The dissemination of the information at issue had always occurred as a result of the operation of the gazette of public authority decisions as Rallo notes.⁶⁸ The real issue was thus that the digitisation of such information had enabled its dissemination to a broader public due to its digitisation and appearance in a Google search. The conflict correctly analysed was thus between the public interest in the publication of public records, as set against the individual desire to exert a control over the extent to which those records are available – an interaction of the competing principles of freedom of information and freedom of expression under Article 11 of the Charter.

It was not contested in the case that a public interest in the records subsisted at the time of their creation, nor was it disputed that they should be available, nor was the validity of their publication challenged. What was challenged was the degree of their availability, the ease with which they

⁶⁷ Michael A Wilkinson, “Political constitutionalism and the European Union” (2013) 76(2) *The Modern Law Review* 1.

⁶⁸ *Ibid.*

might be located and accessed. This central conflict thus remained unresolved following the Court's decision which merely made them less easily locatable based on an asserted privacy interest. While delisting through the Internet's most dominant search engine presented the CJEU with a treatment for the objection – it did not provide a cure. Moreover, in providing such a treatment the Court relied on the improper rights ground of privacy rather than freedom of expression.

The use of unbundling, rather than engaging in a coherent analysis of the rights engaged by a case thus, in the European Union, acts as a barometer of the integrity of the legal system's interpretation of, and adherence to, its core values through the principled application of its enumerated fundamental rights to new and emerging issues and conflicts.⁶⁹ In the European context as the *Google Spain* example demonstrates, unbundling appears to be a symptom of both the failure to understand the rights issues at stake in cases involving the digital market and a perceived lack of resiliency of existing fundamental rights, which are viewed as unequal to the task to which they are called in cases involving the digital market – a view which is self-fulfilling in that the response is unbundling which perpetuates the lack of resiliency the Court fears.

Nor is the reduction in resilience caused by unbundling limited to the right immediately involved. Where unbundling occurs it may also result in impacts on other rights. This has certainly been the case with the right to be forgotten, which has had implications for the rights media freedom, and freedom of expression under Article 11 of the Charter.⁷⁰

Unbundling or rights proliferation also has a corollary impact through what Cohen refers to as the 'deflation' of the referent of rights. In this argument by unbundling a 'core' rights into classes of smaller independent sub-rights the class of individuals who benefit from the protection of the unbundled rights will be fragmented and there will necessarily be spaces or interests which were covered by the core 'umbrella' right which are not provided for by any of the unbundled rights. Thus classes of individuals experience a corollary contraction in the protective capacity of the rights which they can avail of even as the number of rights they are considered to exercise expands.⁷¹

⁷⁰ See Case C-131/12 *Google Spain* EU:C:2013:424, [120] *et seq.* See, Muge Fazlioglu, 'Forget me not: the clash of the right to be forgotten and freedom of expression on the Internet' (2013) 3 International Data Privacy Law 149; Eleni Frantziou, 'Further Developments in the Right to be Forgotten: The European Court of Justice's Judgment in Case C-131/12' (2014) 14 Human Rights Law Review 761.

⁷¹ See, Jean L Cohen, 'Rethinking Human Rights, Democracy, and Sovereignty in the Age of Globalization' (2008) 36 Political Theory 578.

There is an argument to be made that there exists a threshold beyond which unbundling may generate a ‘thicket’ of rights which cumulatively offer a detailed and specific form of protection – the right to property as it exists in common law jurisdictions is emblematic of this pattern which generates dense rights-based patterns of mutual obligation which overlap to provide layered protection to the primary, rights-based interest at their core. Certainly, this could be the argument made in favour of the GDPR which has unbundled from the right to privacy a significant number of statutory rights which may, in some respects, be considered more protective than a single privacy right as a result of their specificity.

Yet in the context of the GDPR the unbundling of the right to data protection from the right to privacy, and of further constituent data protection rights from that, while it has ostensibly permitted the right to privacy to be extended to private actors, has also, in effect, permitted the enumeration of a range of circumstances in, and conditions under which limitations on privacy are permissible. Moreover, it has done so in a manner in which the rights which are protected are directed to the economic and market participatory values and aspects of data protection rather than the broader understanding of privacy protected by Article 7 CFREU and 8 ECHR.

This diminished the capacity of individuals to enjoy the central right to privacy as a broader social right. The result has been a re-orientation of the right to privacy as a guarantee defined by its permissible reductions and infringements rather than its scope of protection. More broadly the results of unbundling are the same – creating a weak form of rights vindication through *ad hoc* and piecemeal rulings with deleterious effects on the rights over which it operates as well as those with which they come into contact.

7.3.3 *Legislative Foresight and Delegation of Public Functions*

The more practical, but no less serious, concern raised by the CJEU’s unbundling as illustrated in *Google Spain* and which is raised both by unbundling, and the Court’s activist stance more generally, is the capacity of the Court to pre-empt the legislative process by effectively requiring the development of EU law in a certain manner. This was effectively the case in *Google Spain*, where the right to be forgotten had been included in the draft GDPR yet was unlikely to have been retained in the final draft was effectively mandated for inclusion by the Court’s ruling⁷² as Advocate General Jääskinen noted in his Opinion.⁷³

⁷² Following the decision in *Google Spain* the right to be forgotten was included in Article 17 GDPR while Article 85 GDPR adopted text requiring that Member States reconcile the right to the protection of personal data with the right to freedom of expression and information, one of the major concerns raised by the decision.

⁷³ Rallo, *The Right to be Forgotten on the Internet: Google v Spain*, 30 *et seq.*

In mandating the inclusion of the right to be forgotten, however, the Court provided no guidance on the implementation of the right or the relative weight to be afforded to various considerations in its enforcement beyond noting that a ‘fair balance should be sought’ between the public’s right to know and the fundamental rights of the data subject in each case.

More problematically, the Court, through its unbundling of the right to be forgotten created a right whose determination and enforcement was effectively outsourced to private actors and the appeals process operated by such actors. As chapter five examined and as Leiser has noted, the result of the deference to private enforcement which the decision occasioned not only permitted but required Google to become the *de facto* arbiter in right to be forgotten cases, while the internal standards and review mechanisms it operates in making assessments in such cases have gone largely unscrutinised.⁷⁴

By permitting such delegation to private actors the Court sanctioned the development of a parallel system of private jurisprudence of rights, unaffected by the strictures of due process and administrative review which face similarly positioned, public actors. The processes also insulate the Court (and to an extent public institutions more generally) from the immediate, negative policy implications of unbundling. Moreover, by removing the adjudication of the new right to a private system of assessment and enforcement a system has been created in which the impacts on other rights are also unclear. This is compounded by the fact that while Google as the main recipient of right to be forgotten complaints is the dominant actor in setting the private policy which decides the parameters of the right, and upholds its efficacy, there are myriad, parallel private systems of decision making and enforcement operated by other search engines and private actors as a result of the decision.

In light of the shortcomings of existing legislative attempts to secure fundamental rights against private actors outlined in chapters two and three it may seem counter-intuitive for this work to turn, in its final portion to advocate for a solution to the harms identified based in the Union’s secondary law. However, given the capacity of the Commission,⁷⁵ however poorly realised to date, to effectively secure the fundamental rights considered by this work (and indeed fundamental rights more broadly) and the limits of the judiciary to do so given the limitations on its institutional capacity and its unprincipled development of rights outlined in this chapter, a legislative solution offers a practical mechanism for redressing the harms identified.

⁷⁴ Leiser, 'Private jurisprudence and the right to be forgotten'

⁷⁵ As the body responsible for proposing and draft proposed legislation under Article 17 TEU.

7.4 In Favour of a Legislative Solution

That the legislature is well placed to secure human rights is a common sense proposition that has been neglected by the constitutionally focused and judiciary centric nature of debates about securing fundamental rights in the European Union, and within constitutional orders more broadly. In this vein modern scholarship on the capacity of the legislature to assure fundamental rights has been characterised, during the twentieth and twenty first centuries, by arguments that the periodic election of legislatures by a popular majority, results in a legislative preference for maintaining the status quo, including in circumstances where it is oppressive to minorities within society.⁷⁶ In these accounts the legislature is inherently subject to capture by public opinion making it a poor rights protector (a view that echoes Rasmussen's theory of legitimate activism).

Within the common law tradition such thinking owes a not insignificant debt to Dicey's view that the codification of rights and deference to the legislature generated a system in which individual rights were vulnerable to the whim and caprice of government.⁷⁷ Yet it is notable that this aversion to legislators as rights protecting actors is relatively new. Aristotle,⁷⁸ Aquinas,⁷⁹ and Blackstone⁸⁰ all emphasised the central and strategic position of the legislature in securing individual rights as part of a responsibility which is prior to but recognised in fundamental rights instruments. Indeed, Blackstone notes that the greatest threat to individuals through arbitrary exercises of power comes not from the legislature but from the King and the courts, in contrast with whom the legislature can be viewed as a defender of due process and liberty.⁸¹

Yet over time this position has shifted. Some accounts attribute this change in attitude to legislative protection to the decades preceding, and the period coinciding with, the Second World War during which democratically elected legislatures specifically failed and, in some cases, enabled the disregard of the rights of all individuals.⁸² It is remarkable that if this is indeed the case, as the Universal Declaration whose drafting was inspired by the international consensus over the need for rights standards to militate against similar future events, includes aims that can be realised only through a detailed legislative programme. Notably under the UNDHR, Article 8's guarantee of an effective remedy, the right under Article 12 to protection in law from interferences with individual

⁷⁶ Ronald Dworkin, *Law's Empire* (Hart 1998), 375.

⁷⁷ Dicey, *The Law of the Constitution*.

⁷⁸ Aristotle, *The Nichomachean Ethics* 384-322 (Clarendon 1970).

⁷⁹ Thomas Aquinas, *Summa Theologica* 1225-1274 (Burns, Oates & Washbourne 1912), Vol I-II, 95-104.

⁸⁰ William Blackstone, *Commentaries on the Laws of England*, vol Of the Rights of Things (Oxford University Press 2016) Vol I, 91.

⁸¹ *Ibid.*

⁸² Grégoire Webber and Paul Yowell, 'Introduction: Securing Human Rights through Legislation' in Paul Yowell Grégoire Webber, Richard Ekins, Maris Köpcke, Bradley W Miller and Francisco J Urbina (ed), *Legislated Rights: Securing Human Rights Through Legislation* (Cambridge University Press 2018).

privacy, as well as the rights to political participation in Article 21, and to social security under Article 22, limitations on working hours under Article 24, adequate standards of living under Article 25 as well as many other provisions explicitly require affirmative action in secondary law to ensure they are secured.

Nor is the pattern unique to this international context. At a national level a similar pattern is also in evidence. In the United Kingdom before the introduction of the Human Rights Act (HRA) legislation including the Representation Acts, the Habeus Corpus Acts, the Education Acts, as well as industrial labour legislation and the National Health Service Act, all guaranteed fundamental rights to individuals. While the HRA was thus a welcome development it was, as Neuberger notes, by no means the bright-line beyond which lay enlightenment and before which lurked the ‘no-rights dark ages.’⁸³

7.4.1 *The Legislature as a Majoritarian Actor?*

Yowell et al note that the argument that legislatures are either unable or unwilling to act as protectors of fundamental rights is premised to some extent on the proportional over-representation of the State as the respondent in cases involving breaches of fundamental rights.⁸⁴ The assumption is that this representative proportion is indicative of the legislature’s failure through inability or lack of desire to protect fundamental rights, and that in such circumstances the natural role of the judiciary is to remedy the violations of rights occasioned by legislative activity.

This *post hoc ergo propter hoc* understanding holds that because the judicial branch has the power to review the product of the legislative branch, and is often required to conduct such review, it follows that the legislative branch is either incapable or fatally flawed in its ability to produce legislation which respects individual rights and does not require such review. This ignores the fact that the proportional representation of the State in such cases is because fundamental rights are directed at the State and not because other actors are not involved in equal incursions on the areas such rights seek to protect as well as more empirical arguments regarding the instances in which

⁸³ Lord Neuberger, 'The Role of Judges in Human Rights Jurisprudence: A Comparison of the Australian and UK Experience' (Address at the Supreme Court of Victoria), 1.

⁸⁴ Paul Yowell Grégoire Webber, Richard Ekins, Maris Köpcke, Bradley W Miller and Francisco J Urbina, *Legislated Rights: Securing Human Rights Through Legislation* (Cambridge University Press 2018).

infringements are identified and that majority of interactions with the State do not result in rights harms.

More commonly the accusation levelled at the legislature in impugning its capacity as a rights-protecting institution is that it is beholden to majoritarian interests and favours a maintenance of the status quo which is slow in recognising the rights of minority populations in particular. This argument is made by Dworkin who, drawing heavily on examples from the US Supreme Court's activist period (in particular its decision in *Brown v Board of Education*⁸⁵) argued that it was the US Supreme Court through its decisions effectively ended segregation in the United States, an objective which the legislature had neglected and would have continued to neglect absent judicial action. Yet it is not clear that this view is correct. Returning to Dworkin's example, empirical studies of the US civil rights movement have concluded, in direct opposition to Dworkin, that the impact of judicial decisions during the period were not as beneficial as is claimed.⁸⁶

Rosenberg, for example, notes that, despite the ruling in *Brown* it was only in 1973 that majority integration succeeded in practice an achievement which he argues is attributable to Congressional action and federal legislation – not judicial activism.⁸⁷ Klarman has gone further, arguing that not only did US Supreme Court decisions fail to produce the progress subsequently attributed to them, they consistently reflected national consensus both in cases that upheld segregation (as in *Plessy v Ferguson*⁸⁸) and in cases where popular opinion was evenly divided tended to side with elite views rather than minority ones.⁸⁹ What gives the appearance of a counter-majoritarian stance in judicial decisions in these accounts is not the presence of a trend favouring minority groups in practice but rather the disproportionate impacts of the judicial decisions on single cases which do not necessarily progress a broader agenda.⁹⁰

More fundamentally, as Klarman hints, it is not clear that Courts are not also subject to a form of majoritarian bias. The operation of precedent, according to Harvey, is not receptive to change but rather favours an incremental development, looking to the past for a direction towards the future.⁹¹ This trend is particularly notable in cases involving an intersection of fundamental rights and the digital environment in which courts demonstrate a tendency to seek to deploy reasoning of

⁸⁵ *Brown v Board of Education* 347 US 438 (1954).

⁸⁶ Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change* (2nd edn, University of Chicago Press 2008); Michael J Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford University Press 2004).

⁸⁷ Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change*, 52-53.

⁸⁸ *Plessy v Ferguson* 163 US 537 (1896).

⁸⁹ Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality*, 447-448.

⁹⁰ *Ibid*, 452.

⁹¹ *Collisions in the digital paradigm* 55, 152 *et seq*.

functional equivalence to earlier technologies, particularly communication technologies,⁹² a strain of analysis which can be deployed to “avoid the inconvenience of a close analysis.”⁹³

The result, Harvey argues, is that the courts obscure the true rights-conflicts involved in cases involving the digital environment, pointing to cases involving electronic commerce and the judicial desire to treat digital transactions in a manner identical to their analog equivalents.⁹⁴ Harvey draws on several cases from common law jurisdictions which illustrate this trend⁹⁵ as well as the CJEU decision in *Svensson v Retriever Sverige AB*.⁹⁶ The compulsion to transmute the laws of contract from an analog to a digital context with little amendment is understandable, however a similar pattern in fundamental rights analysis is also evident and has led, as chapters two and three discussed, to a context in which disproportionate influence has been afforded to private actors in delimiting the scope of public, normative values.

While it is true that legislatures can, and do, fail to vindicate the fundamental rights of the populations whom they legislate for, and while those wielding the legislative power may, of course, use such power to oppress others it does not follow - as current judicially focused narratives suggest, that this is either the default or more likely position. Indeed, as the preceding sections have examined, judicial intervention may in fact be equally damaging to fundamental rights by occasioning a reduction of their protective ambit through unprincipled and unpredictable development and enforcement.

7.4.2 *The Inapplicability of Majoritarian Arguments in the Case of the European Union*

Aside from the questionable accuracy of the majoritarian argument, in a European context the majoritarian case for affording judicial protection of fundamental rights a degree of primacy or deference has one further, and significant, flaw as a result of the structure of the legislature with the Union.

The Council and Parliament operate a joint legislative function under Article 14 TEU and Article 289 TFEU, while the Commission has the power to propose secondary laws under Article 17(2) TEU and draws up proposed acts for adoption by the Council and Parliament. Thus, while the

⁹² Harvey, *Collisions in the Digital Paradigm*, 55.

⁹³ Collisions in the digital paradigm 55

⁹⁴ Collisions in the digital paradigm 55-58

⁹⁵ See, *Cubby v CompuServe* 776 F. Supp 135 (SDNY 1991); *Stratton Oakmont v Prodigy* (1995) NY Misc Lexis 229; 23 Media LR 1794; *R v Hayes* (2006) 23 CRNZ 547 (CA), [77]; *Universal City Studios v Reimerdes & Corley* 111 F Supp 2d 294 (SDNY) 2000.

⁹⁶ Case C-466/12 *Svensson v Retriever Sverige AB*, EU:C:2014:76.

passage of secondary laws may prove subject to certain political considerations before the Council and Parliament, the legislative drafting process itself is deliberately structured under Article 17 TEU as conducted by the Commission to be a-political. Indeed the Commission is specifically tasked with the achievement of the best interests of the Union as a whole under Article 17.⁹⁷ The result of this structure is that majoritarian criticisms of the legislature's capacity to guarantee fundamental rights are less easily drawn – as the legislature in a European context is defined, practically, as a diptychal actor.

Majoritarian critiques as applied in a European context also presume there is a single, unique and consistent majority preference which the legislature can both identify and thereafter seek to achieve. It is not clear that this is the case. Certainly the prohibition on seeking comment from any government, institution, body, office or entity under Article 17 TEU⁹⁸ and the requirement that Commission members be selected based on their independence⁹⁹ in combination with the equal representation within the Commission as between Member States makes a consensus oppressive to one particular minority challenging to hold in theory, or to maintain in practice.

More fundamentally, arguments surrounding the legislature's maximisation of majoritarian preferences presume that a majoritarian preference and a majoritarian understanding of the best interests of the Union is rights exclusive rather than inclusive. Yowell has countered this view, arguing that a substantive understanding of the common good should be read as complementary to the protection of fundamental rights, as harms to rights import subsequent reductions in the common good as a result of the erosions of the underlying values necessary for the common good which rights protect.¹⁰⁰ Indeed, as the preceding chapters of this work have established the protection of fundamental rights and the autonomy these rights foster is integral to ensuring democratic participation and the health of the Rule of Law – central, in other words, to the best interests of the Union and the common good.

Rights should thus be understood as integral to and constitutive of the common good, defining its outline through vindicating a range of agreed values. This understanding of the interdependence of rights and the common good which the legislature is tasked with achieving is evident in the stated

⁹⁷ As a result, the Commission is often referred to as the guardian of the Treaties. See generally, Michelle Cini, 'The Commission as an Unelected Legislator' (2002) 8 *Journal of Legislative Studies* 14; Thomas Christiansen, 'The European Commission: the european executive between continuity and change' in Jeremy Richardson (ed), *European Union: Power and Policy Making* (3rd edn, Routledge 2006).

⁹⁸ Article 17 TEU.

⁹⁹ *Ibid*; Article 17(5) TEU.

¹⁰⁰ Paul Yowell, 'From Universal Rights to Legislated Rights' in Paul Yowell Grégoire Webber, Richard Ekins, Maris Köpcke, Bradley W Miller and Francisco J Urbina (ed), *Legislated Rights: Securing Human Rights Through Legislation* (Cambridge University Press 2018), 134-135.

aims of the legislature in the Union in the provisions of Article 17 TEU which requires that the Commission promote the best interest of the Union by ensuring the application of the Treaties – an objective which is necessarily inclusive of rights given the framing values of the Union.

There is, of course, an argument to be made that the elevation of the Commission above other institutions necessarily creates an imbalance, however, in as much as the model proposed by this research prioritises a legislative solution based in secondary law it does so on the basis of a pragmatic account of the constitutional constraints and desire for jurisprudential constituency in protecting rights and does not advocate the augmentation or elevation of the Union's legislative branch, simply that part of a workable solution to the harms identified in this doctoral work can be achieved through the legislative competence.

There is, of course, the practical counter argument that any legislative process, the European model included, is subject to the influence of private interests, in a manner not paralleled in the judicial branch. Indeed, there is evidence that dominant actors in the digital market have spent considerable resources, monetary and otherwise, in seeking to influence the policy and legislative outcomes of the Union.¹⁰¹ Yet the potential changes in the broader legislative or policy scheme which such influence can effect are minimal given the diverse interests of Member States within the Union's legislative process, and more easily remediable than the results of judicial enumeration of rights as described in this chapter.

7.4.3 *Legislative Capacities to Engage in Normative Balancing*

The final objection to legislative rights protections is that even where the legislature is not subject to majoritarian capture, the legislature as an institution lacks the capacity to conduct the normative balancing necessary in fundamental rights protection. Dworkin's arguments concerning the attainment of the highest average welfare through the assignment of different types of questions to different institutions according to their competences¹⁰² is the most evident example of this argument. In Dworkin's account the judiciary is the forum of principle which settles questions of rights¹⁰³ while the legislature is the forum of policy which settles matters of general interest, in line

¹⁰¹ Jockum Hilden, 'The Politics of Datafication : The influence of lobbyists on the EU's data protection reform and its consequences for the legitimacy of the General Data Protection Regulation' (2019); Hilden, 'Whose Privacy? Lobbying for the Free Flow of European Personal Data'.

¹⁰² Dworkin, *Taking Rights Seriously*, 277.

¹⁰³ Dworkin, *A Matter of Principle*, 69-72.

with the latter's orientation towards the common good – a bipolar relationship in which the judiciary refine the blunt instrument of utilitarian legislative calculations.¹⁰⁴

The legislature in this account is not devoid of beneficial attributes, in particular, Dworkin's account holds that the legislature has the institutional advantage of being able to produce an accurate expression of the different interests that should be taken into account in rights adjudication as a result of that branch's responsiveness to popular demands.¹⁰⁵ Yet, he argues, it is just this responsiveness that renders the legislature unable to respond to arguments of principle, making it incompetent to consider matters of rights adjudication.¹⁰⁶ Yet this, like the argument outlined above presumes that popular demands are rights or principle exclusive.

More fundamentally, as Kryitsis notes, Dworkin undercuts his own argument when he acknowledges that the justification of a legislative program will generally require the consideration of both principles and policies.¹⁰⁷ Kryitsis, moreover, contends that it would cast legislatures in an 'irredeemably bad light' to suggest they are bound to do nothing more than aggregate interests and would fail in their duty if they ignored or failed to account for the normative nature of the rules and standards they provide for in law and notes legislatures are in fact bound to take account of such issues.¹⁰⁸ Webber and Yowell have gone further, arguing that the legislature is under a particular obligation to give 'the broad, goal-oriented standards' included in fundamental rights instruments a 'specified, relatively precise legal form.'¹⁰⁹

Indeed, as the final chapter of this work illustrates, in the context of the Union, legislative proposals have, over the last decade or more, demonstrated an increasing alignment with Kryitsis' view, gradually adopting regulatory and review procedures of the Union's legislative product which seek to incorporate and assure fundamental rights in legislative schema. While such efforts have enjoyed

¹⁰⁴ Though Dworkin later abandoned the utilitarian point of view he continued to define the public interest and sound policy in terms of what community members want by reference to the distribution of preferences, a distinction consistent with his differentiation between choice-sensitive and choice-insensitive issues corresponding to policy and principle respectively with the judiciary charged with resolving choice-insensitive issues in which the object is moral truth and the legislature charged with the resolution of choice-sensitive issues in which preference distribution is the controlling factor. See, Dworkin, *Law's Empire*, 116-120; Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press 2000), 204-5.

¹⁰⁵ Dworkin, *A Matter of Principle*, 85.

¹⁰⁶ Dworkin, *Taking Rights Seriously*, 85-86.

¹⁰⁷ Dimitrios Kryitsis, 'Principles, policies and the powers of courts' (2007) 20 *Canadian Journal of Law and Jurisprudence* 379, 386-7.

¹⁰⁸ *Ibid*, 386-7.

¹⁰⁹ Yowell, 'Introduction: Securing Human Rights through Legislation' 1.

an uneven success, the Commission in its legislative development, nonetheless demonstrates a willingness and nascent capacity to take account of both principle and policy in drafting.¹¹⁰

7.5 Conclusion

Realising fundamental rights requires the legislature not only to ensure existing rights are respected but also to ensure that rights are actively brought into being in so far as they are made genuinely actionable, in particular as against private actors in the contexts considered by this work.¹¹¹ This assertion is, contemporaneously, controversial not only because of the fears that the legislature is unable to act with sufficient neutrality to assure rights but also because of the view that the legislature is an institution of limited capabilities, equipped - at most - to maximise the general welfare and ill equipped to reason about rights except in service to the preferences or interests of the majority.

Yet there are reasons to actively prefer the legislature as a guarantor of fundamental rights. Aside the legislatures capacity to ensure a horizontal application of rights to private actors, the most pragmatic is the legislatures capacity to apply institutional resources and foresight to attempt to resolve the complexity of the fundamental rights conflicts raised by private actors and the digital market. As the analysis of *Google Spain* above has illustrated, judicial actors lack the capacity to identify and formulate judgments which aver to and accommodate the consequences of their decisions in parallel manner.

Objections to legislative engagement and protection of fundamental rights based on majoritarian concerns and the capacity of the legislature to engage in normative balancing are much reduced in an EU context and what is evident, in the context of the conflicts between fundamental rights and private actors examined by this work, is a need for a unified, and disciplined understanding of fundamental rights within secondary laws. Moreover, legislative actors are better placed than their judicial colleagues to develop a coherent approach to fundamental rights review of secondary laws that restrains unbundling of rights and the associated fragmentation of rights protections.

With a view towards how the rights-harms examined by this work might be accommodated and enforced by legislative action given the constitutional and competence based limitations outlined by this work thus far the final two chapters of this work turn to examine the extent to which it is

¹¹⁰ Kyritsis, 'Principles, policies and the powers of courts', 386-7.

¹¹¹ Maris Köpcke, 'Why it Takes Law to Realise Human Rights' in Paul Yowell Grégoire Webber, Richard Ekins, Maris Köpcke, Bradley W Miller and Francisco J Urbina (ed), *Legislated Rights: Securing Human Rights through Legislation* (Cambridge University Press 2018) 55.

permissible to limit the contractual activity which permit those harms under EU law, given the absence of a European law of contract.

CHAPTER EIGHT

LOCATING THE LEGISLATIVE LIMITS OF FREEDOM OF CONTRACT

8.1 Introduction

While scholars have disputed the implications of contractual digitisation and the proliferation of mass consumer contracts for the doctrine of contract¹ and the impacts of behavioural psychology² on contractual practices online, there has been a failure to address the more fundamental issue of how and whether contract law theory should apply in a functionally equivalent manner in the digital market.³ This neglect has resulted in a failure to consider contract as the means by which the rights-based harms examined by this work have been occasioned.

The previous chapters have demonstrated the impacts of private actors on fundamental rights in the digital market, and the impacts of the harms to those rights on individual autonomy and the Rule of Law.⁴ What is apparent from the preceding chapters is that private actors in the digital market enjoy significant capacity to shape user behaviour in pursuit of their commercial interests,⁵ and in doing so to redefine public normative standards with negative impacts for fundamental rights.⁶ While chapter seven established the desirability of a legislative solution to ensure fundamental rights in the digital market, this chapter commences the argument that such a legislative solution is best accomplished through the Union's consumer protection competence.

In doing so, this chapter turns first to examine how consumer protection has operated as the functional limit on freedom of contract, within EU law. In the proceeding sections the chapter outlines the Union's 'spectral' contract law which, despite the absence of an explicit EU competence in the area has achieved a negative definition through consumer protection. The chapter argues that the Union's understanding of contract is characterisable as falling within the liberal tradition evincing an emphasis on deference to market rather than social concerns, though there is evidence of a nascent move towards a more consumer-welfarist trend.

¹ Eric Felten, 'Postmodern Times: Are We All Online Criminals' *Wall Street Journal* (18 November 2011) accessed 22 January 2019.

² Ian Ayres and Alan Schwartz, 'The No-Reading Problem in Consumer Contract Law' (2014) 66 *Stanford Law Review* 545, 555-562. §

³ European contract law to be understood broadly as the law governing economic transactions in Europe comprising both EU measures in the area of contract law as well as Member States' laws regarding contract.

⁴ Nor are the impacts on these fundamental rights isolated instances but rather are part of a broader pattern. See, A Pettrachin, 'The pluralisation of regulation' (2018) 9 *Theoretical Inquiries in Law* 349

⁵ Suzor has referred to this, in the context of intermediaries, as 'lawless' governance, Suzor, 'The responsibilities of platforms: A new constitutionalism to promote the legitimacy of decentralised governance'.

⁶ Suzor, 'Lawless: the secret rules that govern our digital lives'

The chapter then moves to consider the operation of the principle of freedom of contract in EU law, contextualising its ideological endurance in the absence of a European contract law as necessary within the Union's emphasis on market-led integration. Ultimately the chapter argues that in EU law consumer protection laws have functioned as the primary and longest standing limitation on freedom of contract and that the Union, while it continues to endorse a market-oriented understanding of consumer protection, has indicated, in more recent secondary laws, a commitment to moving beyond its traditional market-oriented limits on freedom of contract towards an explicitly rights-oriented consumer protection regulating contractual practices.

8.2 Contract without Competence – The Union's Spectral Law of Contract

Debates over whether or not to develop a comprehensive contract law in the Europe Union began in the late 1980s⁷ and have continued, with varying degrees of success to seek to locate a common set of rules or agreement as to the necessity for a common European private law.⁸ Various arguments have been forwarded for why this uncertainty has endured, including an absence of political will,⁹ that it is simply a matter of time, according to which the Union is gradually maturing toward a more developed legal system which would include a private law¹⁰ and finally that there is no need for a more developed contract law as long as the Common Frame of Reference endures as a soft law instrument.¹¹

The most concerted efforts at building a coherent EU contract law began with the work of the Commission on European Contract Law (the Lando Commission). The impetus for Commission was a series of resolutions passed by the European Parliament between 1989 and 1994 which sought to establish a common European civil law. The Commission produced the Principles of European Contract Law which sought to establish 'general rules which are designed to provide maximum

⁷ Kathleen Gutman, *The Constitutional Foundations of European Contract Law: A Comparative Analysis* (Oxford Studies in EU Law, Oxford University Press 2014), 153 *et seq.*

⁸ In addition to the common law systems of England and Wales (at the moment) and Ireland there are some twenty-eight systems of contract law in the EU - including Scotland and Catalonia; O Lando (ed), *The Principles of European Contract Law, Parts I and II* (Kluwer 1999).

See also, C Von Bar, *Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR) Outline Edition* (Sellier 2009); European Commission, *Action Plan on a More Coherent European Contract Law OJ C63/01* (2003).

⁹ Christian Hertel, 'Preventive Consumer Protection in an Optional Instrument – A Practitioners View' (2003) 4 70, 73.

¹⁰ Christian Bar, 'From Principles to Codification: Prospects for European Private Law' (2002) 8 Columbia Journal of European Law 379, 387-8.

¹¹ Diana Wallis, 'Expectations for the Final Common Frame of Reference' (2008) 9 ERA Forum 11, 10; other academic reasons are covered by Gutman, *The Constitutional Foundations of European Contract Law: A Comparative Analysis*, 278-280.

flexibility and thus accommodate future development in legal thinking in the field of contract law'¹² with the first part of the Principles being published in in 1995.¹³

During this period, the first edition of 'Towards a European Civil Code' was also produced, which considered those areas of private law which might be brought together to constitute a Civil Code for the Union.¹⁴ However, both of these efforts produced only considerations of pre-existing common traditions of Member States, and did not generate a distinct European law of contract.

In 2001 the Commission's Communication on European contract law, was the first document which envisaged a more fundamental discussion about the way in which problems resulting from divergences between contract laws in EU should be dealt with at Union level.¹⁵ The purpose of the Communication was to solicit contributions from interested parties on the need for more far reaching action in area of contract under EU law and was primarily focused on general contract rules and specific contract types.¹⁶ In 2003, the Commission disseminated a further Communication on the creation of a more coherent European contract law¹⁷ calling for further submissions on divergences in contract law at Member State level and methods for their potential amelioration.

Following the receipt of submissions from the 2001 and 2003 Communications, the Commission proposed an Action Plan¹⁸ which would see the creation of a Common Frame of Reference specifically in the field of consumer protection in line with the Union's 2002-2006 Consumer Policy Strategy.¹⁹ As part of the Action Plan, in 2004 the Commission released a third Communication titled 'European Contract Law and the revision of the *acquis*'²⁰ calling for further contributions.

The following year, in 2005, the Commission published its First Annual Progress Report On European Contract Law And Acquis Review,²¹ which noted the steps taken towards the creation of a Common Frame of Reference²² and the initial areas and challenges identified. In 2006 there

¹² Martijn W. Hesselink Arthur S. Hartkamp, Ewoud Hondius, C Mak and Edgar Du Perron, *Towards a European Civil Code* (4th edn, Wolters Kluwer 2010).

¹³ Today, the work of the Commission on European Contract Law has continued by the *Study Group on a European Civil Code*.

¹⁴ Arthur S. Hartkamp, *Towards a European Civil Code*.

¹⁵ European Commission, 'On European Contract Law' COM (2001/398).

¹⁶ *Ibid*, 2-3.

¹⁷ European Commission, 'A More Coherent European Contract Law' COM (2003/C83/01).

¹⁸ European Commission. 'A More Coherent European Contract Law: An Action Plan' COM (2003/C63/01).

¹⁹ *Ibid*.

²⁰ European Commission, 'European Contract Law and the revision of the *acquis*: the way forward' COM (2005/65)

²¹ European Commission, 'First Annual Progress Report on European Contract Law and the Acquis Review' COM (2005/456).

²² *Ibid*, 2.2.

followed a resolution by European Parliament on contract law and the revision of the *acquis*²³ and, in 2007, the Green Paper on Review of Consumer Acquis.²⁴

The Draft Common Frame of Reference was published in October 2008²⁵ and a final version of the Common Frame of Reference followed in 2009. The CFR and was intended to act as a ‘toolbox’ of contract principles, concepts and terms which would be commonly understood across the EU, and in future secondary laws. While the Frame of Reference was never referred to as a European civil code, and it has been emphasised that there was no question of the Frame of Reference supplanting national laws, it did raise the possibility of what it called an ‘optional instrument’ to act as a legal basis to which, parties might choose to subject themselves. No such optional instrument has materialised to date and the Frame of Reference has never enjoyed standing greater than that of a soft law instrument, and one which has remained underutilised in much of the subsequent work by the European institutions.²⁶

Alongside the release of the final Frame of Reference, in 2009, the Commission also released a Green Paper on policy options for progress towards a European contract law for consumers and business addressing how the Union could strengthen the internal market by making progress in the area of European contract law.²⁷ Subsequently to this, the most notable development was the 2011 proposal for a Common European Sales Law (CESL), though the project was abandoned in 2015 in favour of a set of Directives on the online sale of goods and supply of digital content though the adoption of a suite of Directives which incorporated some of its central tenets in the Directives on distance contracts²⁸ and the online sale of goods.²⁹

While these Directive as well as other portions of Union secondary law include provisions which have harmonised aspects of contracts across the Member States, specifying rules on the conclusion of contracts,³⁰ the form and content of offer, acceptance and performance of contracts,³¹ as well as

²³ European Parliament, ‘Resolution on European contract law and the revision of the *acquis*: the way forward’ (2005/2022 (INI)).

²⁴ European Commission, ‘Green Paper on the Review of the Consumer Acquis’ COM (2006/0744).

²⁵ See, Draft Common Frame of Reference, available at (< [https://www.trans-lex.org/400725/_outline-edition-/->](https://www.trans-lex.org/400725/_outline-edition-/)) accessed 8 July 2019.

²⁶ Martijn W Hesselink, ‘The Common Frame of Reference as a Source of European Private Law’ (2009) 83 *Tulane Law Review* 919.

²⁷ European Commission, ‘Green Paper on policy options for progress towards a European Contract Law for consumers and businesses’ COM (2010/348).

²⁸ European Commission, *Proposal for a Directive on certain aspects concerning contracts for the online and other distance sales of goods COM(2015)635*

²⁹ Digital Content Directive (Directive); Sale of goods Directive (Directive).

³⁰ Unfair Contract Terms Directive (Directive 93/13/EEC); Consumer Sales and Guarantees Directive (Directive 1999/44/EC).

³¹ *Ibid*; Price indication directive (Directive 98/6/EC); Distance sales Directive (Directive 97/7/EC).

informational requirements³² there remains no unified law of contract in EU law, rather there are bodies of distinct sectoral secondary laws broadly unified by their characterisation as related to restrictions on consumer contract practices in various areas. Indeed, what is notable is that these initiatives highlight explicitly what had long been implicit in the Union's engagement with contract law, namely the Union's framing of its activity within the area of contract is accomplished by reference to its established competence in consumer protection.

While there is thus a body of disparate legal standards applicable to contract which forms part of EU law which can be broadly described as contract law as part of the *acquis* it is notable that in as much as there is a European contract law it is negatively defined by consumer protection which effectively defines the limits of acceptable contractual practice within the Union.³³ In this sense the definition of the Union's contract law and the restrictions on freedom of contract has been negatively drawn by the EU's consumer protection competence creating what operates as a spectral contract law.

This limited conception of contract in EU law, is characterised by a consistent interplay, and competition between, market and public welfare concerns.³⁴ This is reinforced by the constitutional basis for the Union's competence under Article 169 TFEU which provides that to promote the interests of consumers and ensure a high level of consumer protection, the Union 'shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organise themselves in order to safeguard their interests' through measures adopted under Article 114 in the context of the completion of the internal market.³⁵ Article 169's framing of the Union's competence in the area of consumer protection highlights the two underpinning ideologies, of modern contract law which can be broadly characterised as 'market-individualism' and 'consumer-welfarism'.³⁶

³² Directive 2006/123 on services in the internal market; Directive 2011/83 on consumer rights; Directive 2011/83 distance selling (financial services); Directive 97/7 distance selling; Directive 90/314 package travel; Directive 2008/112 timeshares.

³³ Vincenzo Roppo, 'From Consumer Contracts to Asymmetric Contracts: a Trend in European Contract Law' (2009) 5 *European Review of Contract Law* 304.

³⁴ Jacobien Rutgers, *European Contract Law and the Welfare State* (Europa 2012).

³⁵ Article 114 provides that the Parliament and Council shall adopt measures which have as their object the establishment and functioning of the internal market and shall adopt a high level of protection in matters concerning health, safety, environmental protection and consumer protection; Gutman, *The Constitutional Foundations of European Contract Law: A Comparative Analysis*, 378-9; John N Adams and Roger Brownsword, 'The Ideologies of Contract' (1987) 7 *Legal Studies* 205; John N Adams and Roger Brownsword, *Understanding Contract Law* (4th edn, Sweet & Maxwell 2006), 52 *et seq.*

³⁶ Brownsword, 'The Ideologies of Contract'; John N Adams and Roger Brownsword, *Understanding Contract Law*, 52 *et seq.*

8.2.1 *Liberal Theories of Contract in EU law*

Drawing on the fundamental principles enumerated in Article 6 TEU of liberty, democracy, respect for the fundamental rights, the Rule of Law, and respect for the national identities of its Member States, Hesselink has argued that the Union displays a commitment to a social justice theory of contract.³⁷ Hesselink grounds this argument in the Union's attitude to contract which can be discovered through an examination of the Union's legislative initiatives – many of which take the form of consumer protection standards.³⁸ Micklitz similarly considers that EU law has traditionally been involved in the construction of what he describes as the pillars of private law systems as they have developed in Europe - the concept of legal persons, a concept of binding contracts, and a concept of property as well as a remedial scheme for the protection of rights and the enforcement of obligations.³⁹

More recently, however, Micklitz argues that the EU has moved beyond this conservative approach and has begun to fashion European pillars for private law derived from general principles of law and Charter rights as part of the constitutionalisation of private law as part of which the foundations of private law in the EU are being articulated for the first time in a novel way that corresponds in Micklitz's view with what Kennedy described as the third wave of globalisation in law.⁴⁰

Gutmann has criticised this view that social justice must be or is a defining element of European contract law on the basis that the account offered by Hesselink, in particular, fails to indicate what theoretical concept of contract law a view premised on social justice seeks to achieve.⁴¹ Certainly the claim of social justice offered by Hesselink is amorphous, implicitly invoking a theory of contract based on the need to ensure the protection of the weaker party but lacking a more coherent articulation of its own means and ends. However, this is not to say that Hesselink does not provide an accurate account.

At the heart of the account given by Hesselink, and indeed more broadly, is a concern about the distributive effects of the market order. However while Hesselink's account is aspirational it is not reflective of the reality of the Union's understanding of contract which has traditionally been more

³⁷ Study Group on Social Justice in European Private Law, 'Social Justice in European Contract Law: a Manifesto' (2004) 10 *European Law Journal* 653.

³⁸ *Ibid.*

³⁹ Hans-W Micklitz, 'The Constitutional Transformation of Private Law Pillars through the CJEU' in Hugh Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (Intersentia 2017), 51.

⁴⁰ *Ibid.*

⁴¹ Thomas Gutmann, 'Some Preliminary Remarks on a Liberal Theory of Contract' (2013) 76 *Law and Contemporary Problems* 39, 49.

accurately described as falling within a liberal account in as much as it defers to individual choice and freedom of contract.

Liberal theories of contract locate the normative foundations of contract in the need to realise self-determination and autonomy⁴² which are central features of liberal or what Weber refers to as 'contract societies.'⁴³ As part of this normative aim liberal theories view the preservation of freedom of contract as central to the preservation of individual autonomy. Liberal theories thus echo Hart's observation that self-determination is necessary for individuals to lead a fully human life.⁴⁴

Gutmann, has contended there is, in fact, no such thing as a non-liberal theory of contract, as the normative structure underlying the concept of contract is so interwoven with and dependent on individual autonomy and self-determination that it cannot be considered anything but, fundamentally, liberal⁴⁵ 'embracing the conviction that basic individual autonomy and self-determination impose limits on the collective search for the good life.'⁴⁶

Traditionally, the European Union, founded on the four freedoms, endorsed a vision strongly emphasised the freedom of choice of EU citizens in their commercial interactions and activities. This emphasis has been reflected in the informational requirements which dominate European secondary laws relating to contracts⁴⁷ from the Consumer Credit⁴⁸ to Financial Services⁴⁹ and Distance Selling Directives.⁵⁰

Further support for a liberal understanding of contract can be located in the remarks of Advocate General Colomer in *Vedial* that the power to '... delimit the scope of proceedings ... reflect[s] the acknowledgement of individual autonomy. It is for the parties, not only to initiate or terminate proceedings but also to determine their subject-matter. After all, it is the manifestation at a

⁴² Autonomy has been variously located through promise or choice but can also be a general one, addressing varied goods and diverse values to form a coherent general theory. See, Hanoch Dagan and Michael Heller, *The Choice Theory of Contracts* (Cambridge University Press 2017), 4-7.

⁴³ Gutmann, 'Some Preliminary Remarks on a Liberal Theory of Contract', 44.

⁴⁴ HLA Hart, 'Legal Rights' in HLA Hart (ed), *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Clarendon Press 1982) 162, 189-192.

⁴⁵ Gutmann, 'Some Preliminary Remarks on a Liberal Theory of Contract'.

⁴⁶ *Ibid*, 52, 61 In contrast, Kimel endorses a perfectionist version of liberalism which maintains that government can and should go beyond mere protection of individual rights to make assessments about the common good which it should seek to foster. Thus, while liberalism generally declines to assert value claims, perfectionist liberalism is a thoroughly value based.

⁴⁷ See, Hugh Collins, 'Good faith in European Contract Law' (1994) 14 *Oxford Journal of Legal Studies* 229.

⁴⁸ Directive 87/102/EC as amended by Directives 90/88/EC and 98/7/EC.

⁴⁹ Articles 3-5 Directive 2002/65/EC.

⁵⁰ Article 4-5 Directive 97/7/EC.

procedural level of the individual's power of disposition concerning his own rights, which, on a substantive level, is manifested in the primacy of contractual intent.'⁵¹

A similar emphasis is evident in the jurisprudence of the CJEU concerning barriers to trade and competition, in the enumeration of the average consumer as a market actor, and in the restricted understanding of the vulnerable consumer.⁵² The historical emphasis of the EU law in matters concerning contract could therefore be described as tending towards a liberal theory of contract characterised by a normative justification based in market-individualism.

According to theories of contract grounded in market-individualism, the market is a site for competitive exchange which the law of contract functions to facilitate with maximum competitiveness. This is the view adopted by several theorists, notably Hayek,⁵³ who challenged the idea of social or distributive justice and argued that ample space should be given to freedom of contract.⁵⁴

Kaplow and Shavell have offered a more traditionally libertarian articulation of market-individualism arguing that policy should never be guided by notions of justice or fairness – not because such aims are not legitimate but because social welfare is best maximised through the market, which provides the most efficient mechanism for the allocation of welfare benefits.⁵⁵

In line with its advocacy in favour of an approach of minimal interference with market mechanisms, market-individualism understands the role of judges as one of minimal intervention in deference to party autonomy, which should be maximised.⁵⁶ The line traditionally drawn between actionable misrepresentation and mere non-disclosure in national law, epitomises this view which emphasises minimal restraints on parties and transactions, minimal and clearly articulated restrictions on contracting, and the general endorsement of an approach by which the law accommodates commercial practice.⁵⁷

⁵¹ Case C-106/03 *Vedial SA v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* EU:C:2004:457, [28]. Similar linking of freedom of contract and autonomy are seen in the comments made by Advocate General Cruz Villalon in Case C-426/11 *Alemo-Herron* EU:C:2013:82, [56].

⁵² This has been detailed by Stephen Weatherill, 'The Role of the Informed Consumer in European Community Law and Policy' (1994) 2 *Consumer Law Journal* 49.

⁵³ Hayek, *The Road to Serfdom*; Hayek, *Law, Legislation and Liberty*, The Mirage of Social Justice.

⁵⁴ Stefan Grundmann, 'European Contract Law(s) of What Colour' (2005) 2 *European Review of Contract Law* 184. Though Hayek's iteration of this argument is notable for its rejection of laissez-faire libertarianism advocating for strong policies against power rejection and inequality of opportunity, Hayek, *The Road to Serfdom*, 18, 38, 115-116, 133.

⁵⁵ Louis Kaplow and Steven Shavell, *Fairness versus Welfare* (Harvard University Press 2006).

⁵⁶ Brownsword, 'The Ideologies of Contract'.

⁵⁷ Recognised in the objective approach to parties' intentions, a conservative approach to subjective mistake and the protection of third-party purchasers.

Despite this a pure, liberal understanding of contract is not compatible with the limits on freedom of contract imposed by the EU legal order. Indeed given these limits, the Union's understanding of contract is more accurately characterised as striving to reflect Kimel's perfectionist and communitarian version of liberal contract theory.⁵⁸

Under this understanding of contract the pursuit of specific liberal values,⁵⁹ and not an unyielding defence of individual autonomy, is the ultimate goal of contract.⁶⁰ In this account, while autonomy is still prioritised, this is the case only when that autonomy is exercised 'in pursuit of the good,' which includes the protection of 'valuable activities and relationships.'⁶¹ In this analysis, contractual relations may be subjected to distributive concerns⁶² where the aggregate effects of individual pursuits of autonomy produce distributive harms. However, in Kimel's analysis these should be ameliorated not by interfering with contract rules but through the imposition of distributive justice obligations on certain private parties – an apparent rejection of Savigny's dictum that, in contract law, one party may let the other starve, as long as public law takes care of him.⁶³

Indeed, more recent European secondary law displays a more consumer-welfarism trend which aligns with Kimel's modified account of communitarian liberal. In contrast to market-individualism, consumer-welfarism emphasises principles of fairness and reasonableness and begins from the premise that consumer contracts though viewed as competitive transactions, should be closely regulated. In common law systems consumer-welfarism trends include the principle of constancy or estoppel, the principle of proportionality, and the equitable doctrine of common mistake.⁶⁴

A consumer-welfarism trend is notable in the Union's Unfair Contract Terms Directive,⁶⁵ the Consumer Sales Directive,⁶⁶ and the GDPR⁶⁷ which intervene directly and strongly in contractual relationships through the introduction of fairness rules and good faith requirements as well as through more traditional informational requirements. The GDPR, for example, also imposes rights

⁵⁸ Perfectionist liberalism maintains that government can and should go beyond mere protection of individual rights to make assessments about the common good which it should seek to foster. Thus, while liberalism generally declines to assert value claims, perfectionist liberalism is value-based.

⁵⁹ That 'good' is to be determined by liberal values, which demands freedom of contract only insofar as liberal values are enhanced by the enforcement of contracts. See, D Kimel, *From Promise to Contract* (Hart 2003).

⁶⁰ Dori Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Hart 2003).

⁶¹ (!!! INVALID CITATION !!!) Kimel, *From Promise to Contract*, 131.

⁶² Gutmann, 'Some Preliminary Remarks on a Liberal Theory of Contract', 55.

⁶³ *Ibid*, 53, 56.

⁶⁴ See, *Bell v Lever Bros Ltd* [1932] UKHL 2. More generally see, P Benson, *The Theory of Contract Law* (Harvard University Press 2001); Jurgen Basedow, 'Freedom of Contract in the European Union' (2008) 16 *European Review of Private Law* 1.

⁶⁵ Directive 99/44/EC.

⁶⁶ Directive 93/13/EC.

⁶⁷ Regulation (EU) 2016/679.

based standards into contractual relationships through its transmutation of the values of Articles 7 and 8 of the Charter. As a result, though the express justifications for EU consumer law are not drawn in distributive terms both the constitutional framing of EU law and what Hesselink calls social justice have generated the foundation for a rights orientated understanding of consumer protection.

Thus, a distinctly liberal and specifically market-welfarist understanding of contract is present in EU law through the clear emphasis on an implicit freedom of contract, discussed in the following part, as well as in the substantive, rights-based limits placed on freedom of contract.

8.3 Freedom of Contract in European Law

Sir George Jessel in 1975 noted that ‘contracts when entered freely and voluntarily shall be held sacred and enforced by Courts of justice’⁶⁸ Jessel understood freedom of contract as affording ‘men of full age and competent understanding ... the utmost liberty of contracting,’⁶⁹ a formula which articulates the basic understanding of freedom of contract as embodied by liberal theories of contract. However, freedom of contract may be further subdivided into freedom of contract referring to an individual’s freedom to control their relations with others through contract (positive freedom of contract), and referring to an individual’s freedom to refrain from so entering (negative freedom of contract).

Under this definition freedom of contract has a dual aspect, with its positive conceptualisation regarded as forming part of individual capacities for self-determination and autonomy, while the negative conceptualisation refers to freedom from state intervention in contractual relationships.⁷⁰ Though the Union does not differentiate between negative and positive freedom of contract both aspects seem implicit in the remarks of Advocate General Geelhoed in *Heinrich Wagner* that ‘it follows from the principle of freedom of contract that each person is free to choose with whom and on what matter he wishes to enter into negotiations and the point to which he wishes to continue such negotiations.’⁷¹

⁶⁸ *Printing and Numerical Co v Sampson* (1975) LR 19 Eq 462, 465.

⁶⁹ *Ibid.*

⁷⁰ Both positive and negative understandings are evident in the jurisprudence of the CJEU. See, Case C-69/97 *Commission v SNUA* EU:C:1999:204, [23]; Case C-334/00 *Tacconi* EU:C:2002:499, EU:C:2010:68 Advocate General Geelhoed at [55], [65]; Case C-61/09 *Landkreuz v Aufsichts* EU:C:2010:606, [55]; Case C-283/11 *Sky Osterrich* EU:C:2013:28, [43]; Case C-26/13 *Arpadkasler* EU:C:2014:85 Advocate General Wahl, [3]; Case C-40/98 *Commission v TVR* EU:C:2000:319 Advocate General Ruiz Jarabo, [28]; Case C-51/00 *Temco* EU:C:2001:496 Advocate General Geelhoed, [40].

⁷¹ Case C-334/00 *Fonderie Officine Meccaniche Tacconi Spa v Heinrich Wagner Sinto GmbH* EU:C:2002:68, [55].

The vision of freedom of contract outlined in *Heinrich Wagner* requires a two pronged form of legislative and judicial restraint in accordance with which both the Courts and the legislature should be slow to intervene between private parties and the temptation to release parties from hard bargains is to be resisted. Yet in recent decades a more complex understanding of freedom of contract has begun to evolve alongside the expansion of the regulatory state.

Atiyah has charted this movement most prolifically in an English context, pointing to the exponential rise of regulatory legislation in a wide range areas as heralding the decline of freedom of contract while Friedman suggests that, more generally, legislation in several jurisdictions has reduced ‘cup by cup’ the ocean of freedom of contract.⁷² The result, these authors argue, has been that in the long run ‘the real course of development has been first from status to contract and then from ... unregulated to regulated contract.’⁷³ In a European context, Cherednychenko has similarly charted freedom of contract’s shift from a formalist⁷⁴ toward a substantive conception focused on the bargaining positions and powers of the parties⁷⁵ as part of the Union’s development of a broader pattern of social-justice orientated public regulation of contracts.⁷⁶

8.3.1 *Freedom of Contract in EU Law*

While the model of market competition outlined in the Treaties appears to assume the presence and endurance of contractual freedom, explicit references to the principle in the Treaties are absent. Despite this absence many of the guarantees provided by the Treaty of Rome, and echoed later in the Treaties of Maastricht and Amsterdam, notably in the area of competition, could be meaningfully achieved only given the existence of freedom of contract.

Despite this, early decisions of the Court of Justice declined to invoke the principle. Indeed, it was not until the 1978 decision in *Sukkerfabriken* that a reference was made to freedom of contract in the decisions of the CJEU.⁷⁷ During the following two decades references to freedom of contract began to proliferate in the jurisprudence of the CJEU, though the principle continued to be deployed

⁷² Grant Gilmore, *The Death of Contract* (2nd edn, Ohio State University Press 1995).

⁷³ Arnold Toynbee, *The Industrial Revolution* (Gleed Press 2013), Chapter I.

⁷⁴ Olha O Cherednychenko, 'Fundamental Rights and Private Law: A Relationship of Subordination or Complementarity' (2007) 3 *Utrecht Law Review* 1; S Grundmann, 'The Future of Contract Law' (2011) 7 *European Review of Contract Law* 490, 504.

⁷⁵ Olha Cherednychenko, 'EU Fundamental Rights, EC Fundamental Freedoms and Private Law' (2006) 1 *European Review of Private Law* 23; Cherednychenko, 'Fundamental Rights and Private Law: A Relationship of Subordination or Complementarity', 4; Grundmann, 'The Future of Contract Law' 504.

⁷⁶ Hugh Collins, *Regulating Contracts* (Oxford University Press 1999), 49.

⁷⁷ Case C-151/78 *Sukkerfabriken Nykøbing* EU:C:1979:4. Subsequent references during this decade are limited see, Case C-258/78 *Nungesser v Commission* EU:C:1982:211, 2035; Case C-784/79 *Porta-Leasey GmbH* ECLI:1980:123, 1521; Case C-56/79 *Zelger v Salintiri* EU:C:1979:285, Opinion Advocate General Capotorti, 100.

only descriptively⁷⁸ largely in judgments on competition law which repeatedly emphasised restrictions on freedom of contract as a definitional element of anticompetitive practices.⁷⁹ Contemporaneously this pattern of superficial reference to freedom of contract in the decisions of the CEJU has endured, with sporadic exceptions⁸⁰ in references to the circumstances in which freedom of contract may be limited by Union law⁸¹ or the need to respect freedom of contract.⁸²

Basedow, in a 2008 article, argued that given the prevalence of references to the freedom of contract throughout the Union's secondary law⁸³ and the dicta in cases such as *Kernkraftwerke Lippe* that interferences with freedom of contract must be justified by reference to the principle of proportionality,⁸⁴ freedom of contract should be considered a general principle of EU law.

⁷⁸ Freedom of contract is referred to superficially, or passim in Case C-126/80 *Salonia v Poidomani* EU:C:1981:77 Advocate General Reischl [2]; Case C-66/80 *Chemical Corporation Rome SpA International* EU:C:1981:102, [23]; Case C-199/86 *Rauffersen v BALM* EU:C:1988:99, [16]; Case C-415/93 *Bosman* EU:C:1995:293 Advocate General Lenz [10]; C-316/93 *Vaneetveld* EU:C:1994:82, Advocate General Jacobs [35]; Case C-272/91 *Commission v Italy* EU:C:1993:310 Advocate General Gulman [34]; Case C-33/89 *Koowalska*, EU:C:1990:265, [5], [17] and EU:C:1990:152 Advocate General Darmon [4], [16], [23]; Case C-67/96 *Albany* EU:C:1999:28 Advocate Generals Jacobs [80], [161], [279], [283], [284]; C-265/97 P *VBA v Florimex* EU:C:2000:170, [134]; Case C-267/97 *Coursier v Fortis Bank* EU:C:1998:269 Advocate General Pergola [9]; Case C-180/98 and 184/98 *Pavlov and Others* EU:C:2000:151 Advocate General Jacob, [150]; Case C-381/98 *Ingmar* EU:C:2000:230, Advocate General Léger [57]; Case C-67/96 *Albany International BV* EU:C:1999:28 Advocate General Jacobs [80], [161], [283], [284], [279].

⁷⁹ Case C-38/22 *DEI v Commission* ECLI:EU:T:2016:748; Case T-679/14 *Teva UK v Commission* ECLI:EU:T:2018:919; Case T-873/16 *Groupe Canal* ECLI:EU:T:2018:904, [86]; Case T-24/90 *Automec* ECLI:EU:T:1999:97; Case T-170/06 *Alrosa* ECLI:EU:T:2007:220, [43], [49], [70]; Case T-51/89 *Tetrapak Rousing v Commission* ECLI:EU:T:1990:15, 329; Case T-193/05 *Laurent Piau v Commission* ECLI:T:2005:22, [55]; Case T-65/96 *Krish Glass* ECLI:EU:T:2000:93; Case T-129/98 *Aéroports de Paris* ECLI:EU:T:2000:290, [82].

⁸⁰ Case C-331/00 *Greece v Commission* EU:C:2003:472, [107]; Case C-59/01 *Commission v Italy* EU:C:2002:421 Advocate General Alber [25]; Case C-421/04 *Matratzen Concord* EU:C:2005:720 Advocate General Ruiz Jarabo Colomer; Case C-437/04 *Commission v Belgium* EU:C:2007:178, [51]; C-277/05 *Societe Thermale* EU:C:2007:440, [21]; Case C-306/06 *Telecom* EU:C:2008:187, Advocate General Piores Maduro Deutsches Telekom [37]; Case C-380/06 *Commission v Spain* EU:C:2008:702, [14] and EU:C:2008:417 Advocate General Sharpston [3]-[4]; Case C-441/07 *Commission v Alrosa* EU:C:2010:377, [7]; Case C-484/08 *Caja de Ahorras v Ausbanc* EU:C:2009:682, Advocate General Trstenjak [38] [39]; Case C-462/09 *Stichting v Mijndert* EU:C:2011:133 Advocate General Jääskinen, [57]; Case C-242/10 *End Produzione SpA* EU:C:2011:861, [26], EU:C:2011:511 Advocate General Cruz Villalon [55]; Case C-92/11 *RWE Vertreib* EU:C:2013:180, [17], [23] and EU:C:2012:566 Advocate General Trstenjak, [27][23]; Case C-531/12 P *SEMEA v Commission* EU:C:2014:2008 [39]; Case C-555/14 *IOS Finance* EU:C:2017:121, [29]-[34], [55]; Case C-477/14 *Pillbox v Secretary of State for Health* EU:C:2015:854, Advocate General Kokott [183], [155]; Case C-163/14 *Commission v Belgium* EU:C:2015:441, Advocate General Villalon [56]; Case C-201/15 *AGET Iraklis* EU:C:2016:972, Advocate General Wahl [49]-[50] and [67]-[69]; Case C-191/15 *Amazon EU Srl* EU:C:2016:388, [89]; Case C-134/15 *Lidl GmbH* EU:C:2016:498, [26]; Case C-277/16 *Polkomtel* EU:C:2017:611, Advocate General Tanchev, [73]; Case C-54/16 *Vinyls Italia* EU:C:2017:433, Advocate General Spunzar [154]; Case C-540/16 *Spika and Others* EU:C:2018:565, [34]; Case C-52/18 *Fulla* EU:C:2019:22, [54].

⁸¹ Case C-434/08 *Freeck Hindinga* EU:C:2010:285, [36]; EU:C:2010:56 Advocate General Mazák [15], [18].

⁸² In Case T-129/98 *Aéroports de Paris* ECLI:EU:T:2000:290, [82] the Court noted that the commission 'must observe the principle of freedom of contract.'

⁸³ Basedow, 'Freedom of Contract in the European Union', 910.

⁸⁴ Case C-161/97 P *Kernkraftwerke Lippe v Commission* EU:C:1999:193 [101], [124].

Basedow contended that the principle should be considered to be constituted of several distinct freedoms, including the freedom to enter a contract, the freedom to select a contractual partner, the freedom to select the content of the contract in respect of subject, object and performance, the freedom of form, and the freedom of amendment.⁸⁵

Subsequently, Advocate General Bot in *Sky Osterreich*⁸⁶ noted that the right to freely exercise an economic activity (read as including freedom of contract) was one of the general principles of EU law. That view was subsequently confirmed in *Unamar*, the Court noting that the principle of freedom of contract may take precedence over the national law of Member States as a general principle of EU law.⁸⁷

The status of freedom of contract as a general principle was subsequently overtaken following the entry into force of the Charter leading the CJEU to find, in *Alemo-Herron*,⁸⁸ that in the circumstances of that case the rights of a transferee under a contract were so limited as to constitute a serious reduction in the transferee's contractual freedom, thus adversely impacting 'the very essence of its freedom to conduct a business'⁸⁹ under Article 16 of the Charter. This protection of freedom of contract as an aspect of the Article 16 right to conduct a business was confirmed in *Sky Osterreich*⁹⁰ and has been subsequently reaffirmed by the Court.⁹¹

The decision in *Alemo-Herron* was greeted with surprise, following, as it did a series of cases in which freedom of contract has been limited in favour of social objectives.⁹² In *Alemo-Herron* the Court departed from the intention of the drafters of the Acquired Rights Directive to overcome the employee interest clause arguing that such clauses as provided for in the Directive did not seek to strike a structural balance between employers and employees but rather, an internal balance within the Directive itself in light of which the Directive ought to be interpreted in light of the right to conduct a business in Article 16 of the Charter.⁹³

Until the decision in *Alemo* Article 16 had been seen as a weak right both in its formulation and its treatment by the Court which had limited itself to averring to the rights existence (largely pre-

⁸⁵ Basedow, 'Freedom of Contract in the European Union'.

⁸⁶ Case C-283/11.

⁸⁷ Case C-184/12 *Unamar* EU:C:2013:663, [24]; EU:C:2013:301 Advocate General Wahl, [18].

⁸⁸ Case C-426/11 *Alemo-Herron* EU:C:2013:521.

⁸⁹ *Ibid*, [34]-[35].

⁹⁰ Case C-283/11 *Sky Osterreich* EU:C:2013:28, [35] [41]; EU:C:2012:341 Advocate General Bot, [27].

⁹¹ Case C-101/12 *Herbert Schaible* EU:C:2013:661, [25]; Case C-680/15 and C-681/15 *Asklepios Kliniken* EU:C:2017:30 Advocate General Bot, [6]; Case C-544/16 *Marcandi* EU:C:2018:540, [35]; Case C-230/18 *Landespolizeidirektion Tirol* EU:C:2019:383, [6].

⁹² See, chapter 9, 280 *et seq.*

⁹³ Case C-426/11, [25].

Lisbon).⁹⁴ While Advocate General Cruz Villalón offered a minimal interpretation of Article 16 as protecting economic initiative and the ability to participate in the market the Court took a more assertive approach noting that the ‘transferee must be able to assert its interests effectively in a contractual process to which it is party and to negotiate the aspects determining changes in the working conditions of its employees with a view to its future economic activity’ and that absent same the individuals freedom of contract was reduced such that it was liable to adversely affect the ‘very essence of its freedom to conduct a business.’⁹⁵

The Court declined to offer an example or analysis of the circumstances in which the right or freedom to contract might be legitimately restricted, however, the Court has noted in other cases that Article 16 ‘is not absolute and must be viewed in relation to its social function.’⁹⁶ Groussut et al argue that the result was a shallow analysis and that a true engagement with rights balancing would have considered the new Article 16 framework as requiring a high level of social protection for employees in line with its previous case law and the requirements of the Directive.⁹⁷ Indeed Bartl and Leone note that the Court’s treatment of freedom of contract and the right to conduct a business is particularly problematic given the relationship of their market function and broader social and political contexts which make the right ill-suited to an elevation to a constitutionalised rights standard.⁹⁸

However, while the Charter thus vindicates freedom of contract as an aspect of Article 16 it is equally the case that the Charter contains numerous provisions which implicate specific, and often far ranging limitations on freedom of contract. The right to dignity in Article 2 is perhaps the provision which is most ripe to serve as the basis for the enumeration of rights based restrictions on contractual practices, notably given the use of a right to dignity in a similar manner by the German Courts.⁹⁹ This is particularly so given the contents of the Charter’s explanatory memorandum which notes that human dignity ‘is not only a fundamental right in itself but constitutes the real basis of fundamental rights ... It must therefore be respected even when a right is restricted.’

The most established rights-based limitations on freedom of contract are those imposed by the rights protected in chapter IV of the Charter including: workers’ right to be informed and to consultation

⁹⁴ See, Basedow, ‘Freedom of Contract in the European Union’.

⁹⁵ Case C-426/11, [33] and [35].

⁹⁶ Case C-280/93 *Germany v Council* EU:C:1994:367, [78]; Case C-265/87 *Schröder v Hauptzollamt Gronau* EU:C:1989:303, [15]; Case C-5/88 *Wachauf* EU:C:1989:321, [18]. Generally, see Giovanni Comandè, ‘Co-determining European Private Law(s) and Constitutionalization Process(es)’ in Stefan Grundmann (ed), *Constitutional Values and European Contract Law* (Wolters Kluwer 2008), 181.

⁹⁷ Gunnar Thor Petursson and Laurent Pech Xavier Groussot, *The Scope of Application of EU Fundamental Rights on Member State Action: In Search of Certainty in EU Adjudication* (2011), 14.

⁹⁸ Marija Bartl and Candida Leone, ‘Minimum Harmonisation and Article 16 of the CJEU’ in Hugh Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (Intersentia 2017), 123.

⁹⁹ Chapter six, page 189 *et seq.*

within the undertaking (Article 27), the right of collective bargaining and action (Article 28), the right of access to placement services (Article 29), the right to protection in the event of unjustified dismissal (Article 30), the right to fair and just working conditions (Article 31) and the prohibition on child labour and protection of young people at work (Article 32).

Further limitations are imposed by Articles 20, 21 and 23 which guarantee equality, non-discrimination, and equality between men and women echoing Articles 18 and 19 TFEU and in Article 54 which prohibits the abuse of rights.¹⁰⁰ The most high profile of the rights based limitations on freedom of contract under the Charter is the right to data protection under Article 8, echoing Article 16 TFEU, and which has, through the GDPR, which alongside informational requirements similar to those in the Union's consumer protection secondary laws explicitly reference its rights-based footing.

In addition to these rights-based constraints on freedom of contract within constitutional schema, freedom of contract has been limited through the Union's secondary law as the GDPR indicates. Restrictions to freedom of contract in the form of prohibitions on discrimination as between contractual partners have endured in the Union's anti-discrimination and gender-equality secondary laws from an early date. In addition to the limitations imposed by equality laws, beginning in the 1980s the then European Community began to enact sectoral secondary laws impacting contractual relationships including, most notably, consumer protection laws centred on information provision and fair trading practices. Indeed, in as much as the Union's secondary laws contains references to freedom of contract, such references are largely related to the limits placed upon the principle rather than its affirmative capacities.

8.3.2 *Individual and Contractual Freedom in European Law*

As noted above, freedom of contract is articulated repeatedly as either intrinsic or complementary to individual liberty. Wielsch¹⁰¹ and Stürner¹⁰² suggests that national legal systems developed in the nineteenth century based on civil codes regarded private law mechanisms of contract and freedom of contract as constitutive of civil society, protecting property and other vital interests which enabled autonomy to flourish.¹⁰³ In this analysis the movement from status to contract liberated

¹⁰⁰ Which provides that, 'nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.'

¹⁰¹ Dan Wielsch, 'Responsible Contracting: The Requirements of EU Fundamental Rights on Private Law Regimes' in Hugh Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (Intersentia 2017).

¹⁰² Michael Stürner, 'How Autonomous should Private Law Be?' in Hugh Collins (ed), *European Contract Law and the Charter of Fundamental Rights* (Intersentia 2017).

¹⁰³ See also Summer Maine, 'Ancient Law' (1861) ch. V, 170 on the transition from status to contract.

populations from feudal hierarchies by enabling individuals to bargain to determine their own fate.¹⁰⁴ From this background emerged the civil codes which characterise a majority of European legal systems in accordance with which system the political constitution of the state was understood as functioning to protect these private law institutions from attack possibly from the state itself.¹⁰⁵

Indeed, Kant and later Berlin's seminal articulation of the negative and positive senses of liberty is a distinction rooted in contract law¹⁰⁶ with positive liberty defined as freedom to be one's own master - a corollary to the autonomy justification for freedom of contract generally, and positive freedom of contract specifically, while negative liberty was defined as the absence of human coercion - as reflected in negative freedom of contract.¹⁰⁷

Despite the understanding of the mutual reinforcement of individual autonomy and freedom of contract which underpins Berlin's view, and indeed much of the scholarship concerning contract theory more broadly, individual autonomy and freedom of contract also stand in tension with each other. This tension stems from the potential of freedom of contract to transform into a force of control or manipulation rather than liberty and which is particularly marked in the digital market.¹⁰⁸

Berlin's primary motivation in distinguishing between positive and negative liberty was to express concern over the autonomy reducing potentials of a positive conception of liberty which might be used as a justification for the reduction of the freedom of some on the basis that what they 'truly' needed to be free could be identified only by others, or the state, thus enabling tyranny.¹⁰⁹ Yet Berlin himself acknowledged, as others had previously, that it may be necessary to limit the freedom of one individual to protect the greater freedom of society.

Indeed, as Wielsch and Habermas note while initially private law was viewed as a parallel means of securing individual autonomy in social settings, it was ultimately recognised as being unsuitable for this constitutive role as the emphasis on individual choice without the institutional restraints to ensure the functional conditions for autonomy lead to private dominance.¹¹⁰ Wielsch argues that the result was that in most European jurisdictions the State began to steer private law towards what

¹⁰⁴ On the parallel shift in common law jurisdictions see, Patrick S Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford University Press 1985).

¹⁰⁵ See for example, Jean Carbonnier, 'Le Code Civil' in Pierre Nora (ed), *Les Lieux de Mémoires*, vol 2 (Gallimard 1986), 309; Rémy Cabrillac, 'Le Code Civil est-il Law Véritable Constitution de la France' (2005) 39 *Revue Juridique Thémis* 245.

¹⁰⁶ Berlin, *Four Essays on Liberty*.

¹⁰⁷ *Ibid*, 118, 133.

¹⁰⁸ Nili Cohen, 'Pre-contractual Duties: Two Freedoms and the Contract to Negotiate' in Jack Beaton and Daniel Friedman (ed), *Good Faith and Fault in Contract Law* (Oxford University Press 1997), 25.

¹⁰⁹ Berlin, *Four Essays on Liberty*, 133.

¹¹⁰ Wielsch, 'Responsible Contracting: The Requirements of EU Fundamental Rights on Private Law Regimes'; Jurgen Habermas, 'Paradigms of Law' (1995) 17 *Cardozo Law Review* 771, 772-773.

Weber has elsewhere described as a ‘materialisation of law’¹¹¹ which sought to re-regulate the structures and institutions of private law in order to counter some of their deleterious effects such as the exploitation of workers and the unfair manipulation of consumers.¹¹²

Indeed, MacCallum has similarly argued that Berlin’s distinction unhelpfully creates a bright line dichotomy where instead there is, in practice, a constant comingling of both senses of liberty to greater or lesser extents in everyday life.¹¹³ While this may not be a universal rule, certainly in an EU context, the understanding of freedom of contract and its relationship with individual autonomy mixes both understandings of liberty, simultaneously holding that individuals should be free to contract on those terms they find most advantageous while also imposing limitations that proscribe the harmful terms which individuals can agree to be bound by.

Yet what is particularly notable in the Union’s approach to limiting freedom of contract is the consistent deference to individual autonomy as a one-dimensional matter – implicated only in the choice of whether to contract such that it is guaranteed by informational requirements. There is a failure to appreciate that autonomy is also at stake within the terms of the contracts themselves and as part of a broader market within which choices can be more or less autonomous dependent on the functional alternatives available to individuals. The result, is a legal landscape in which deference to individual freedom of contract has been leveraged to create a perception of individual autonomy as justifying the current regulatory schema, without referring to the more substantive autonomy harms which flow from the absence of more substantive consumer protection or rights protective measures.

The argument that further interventions to refrain freedom of contract and protect autonomy or rights based interests has been refuted by reference to claims that current assent to the contractual terms and practices in use is indicative of the fact that further intervention would only harm autonomy. This is often referred to in the context of privacy rights in the digital market as the ‘privacy paradox’¹¹⁴ - what this work will refer to more broadly as the myth of the caring consumer.

The myth of the caring consumer looks beyond this privacy exclusive view, to analyse the impacts of contractual practices on rights more broadly and refers to the (incorrect) argument that there is a

¹¹¹ See, Max Weber (ed), *Economy and Society* (G Roth and C Wittich eds), vol ii (University of California Press 1978), 412.

¹¹² See Case C-415/11 *Aziz* EU:C:2013:164. Wielsch argues that this pattern is equally evident in the EU which has supplemented its emphasis on contractual and economic freedom with the protection of fundamental rights to ensure that the market conforms to its social purposes Wielsch, 'Responsible Contracting: The Requirements of EU Fundamental Rights on Private Law Regimes', 265, 273 and 276.

¹¹³ MacCallum, 'Negative and Positive Freedom'.

¹¹⁴ Schwartz, 'Opting In': A Privacy Paradox'; Susan B Barnes, 'A privacy paradox: social networking in the United States' (2006) 11 *First Monday* 1, Barnes uses the ‘privacy paradox’ to refer to the ambiguous boundary between private and public spaces on social media.

fundamental contradiction between the claims of consumers that they are concerned about breaches of their rights by private actors and the simultaneous acquiescence of the same consumers to those harms through contractual mechanisms.

Numerous academic studies have shown that this argument that consumers do not care is just that – a myth. In fact consumers, variously, operate under the, incorrect, belief that private actors are bound by rights obligations in a similar manner to public actors; are unable to appreciate the implications of contractual language for their rights; or, though they do aver to rights harms, require access to the service on a personal or professional basis and consent in the knowledge that they will be unable to access the service required, or a comparable service, without acquiescing to such harms.¹¹⁵

The emphasis on autonomous authorisation as part of a notice and consent model on which consumer protection turns at present demonstrably overloads consent transactions with the result that they become too numerous and complex for an individual user to consider as these studies demonstrate. Jolls and Sunstein, for instance, have found that consumers learn to tune out messages that they see often, and projected that even where informational requirements (similar to the GDPR) operated the time necessary to read contractual terms was prohibitive,¹¹⁶ while their language effectively obscured their impacts for a majority of consumers.¹¹⁷ The evidence is thus not that consumers do not care but rather that they do not appreciate and where they do appreciate do not enjoy a functional choice within the market.

¹¹⁵ Oeldorf-Hirsch, *Clickwrap Impact: Quick-Join Options and Ignoring Privacy and Terms of Service Policies of Social Networking Services*, 15. In the Obar and Oeldorf-Hirsch study, the participants agreed, in return for access to a fictional social network, to give their first born to the social media company. David A Hoffman, 'From Promise to Form: How Contracting Online Changes Consumers' (2016) 91 *New York University Law Review* 1595; David A Hoffman and Zev J Eigen, 'Contract Consideration and Behaviour' (2017) 85 *George Washington Law Review* 351; David A Hoffman, *Relational Contracts of Adhesion* (University of Pennsylvania 2017); Tess Wilkinson-Ryan, 'A Psychological Account of Consent to Fine Print' (2014) 99 *Iowa Law Review* 1725. For a detailed examination of the failures of the traditional consent and information models see, Kopsell, 'Trained to Accept? A Field Experiment on Consent Dialogs'; Bart Custers, 'Data mining and group profiling on the internet' in Anton Vedder (ed), *Ethics and the internet* (Intersentia 2001), 87.

¹¹⁶ See also, Aleecia M McDonald and Lorrie F Cranor, 'The cost of reading privacy policies' (2010) *Journal of Law and Policy for the Information Society* 560 who estimate that it would take an average consumer 244 hours annually to read the privacy policies presented to them in full. Skimming the policies would still require 154 hours per year, while Acquisti and Grossklags note that individuals' bounded cognitive abilities mean even if they had such time they would be unable to acquire, understand and process all information relevant to make a decision about consent to data processing, Grossklags, 'Privacy and rationality in individual decision-making'.

¹¹⁷ The European Union's Consumer Protection Commission has warned Facebook that its terms of service are 'misleading' and must be clarified to allow consumers to understand the practical uses to which their data is put, see, extracts from the press point opening remarks by Vera Jourova Member of the European Commission in charge of Justice, Consumers and Gender Equality, at (<<https://ec.europa.eu/avservices/video/shotlist.cfm?ref=I160595&sitelang=en>>) accessed 14 October 2018.

8.4 Consumer Protection as the Limit of Freedom of Contract in EU Law

Thus far it is clear that while the EU appears to understand contract in line with liberal theories, there is no EU contract law *per se*, in as much as the *acquis* is largely composed of laws which limit the extent and content of contractual relationships. Nor is there a competence to generate a distinct body of contract law under the Union's constitutional schema. Yet an apparent shadow competence in contract has emerged with the recognition of freedom of contract first as an operating condition for the Union's market-led integration, then as a general principle and latterly as a component of the right to conduct a business under Article 16 of the Charter as part of a broader spectral contract law defined negatively through the borders drawn by consumer protection.

As against this context, the Union has drawn the boundaries of freedom of contract though what can be broadly characterised as consumer protection law as well as, through its equality law. As a result, while the Union presumes a baseline contractual liberty in the capacity of parties to enter into contracts and to define the terms of their contractual relationships, there is a stronger and more sustained view present in the Union's secondary law that freedom of contract is to be respected only as long it contributes towards to the achievement of broader Union objectives.

Traditionally, the objectives in service of which consumer protection was imposed were limited to the maintenance of the internal market and free movement of goods and services. However, over time these objectives have expanded with the Union's competences to include more substantive rights based restrictions such as ensuring data protection.¹¹⁸ Ultimately, and as alluded to by Advocate General Léger in *Stefan* the Union appears to have developed a body of consumer protection law which views is as '[un]acceptable for freedom of contract to contribute to the perpetuation of legal situations which are inequitable or maladjusted to the development of the law and legal thinking where in the case of contracts of indefinite duration that freedom produces definitive effects.'¹¹⁹

8.4.1 Consumer Protection Law in the EU – from Market to Social Understandings

Consumer protection first emerged at a national level, but has been emphasised with increasing force in the Union's constitutional schema since the creation of the European community. Thus, at the outset of the creation of what would later become the Union, Article 39 of the Treaty of Rome sought to ensure that supplies reached consumers at reasonable prices while Article 85 provided that consumers were enabled in enjoying a 'fair share of the resulting benefit' of improved

¹¹⁸ Martijn W Hesselink, *European Contract Law: A Matter of Consumer Protection, Citizenship or Justice* (University of Amsterdam 2006).

¹¹⁹ Case C-464/98 *Stefan* EU:C:2001:9, [82].

production and economic or technical progress references to the consumer protection were limited to contextual mentions in the context of the Community's agricultural and competition policies.¹²⁰

Against this constitutional orientation, the first EU consumer policy came with the 1969 Boersma Report which engaged with the potential for strengthening the position of consumers in the common market and called for an increased recognition of consumer interests in community policies. Subsequently, the 1972 Paris Summit and 1975 Council Resolution laying out preliminary programme on consumer protection were significant in establishing five basic consumer rights within the then EC namely; the right to protection of health and safety, right to protection of economic interests, the right of redress, the right to information and education and the right of representation¹²¹ which should be emphasised in specific community policies as a means of improving living conditions under the Article 2 EEC.

There followed a series of action programmes and, in 1985, on the tenth anniversary of the Council's 1975 preliminary programme the Commission issued a Communication on 'A New Impetus for Consumer Protection Policy' which coincided with the publication of Lord Cockfield's white paper on the internal market¹²² and a period of increased consciousness of consumer protection.¹²³ One of the objectives outlined in the 1985 Communication was that consumers must be able to benefit from what was then the common market noting 'if the common market is to be fully effective it must be made easier for consumers to buy goods in other countries to use them at home to get them repaired like domestically purchased products and to see complaints handled effectively.'¹²⁴

Despite this seemingly economic vision of the consumer as a market actor this period also saw the rise of a more comprehensive understanding of the consumer as 'no longer ... merely a purchaser and user of goods and services for personal, family or group purposes but also as a person concerned with the various facets of society which might affect him directly or indirectly as a consumer.'¹²⁵

¹²⁰ These provisions have undergone successive renumbering as a result of the Amsterdam, and then the Lisbon Treaties and today their provisions are found in Articles 39, 40, 101, 102 and 107 TFEU. In addition, the commitment to consumer protection reflected in these articles is reinforced by Article 169 TFEU as well as in the Union's secondary legislation and, most recently, Article 38 CFR.

¹²¹ Council Resolution C-92/01 'On a preliminary programme of the European Economic Community for a consumer protection and information policy.'

¹²² European Commission Communication, 'A New Impetus for Consumer Protection Policy' (1985).

¹²³ Lord Cockfield, 'Completing the Internal Market: White Paper from the Commission to the European Council' COM (1985) 310.

¹²⁴ This link between consumer protection and the internal market program soon became constitutionalised in the EC Treaty itself with the adoption of the SEA.

¹²⁵ EEC in Council Resolution on a Preliminary Programme for a Consumer Protection and Information Policy (1975), available at (<<https://publications.europa.eu/en/publication-detail/-/publication/26d73eca-e878-4d14-8d1b-0c6fdc73b323/language-en>>) accessed 12 July 2019.

However these soft law measures enjoyed no binding impact and with the push for greater economic integration and reform during the 1980s consumer protection was taken up as an aim complementary to market integration by the Commission¹²⁶ and in 1987 the Single European Act recognised consumer protection as an autonomous policy aim within the internal market.¹²⁷

Subsequent successive three year consumer policy action plans¹²⁸ sought to build the consumer confidence necessary to support the realisation of the internal market through consumer representation, consumer information, consumer safety and consumer transactions.¹²⁹ In 1993, the Treaty of Maastricht granted the Union a competence to legislate on consumer issues under Article 129(a) EC with the aim of strengthening consumer protection under Article 3(s).¹³⁰

This competence was enlarged under the Treaty of Amsterdam with Article 153 EC providing the Community ‘shall ensure a high level of consumer protection’ by contributing to the protection of the health, safety and economic interests of consumers and promoting their right to ‘information, education and to organise themselves in order to safeguard their interests.’ In addition, Article 153 obliged the institutions to take account of consumer protection in the definition and implementation of other EU policies.

The changes introduced by the Treaty of Amsterdam have been retained following the Lisbon Treaty. Article 169 TFEU provides that the Union’s aim is to protect the ‘health, safety and economic interests of consumers’ and vindicate their right to ‘information, education and to organise themselves.’ While the legal basis for consumer law in the EU is the Single Market (as provided in Article 114 TFEU) Article 169 gives the EU the necessary competence to adopt measures that ‘support, supplement and monitor the policy pursued by the Member States.’

None of these Articles provide a sophisticated structure for, or understanding of, consumer protection, and instead assume that consumers will benefit from the market integration occasioned by the development of a European community but is notable that they reinforce an idea of consumer as more than mere economic actors, and being concerned with social ends of education, health and information provision.

¹²⁶ OJ 1987 C3/1.

¹²⁷ Article 100a Single European Act.

¹²⁸ COM (90) 98 (1990-1992); COM (93) 378 (1993-1995); COM (98) 696 (1996-8); COM (99) 206 (1999-2001); COM (02) 208 (2002-2006).

¹²⁹ Ibid.

¹³⁰ Which permit the EU to adopt measures designed to liberalise the free circulation of persons and services and the development of judicial cooperation in civil matters to support the proper functioning of the internal market.

The recognition of consumer protection as a right under the Charter has elevated consumer protection to a fundamental right under Article 38 as part of the solidarity chapter implying a similar emphasis on the consumer as a social as well as an economic actor.¹³¹ However, it seems that Article 38 refers to a policy level power to legislate rather than a right¹³² indicating an intention for the provision to be a principle rather than a right as differentiated under Article 52 of the Charter.¹³³ There is a competing view that Article 38 might evolve into a substantive rights provision through case law¹³⁴ or if applied in combination with other rights of the Charter, Treaties or constitutional provisions.¹³⁵ However, no such pattern has yet emerged.¹³⁶

The constitutional context then accommodates a view of the consumer as more than a mere economic unit or actor. Yet, the Union's secondary law has displayed a markedly different approach, imposing restrictions which disproportionately characterise the consumer as an economic actor. The Union's consumer protection law places on freedom of contract can be divided into three distinct groups, namely; fair trading interests, informational requirements, and substance based regulation¹³⁷ which are justified, ultimately, by a combination of the Union's liberal understanding of contract and its market oriented legislative preferences.

8.4.2 *From Minimal Market Intervention to Rights Based Limits on Freedom of Contract*

From the 1970s the CJEU consistently required Member States to provide an advanced level of justification for national measures which prohibited 'unfair' commercial practices in a manner which restricted free movement of goods¹³⁸ which frequently favoured the objectives of free movement of goods over national consumer protection rules.¹³⁹ From this jurisprudence emerged

¹³¹ Benohr, *EU Consumer Law and Human Rights*, 45-50; Iris Benohr and H-W Micklitz, 'Consumer Protection and Human Rights' in I Ramsay and T Wilhelmsson G Howells (ed), *Handbook of Research on International Consumer Law* (Edward Elgar 2010).

¹³² D McGoldrick, 'The Charter and the UN Human Rights Treaties' in Steve Peers and A Ward (ed), *The European Union Charter of Fundamental Rights* (Hart 2004).

¹³³ T Goldsmith, 'A Charter of Rights, Freedoms and Principles' (2001) 38 *Common Market Law Review* 1201.

¹³⁴ CFR-CDF, *Rapport sur la situation des droits fondamentaux dans l'Union europeene et ses Etats membres en 2003* (2003), 121.

¹³⁵ Benohr, *EU Consumer Law and Human Rights*, 64-65.

¹³⁶ Mak, 'Two levels one standard? The multi-level regulation of consumer protection in Europe' 221; T Wilhelmsson, 'The Average European Consumer: A Legal Fiction' in J Devenney and M Kenny (ed), *European Consumer Protection: Theory and Practice* (Kluwer Law International 2007) 243.

¹³⁷ Commission, 'Follow-up Communication to the Green Paper on EU Consumer Protection' COM 2002 289 P.14.

¹³⁸ Case C-120/78 *Rewe v Bundesmonopolverwaltung* EU:C:1979:42; Case C-286/81 *Michelin Italiana* EU:C:1983:78; Case C-362/88 *GB:INNO:BM* EU:C:1990:102; Case C-126/91 *Schutzverband* EU:C:1993:191; Case C-368/95 *Vereingte Familiapress* EU:C:1997:325; Case C-405/98 *Gourmet International Products* EU:C:2001:135.

¹³⁹ Hans W-Micklitz and Thomas Wilhelmsson Geraint Howells, *European Fair Trading Law* (Routledge 2006), 19.

the fair trading regulation of contracts with Directive 1984/450/EEC on Misleading Advertising (MAD)¹⁴⁰ which is properly regarded as being among the Union's first entries into consumer protection law.

Fair trading regulations have consistently formed a part of the Union's suite of consumer protection law since the MAD, with the subsequent addition of the Directive on Consumer Sales and Guarantees¹⁴¹ and chapter IV of Directive 2011/83/EC on consumer sales, and Regulation 1924/2006 (as amended by Directives 97/55, 2005/29 and 2006/114).¹⁴²

In light of shortcomings with the MAD, specifically its failure to capture deceptive practices outside the scope of advertising, the Commission began developing a new Directive on unfair commercial practices (UCPD) which was subsequently adopted in 2005.¹⁴³ The UCPD seeks to establish a unified and coherent European legal framework for fair trading through the abolition of obstacles to cross-border trade and secondly, to secure a sufficiently high, common level of consumer protection throughout the Union.¹⁴⁴ Contemporaneously the Directive is considered the most important and powerful tool in the field of consumer protection.¹⁴⁵

In this respect the UCPD largely codified the CJEU's jurisprudence maintaining a line of minimal intervention to ensure market efficiency with the Court continuing to play a crucial role in the interpretation of the Directive clarifying the scope of application and the meaning of its provisions.¹⁴⁶ Indeed, as in the CJEU's decisions, the achievement of a high level of consumer protection is not the principal goal of the UCPD, rather the Directive's main purpose is the improvement of the functioning of the internal market with a focus on the average consumer.¹⁴⁷

¹⁴⁰ Subsequently amended by Directives 97/55/EC and 2006/114/EC.

¹⁴¹ Directive 1999/44/EC.

¹⁴² Article 3 Regulation 24/2006. See also Case C-544/10 *Deutsches Weintor eG v Land Rheinland Pflaz* EU:C:2012:526, [52].

¹⁴³ Directive 2005/29/EC; European Commission, 'Follow-up Communication to the Green Paper on EU Consumer Protection' COM (2002) 298; Jan Stuyck, 'European consumer law after the treaty of Amsterdam: consumer policy in or beyond the internal market' (2000) 37 *Common Market Law Review* 367; C Twigg-Flesner and M Ebers H Schulte-Nolke (ed), *EC Consumer Law Compendium* (Sellier 2007).

¹⁴⁴ Article 1 UCPD; Case C-428/11 *Purely Creative v Office of Fair Trading* EU:C:2012:651, [44].

¹⁴⁵ The Directive generated a hierarchically defined three step mechanism for the assessment of fairness of commercial practices and while the CJEU has confirmed the UCPD is a maximum harmonisation measure and enjoys a wide scope of application to all commercial practices which hinder the economic interests of consumers. See, Joined Cases C-261/07 and C-299/07 *VTB-VAB NV v Total Belgium NV* and *Galatea BVBA v Sonoma Magazines* EU:C:2007:484; Case C-304/08 *Zentrale zur Bekämpfung unlauteren Wettbewerbs* EU:C:2010:12; Case C-522/08 *Telekomunikacja Polska* ECLI:ECU:C:2010:135; Case C-540/08 *Mediaprint Zritungs* EU:C:2010:660; Mateja Durovic, *European Law on Unfair Commercial Practices and Contract Law* (Modern Studies in European Law, Hart 2016) 1.

¹⁴⁶ Marios Koutsias and Chris Willett, 'The Unfair Commercial Practices Directive in the UK' (2012) 5 *Erasmus Law Review* 237, 251.

¹⁴⁷ Article 1, 2(a) and Recital 18 UCPD.

Informational requirements as a limit on freedom of contract can be found in European Directives on lack of conformity,¹⁴⁸ package travel,¹⁴⁹ distance selling,¹⁵⁰ timeshares,¹⁵¹ consumer credit,¹⁵² payment services,¹⁵³ liability for defective products,¹⁵⁴ electronic commerce¹⁵⁵ and electronic signatures¹⁵⁶ as well as proliferating in the Union's more recent data protection and e-Privacy law. Indeed, informational rights have assumed a central role in defining freedom of contract within the Union since Directive 85/577/EEC on doorstep selling and was first recognised in *GB-INNO-BM*.¹⁵⁷

In that case the Court justified their recognition of the right to information by reference to information asymmetries which persist between consumers and traders in the conclusion of contracts resulting in a need to balance the interests of the parties.¹⁵⁸ This need for information is strongly linked to the European conception of the average consumer¹⁵⁹ who, being informed of his rights, is more ready to engage with the market and conclude contracts.¹⁶⁰

One of the rationales for consumer rights to information is thus economic – greater informational parity results in a more efficient market.¹⁶¹ The second justification, however, is normative, grounded on historical justifications of informational equality stemming the argument, famously made by Cicero,¹⁶² that morality requires disclosure of those facts that would place the parties not on an equal but certainly on a more equal footing and the legally and morally transformative nature of consent which requires good faith disclosures in order to be considered valid at law.

The right to information is thus attributed to the moral obligation to disclose all relevant information. In this sense informational requirements in EU law act as safeguards of certain minimal moral content of consent, seeking to protect the weaker party from exploitative and abusive

¹⁴⁸ Directive 1999/44/EC.

¹⁴⁹ Articles 3,4 Directive 90/314/EEC.

¹⁵⁰ Articles 6,7,9 Directive 2011/83/EC.

¹⁵¹ Articles 4, 5, 8 Directive 2008/112/EC.

¹⁵² Articles 4-8 and 10-18 of Directive 2008/48/EC.

¹⁵³ Title III Directive 2007/64.

¹⁵⁴ Directive 85/374/EEC (as amended by Directive 1999/34/EC of the European Parliament and of the Council of 10 May 1999).

¹⁵⁵ Directive 2000/31/EC.

¹⁵⁶ Directive 1999/93/EC.

¹⁵⁷ Case C-362/88 *GB-INNO-BM* EU:C:1990:102, [18].

¹⁵⁸ See, Case C-92/11 *RWE Vetreib AG v Verbruucherzentrale Nordrhein-Westfalen* EU:C:2013:180, [53].

¹⁵⁹ See, Regulation (EU) No. 254/2014 of the European Parliament and of the Council of 26 February 2014 on the multiannual consumer programme for the years 2014-2020 and repealing Decision No 1926/2006/EC [2014] OJ L84/42.

¹⁶⁰ See, C Twigg-Flesner, 'Innovation and EU Consumer Law' (2005) 28 *Journal of Consumer Policy* 409.

¹⁶¹ W Kerber and S Weatherill S Grundmann, 'Party Autonomy and the Role of Information Overview' in W Kerber and S Weatherill S Grundmann (ed), *Party Autonomy and the Role of Information in the Internal Market - An Overview* (Walter de Gruyter 2001); S Becher, 'Asymmetric Information in Consumer Contracts: The Challenge that is Yet to be Met' (2008) 45 *American Business Law Journal* 723, 753.

¹⁶² Cicero, *De Officiis*

behaviours¹⁶³ and aligning with the Union's concept of social justice in which the protection of the weaker party plays a critical role.¹⁶⁴ Yet informational requirements have, equally, been subject to criticism, notably where they have been applied as a means of redressing imbalances in complex contractual contexts such as those addressed by this work, where they have been illustrating as having little practical impact on consumer experiences or protection.

Instead, such protection measures result in the imposition of 'information overload' on the basis that the content of informational requirements require consumers to consider, and understand a volume of information which an average consumer cannot process or indeed benefit from.¹⁶⁵ Simon has noted in this vein that 'a wealth of information creates a poverty of attention'¹⁶⁶ a remark substantiated by subsequent studies across disciplines¹⁶⁷ and which has been similarly noted by the Commission.¹⁶⁸ However, the development of substance-based regulation of contracts in the Union has added an additional layer to the consumer protection based restrictions on freedom of contract in EU law, moving towards the communitarian version of liberal contract theory which currently subsists within the Union.

Informational and fair trading restrictions on freedom of contract attempt to remedy imbalances of power in the pre-contractual and post-contractual phases of a relationship. In contrast, the substance based regulations seek to assert certain minimum protections as part of the bargain struck between the parties.

Product liability under Directive 1985/374/EC¹⁶⁹ is perhaps the most prominent and enduring measure of substance-based consumer protection in Union law.¹⁷⁰ The Directive imposes liability

¹⁶³ Kimel, *From Promise to Contract*, 117-134; B Jaluzot, *La bonne foi dans les contrats* (Daloz 2001), 404-405.

¹⁶⁴ HW Micklitz, 'Introduction' in HW Micklitz (ed), *The Many Concepts of Social Justice in European Private Law* (Edward Elgar 2011).

¹⁶⁵ H Rosler, 'Protection of the Weaker Party in European Contract Law: Standardised and Individual Inferiority in Multi-Level Private Law' (2010) 18 *European Review of Private Law* 729, 737-739; T Paredes, 'Blinded by the Light: Information Overload and its Consequences for Securities Regulation' (2003) 81 *Washington University Law Quarterly* 417.

¹⁶⁶ Herbert A Simon, 'Designing Organisations for an Information-Rich World' in Martin Greenberger (ed), *Computers, Communication and the Public Interest* (Johns Hopkins Press 1971), 40-41.

¹⁶⁷ BK Lee and WN Lee, 'The Effect of Information Overload on Consumer Choice Quality in an On-Line Environment' (2004) 21 *Psychology and Marketing* 159;

¹⁶⁸ European Commission, 'Staff Working Document on Knowledge-Enhancing Aspects of Consumer Empowerment' 2012-2014 SWD (2012) 235 final, 9.

¹⁶⁹ As amended by Directive 1999/34/EC.

¹⁷⁰ The first Commission proposal in the field of product liability dates to 1976. See, OJ 1976 C241/9.

on the producer¹⁷¹ for any damage caused by a defect in his product.¹⁷² This notion of defectiveness imposes a substantive standard of safety in relation to the subject-matter of the contract in light of the reasonably foreseeable uses of the product.¹⁷³ Further, specific, Directives governing toy safety¹⁷⁴ and general product safety¹⁷⁵ followed the product liability Directive and imposed substantive safety standards in relation to toys and products supplied, or made available to consumers whether or not for consideration.¹⁷⁶

The law governing food and drink safety developed by the European Union, in particular under Regulation 178/2002 also regulates the substantive content of contracts – in that case for the sale and supply of food and food stuffs¹⁷⁷ and is among the Union's most established areas of consumer protection with Article 1 stating that the protection of human health and consumers' interest are the primary aims of the Regulation and the Union's food law more generally.

These mandatory requirements governing the substance of contracts in EU law ensure the protection of consumers, but nonetheless effectively restrict the content and scope of the contracts which they cover. Moreover, though such limits stem initially from a desire to promote consumer confidence and market growth are, in many ways, the first steps towards the more recent development of rights-based understanding of consumer protection.

The idea of a rights-based understanding of consumer protection is not new, indeed rights-based regulation of contracts has a long, and not uncontroversial, legacy within EU law.¹⁷⁸ However, much of the attention on this inter-relationship to date has focused on the modern recognition of consumer protection as a fundamental right, rather than, as this work argues should be the case, a rights oriented understanding of consumer protection.

Chapter nine deals in depth with this narrative and its implications for modern understandings of consumer protection. However, several recent legislative developments in the Union have as their distinct and stated aims, the protection of the fundamental rights. In this respect Recital 1 of the GDPR explicitly states its objectives relative to the protection of the fundamental right, under

¹⁷¹ Producer is defined under Article 3 as including any manufacturer of a finished product, producers of raw materials or the manufacturer of a component of the product. In addition, a supplier may incur liability under Article 3 Directive 85/364/EC.

¹⁷² Article 1, Directive 85/364/EC.

¹⁷³ See, Article 6 Directive 85/364/EC.

¹⁷⁴ Directive 2009/48/EC.

¹⁷⁵ Directive 92/59/EC replaced in with Directive 2001/95/EC.

¹⁷⁶ Article 2 Directive 2001/95/EC.

¹⁷⁷ See Article 3 Regulation (EU) 178/2002.

¹⁷⁸ On this relationship see, Benohr, *EU Consumer Law and Human Rights*; Micklitz, 'Consumer Protection and Human Rights'.

Article 8 of the Charter, to data protection. The Recitals go on to note that the Regulation is a continuation of the attempts of Directive 95/46/EC to harmonise and protect the fundamental right to data protection¹⁷⁹ and that the processing of personal data should therefore ‘serve mankind.’¹⁸⁰

This aim is reinforced by the Regulation’s subject-matter and objectives laid down in Article 1(2) which states that the Regulation ‘protects fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data.’ The Regulation is, in fact, permeated by references to fundamental rights and the Regulation’s role in protecting them, with some 30 references to the need to protect fundamental rights throughout its text.¹⁸¹

Similar trends in the form of rights based language are evident in the e-Privacy Directive¹⁸² and the planned e-Privacy Regulation. Among the references to fundamental rights in the Directive¹⁸³ Recital 51 in particular mirrors the GDPR’s emphasis on the need to ensure protection of the fundamental rights to privacy, with respect to the processing of personal data in the electronic communications. In addition, Recital 56 notes that while communications technologies offer the potential to contribute positively to the internal market their use is acceptable to citizens and that ‘[t]o achieve this aim, it is necessary to ensure that all fundamental rights of individuals, including the right to privacy and data protection, are safeguarded.’ The content of the Recitals is reinforced by Article 2 which emphasises the protection of fundamental rights, in particular the right to privacy and confidentiality as the aim of the Directive.

Recital 1 of the proposed e-Privacy Regulation¹⁸⁴ specifically states the Regulation aims to protect the right to privacy under Article 7¹⁸⁵ while Article 1 again emphasises the aim of the Regulation as the protection of fundamental rights, an aim which is emphasised repeatedly throughout the Regulation.¹⁸⁶

Despite these provisions and the statements they contain which purport to provide a social aim of the laws to which they relate, as the preceding chapters have examined this social aim has not been

¹⁷⁹ Recital 3 Regulation (EU) 2016/679.

¹⁸⁰ Recital 4 *ibid.*

¹⁸¹ See, Recitals 1, 2, 3, 4, 8, 10, 11, 47, 51, 52, 53, 69, 102, 109, 111, 113, 114, 153, 166 and 173 GDPR and Articles 1(2), 4(24), 6 (f), 9(2)(b), 9(2)(g), 9(2)(j), 23, 50(b), 51 and 88(2) GDPR.

¹⁸² Directive 2009/136/EC.

¹⁸³ See Recitals 29, 30, 51, 56, 52 and Article 2 Güneş Acar1, *Facebook Tracking Through Social Plug-ins* *ibid.*

¹⁸⁴ As in previous chapters the work is referring to the September 2018 draft of the proposed Regulation, available at (<https://iapp.org/media/pdf/resource_center/ePrivacyReg-2018-09-20-draft.pdf>) accessed 18 July 2019.

¹⁸⁵ Further references to fundamental rights, in particular Article 7 rights, are found in Recitals 20 and 26, *ibid.*

¹⁸⁶ See, Articles 1(a), 3(2a), 6(2), 6(a) and 11.

borne out. In reality, these laws while seeking to secure rights have carried out that aim in a manner which has given effect to the market oriented aspect of those rights.

8.4.3 *Consumer Protection as the Limit on Freedom of Contract*

The EU was initially shaped by a divide between material welfare concerns which were considered economic and the primary objective of the single market project and issues of individual rights which, as a political issue, were to be achieved through explicit social protection measures where they fell within the Union's competences. Yet the expanding constitutional mandate of the Union has led to a blurring of the bright line distinction between these two zones, a trend which is readily appreciable in EU consumer protection.

This trend is evidenced in the Union's consumer protection law – an area of law traditionally driven by a desire for greater market efficiency but which has, over time, come to integrate a fuller conception of consumer protection as incorporating social policy as well as market objectives. Despite this, the Union has retained a disproportionate emphasis on restrictions in the form of informational requirements which emphasise an incomplete understanding of the relationship between freedom of contract and individual autonomy and the consumer as a context driven social as well as an economic actor.

Recent EU consumer protection measures have evidenced an nascent recognition of the need for a rights based regulation of contracts, in an apparent acknowledgement that markets and social policy are not parallel concerns but rather interwoven ones. However, in this progressing further with such an approach the EU is now faced with a need to interrogate the traditional understanding that individual autonomy, as a political problem, and material welfare, as an economic problem, are easily divisible.¹⁸⁷

8.5 Conclusion

Common to the legislative efforts outlined in this chapter, from the minimalist market-oriented understandings of consumer protection in early information and fair trading restrictions to the emergence of secondary law which hints at the emergence of a rights-based understanding of consumer protection, is a common view that freedom of contract may be limited by EU secondary

¹⁸⁷ Olha O Cherednychenko, 'Fundamental Freedoms, Fundamental Rights and the Many Faces of Freedom of Contract in the EU' in M Andenas et al (ed), *The Reach of Free Movement* (TMC Asser Press 2017), 273; D Leczykiewicz and S Weatherill, 'Private Law Relationships in EU Law' in D Leczykiewicz and S Weatherill (ed), *The Involvement of EU Law in Private Relationships* (Hart 2013) 1.

law where it permits imbalances of power that distort the capacity of the market to function effectively.¹⁸⁸

Yet these measures which seek to facilitate the corrective power of the market have been unable to eliminate and have instead perpetuated the harms considered by this work. It is necessary to consider whether further limitations on freedom of contract are necessary and how such measures can be justified in light of the Union's understanding of the appropriate limits of freedom of contract and the function and limits of consumer protection.

In light of the Union's increasing emphasis on the rights implications of market activities in more recent legislative efforts, the following chapter argues that consumer protection should be understood as putting certain areas wholly or partly beyond the reach of the contractual process, on the basis of the rights-based harms such exchanges facilitate and the impacts for individual autonomy, democratic participation and the Rule of Law which they enable. This extension of consumer protection is understood as a continuance of the nascent rights-based understanding of consumer protection observable in current legislative standards – most notably the GDPR.

¹⁸⁸ See, Case C-472/16 *Jorge Luis Colino Sigienza* EU:C:2017:943 Advocate General Tanchev, [63]-[64]; Case C-496/99 P *Commission v Cas Succhi Di Frutta* EU:C:2002:610 Advocate General Alber noting that freedom of contract may be restricted by public procurement rules, [30]; Case C-30/77 *Regina v Boucherau* EU:C:1997:141, Advocate General Warner, p.2025.

CHAPTER NINE

TOWARDS A RIGHTS BASED MODEL OF CONSUMER PROTECTION

9.1 Introduction

Chapter eight charted the development of consumer protection within the EU, and its function as a limit on freedom of contract. This chapter picks up on the emergence of a nascent rights-oriented understanding of consumer protection and contends that a solution to the harms identified in this work lies in a return to the Union's original, social understanding of consumer protection as part of the adoption of a rights-oriented model of consumer protection.

The chapter begins by examining the opposing visions of the consumer as social actor, and market actor which have competed in the European Union's law and policy averred to in the previous chapter. It argues that a return to a view of the consumer as an integrated social actor is necessary to accommodate the competing but inter-related market and social concerns raised by the digital market. The chapter then turns, in part three, to examine the increasing influence of fundamental rights on the Union's secondary law. In particular, the chapter argues that the increasing influence of fundamental rights on secondary law and a return to the vision of the consumer as a social actor, support the adoption of a rights-based understanding of consumer protection as a means of remediating the harms associated with the rise of private policy identified in this work.

9.2 Consumers in the European Union: from Social to Market Actors and Back Again?

Consumers are the Union's largest economic group 'affected by almost every public and private economic decision'¹ and form the central unit through which integration has been realised.² Initially, the Union's understanding of the consumer was largely synonymous with that of citizen as the internal market operated for the good of consumers and the social citizenship structure of the Union operated for citizens, with neither citizen nor consumer viewed separately but rather as dual aspects of the individual on which the Union was premised.³

¹ John F Kennedy, Speech to Congress, 1962.

² Dorota Leczykiewicz and Stephen Weatherill, 'Images of the Consumer in EU Law' in Dorota Leczykiewicz et al (ed), *The Images of the Consumer in EU Law* (Studies of the Oxford Institute of European and Comparative Law, Bloomsbury 2016), 1.

³ Micklitz has traced this shift to the movement of consumer protection from an area of national concern to one of European competence, see Hans Micklitz, 'The Consumer: Marketized, Fragmentised, Constitutionalised' in al. D L (ed), *The Images of the Consumer in EU Law* (Bloomsbury 2016) 21, 23.

Social citizenship thus incorporated market-orientated objectives such as the right of citizens to a modicum of economic welfare and security as well as socially-oriented objectives such as the right of citizens to share in the social heritage of the Union and 'to live the life of a civilised being according to the standards prevailing in the society.'⁴ Under this view consumers were citizens and vice versa.

Although social policy was not part of the agenda of the original EEC in 1957 the Union's earliest iterations were nevertheless characterised by an allegiance to what has subsequently developed as the European social model albeit (in the context of consumer protection) then embodied primarily in national social welfare states.⁵ The core assumption of the social model is that society is an artefact made by and thus for its citizens.⁶ However that society is conceptualised – as an all-encompassing social system that orders communication between individuals⁷ or as the subjective expression of the requirement for social supports - it is thus orientated towards the achievement of the ideals and values of its subjects.⁸

This instrumental characterisation of society adopted by the European project requires that effective and stable social structuring is premised on the autonomy of the individual⁹ which is secured through the recognition of the fundamental equality of all individuals in positive law, in particular through fundamental rights and provides that where conflicts between such rights emerge they are resolved through institutional mechanisms – notably through the political process.¹⁰

In liberal market economies such as the EU the political process is asked primarily to resolve the extent to which the market's institutional preference for meritocratic individualism should be restrained to enable the achievement of socially acceptable outcomes which guarantee individual autonomy and the common good. In this view citizens as consumers are both market and social

⁴ T H Marshall, *Class, Citizenship and Social Development: Essays* (New Anchor Books 1965), 78; W Van Gerven, *The European Union: A Policy of States and Peoples* (Hart 2005), 188, 191. On the various forms of welfare state see Gosta Esping Andersen, *Social Foundations of Post-Industrialist Economies* (Oxford University Press 1999).

⁵ See, Tony Judt, *Postwar: A History of Europe since 1945* (Vintage 2010).

⁶ Michael Halberstam, *Totalitarianism and the Modern Conceptions of Politics* (Yale University Press 1999), 16.

⁷ Niklas Luhmann, *Political Theory in the Welfare State* (De Gruyter 1990), 30.

⁸ Axel Honneth, 'Redistribution as Recognition: A Response to Nancy Fraser' in Nancy Fraser and Axel Honneth (ed), *Redistribution or Recognition: A Politico-philosophical Exchange* (Verso 2003), 174.

⁹ Ibid, 258-259; Amartya Sen, *The Idea of Justice* (Harvard University Press 2009), 223.

¹⁰ Honneth, 'Redistribution as Recognition: A Response to Nancy Fraser'; Sen, *The Idea of Justice*, 223; J Donald Moon, 'The Moral Basis of the Democratic Welfare State' in Amy Gutmann (ed), *Democracy and the Welfare State* (Princeton University Press 1998), 42.

actors. In theory, then the European social model avers to and seeks to integrate Polanyi's critique of disembeddedness – by recognising that market and social goals are inter-related.¹¹

The Union's early legislative efforts, to prohibit discrimination, promote gender equality,¹² and impose fair working conditions through labour law regulations¹³ described this traditional, accord with this embedded view though they were referred to by the rather more ordoliberal term 'producerism' and took a market oriented view.¹⁴

Over time, this understanding of the dual social and economic nature of the consumer fragmented as a division developed between understandings of citizens as social actors and consumers as market actors. From the 1970's onwards there has been an increasing tendency to deny this dual-capacity and what Micklitz describes as a 'marketisation' as part of which consumers are viewed as distinct from citizens¹⁵ and are progressively reduced to one aspect of their lives – consumption.¹⁶ As part of this trend consumers are alienated from the social aspects of their citizenship.

This trend was highlighted by the CJEU's decision in *Cassis de Dijon*.¹⁷ In *Cassis*, the respondents sought to justify a national prohibition on the use of the term liqueur for drinks below a certain percentage of alcohol on the basis that it sought to prevent German consumers from drawing false conclusions about product content.¹⁸ As Micklitz notes, the case's emphasis on rationality which paved the way for the internal market project and, later, for mutual recognition and harmonisation effectively reduced the capacity of national laws which protected consumers' social interests to operate in accordance with EU law.¹⁹

Prior to the decision in *Cassis*, the consumer was considered an actor of, and within, the social welfare state and was defined in national terms.²⁰ As such, consumers were understood as requiring protection from market forces, to ensure their social and not only their market interests were

¹¹ Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time*, 45-58, 71-80.

¹² Alexandra Timmer and Linda Senden, *Gender equality law in Europe*, 2019).

¹³ See, (<<https://ec.europa.eu/social/main.jsp?catId=157&langId=en>>) accessed 22 October 2019.

¹⁴ This was, and remains, in contrast with the North-American consumer model which views consumer law as driven by concerns of economic efficiency, JQ Whitman, 'Consumerism Versus Producerism: A Study in Comparative Law' (2007) 117 *Yale Law Journal* 340.

¹⁵ LOIC Azoulai, *The Making of the European Individual* (European University Institute 2014).

¹⁶ Weatherill, 'Images of the Consumer in EU Law', 1.

¹⁷ Case C-120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung* EU:C:1979:42.

¹⁸ *Ibid*, 651.

¹⁹ Hans Micklitz, 'The Consumer: Marketized, Fragmentised, Constitutionalised' in Dorota Leczykiewicz et al. (ed), *The Images of the Consumer in EU Law* (Bloomsbury 2016), 28-30.

²⁰ See, Hans Micklitz, *Do Consumers and Businesses Need a New Architecture of Consumer Law? A Thought Provoking Impulse* (European University Institute 2012).

vindicated. The Court's decision in *Cassis de Dijon*, by contrast, viewed consumers as active and rational market participants and part of the project of European integration.

The view expounded in *Cassis* was retrenched by *Tobacco Advertising*²¹ with the CJEU emphasising that the focus of Article 114 TFEU is on trade between the Member States and reasoned that it followed that consumer protection does not constitute an independent aim but should be employed as a mechanism for building the internal market through enhanced consumer confidence.²²

Specifically, the Court noted that legislative measures pursued under Article 114 must have as their genuine objective the improvement of the conditions for the establishment and functioning of the internal market or the resolution of obstructions to fundamental freedoms where differences subsist between the laws of Member States.²³ Furthermore, the CJEU has stipulated that it must be actually and objectively apparent from the legal act that its purpose is to improve the conditions for the functioning of the internal market.²⁴ Subsequently, the CJEU has continued to emphasise this view of the consumer as a market actor, as illustrated by its move from the rhetoric which incorporated the idea of the vulnerable to the average consumer.

9.2.1 *The Paradigms of the Average and Vulnerable Consumer*

Though *Cassis* heralded an increasingly market oriented ideal of the consumer in EU law, elements of social understanding lingered occasionally attempting to break through. Thus, in *Buet*²⁵ some ten years after *Cassis* in which the CJEU recognised the a-symmetry in bargaining power which characterised certain business to consumer transactions.²⁶ While the facts in *Buet* arose from the provisions in the French *Code de la consommation* for *abus de faiblesse* the recognition was contextualised by Schulte-Nolke as part of a broader effort within the Union to remediate the decline in general consumer protection measures in national law following *Cassis*.²⁷

The concept of vulnerable consumer developed in *Buet* permitted Member States a degree of discretion, however, this has progressively declined in the subsequent period. Indeed, Reich has

²¹ Case C-376/98 *Tobacco Advertising* EU:C:2000:544, [83].

²² *Ibid*, [14], [19], [37].

²³ Case C-547/14 *Philip Morris* EU:C:2016:325, [58]; Case C-58/08 *Vodafone* EU:C:2010:321, [32]; Case C-491/01 *British American Tobacco* EU:C:2002:741, [59]-[60]; Case C-376/98 *Germany v EP and Council* EU:C:2000:544, [83].

²⁴ Case C-270/12 *UK v EP and Council* EU:C:2014:18, [113]; Case C-217/04 *UK v EP and Council* EU:C:2006:279, [42].

²⁵ Case C-382/87 *R Buet v Ministère Public* EU:C:1989:189, [13].

²⁶ Weatherill, *EU Consumer Law and Policy*, 234-244.

²⁷ H Schulte-Nolke (ed), *EC Consumer Law Compendium*, 453-65.

argued that given the subsequent development of Directives 2011/83 and 2005/29 the central deference to Member States established in *Buet* no longer stands.²⁸ Further, despite the apparent concession to social orientations within the idea of a vulnerable consumer the range of vulnerabilities recognised has been criticised as narrow and arbitrary. The interpretation of the term, for example, fails to include race, education or ethnicity in its analysis despite the CJEU's own identification of low levels of education as a cause of vulnerability.²⁹

The CJEU has, largely, failed to provide an interpretation of the characteristics of vulnerable consumers,³⁰ resulting in a level of ambiguity as to the extent to which EU law has committed itself to an approach which exceeds the market oriented ethic of minimal intervention and gestures towards an explicit commitment to a socially oriented view of consumer protection.³¹ In practice, a search for clarity on the constituent elements or aspects of vulnerability in consumer protection is redundant as the CJEU in its search for a 'paradigm consumer' has in practice abandoned the socially-oriented idea of the vulnerable consumer in favour of its market-oriented ideal of the average consumer in an 'attempt to navigate a course between the rich diversity of actual consumer behaviour and the need for an operational benchmark.'³² The Advocate General in *Mediaprint*³³ thus noted that the average consumer is a compromise between the requirements for consumer protection and encouragement for freedom of movement of goods based on the principle of proportionality.³⁴

The principle of the average consumer developed by the CJEU through its jurisprudence first emerged during the early 1990s following *Buet*. The CJEU in its analysis and application of the standard has noted that the concept is an autonomous one. In particular, the average consumer should be considered reasonably well informed, observant and circumspect - a rational market

²⁸ Norbert Reich, 'Vulnerable Consumers in EU Law' in Dorota Leczykiewicz and Stephen Weatherill (ed), (Hart 2018), 141.

²⁹ Case C-328/87 *Buet v Minstere Public* EU:C:1989:198.

³⁰ Hans W-Micklitz, 'The General Clause on Unfair Practices' in Hans W-Micklitz and Thomas Wilhelmsson Geraint Howells (ed), *European Fair Trading Law: The Unfair Commercial Practices Directive* (Routledge 2016), 116; G Abbamonte, 'The UCPD and its General Prohibition' in S Weatherill and U Bernitz (ed), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Hart 2007), 26.

³¹ BB Duivenvoorde, *The Consumer Benchmarks in the Unfair Commercial Practices Directive* (Springer 2015).

³² S Weatherill, 'Who is the Average Consumer' in S Weatherill and U Bernitz (ed), *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* (Hart 2007) 135.

³³ Case C-540/08 *Mediaprint* ECLI:EU:2010:660, [102]

³⁴ Reaffirmed in Case C-304/08 *Plus* EU:C:2009:511 [103]. See also, Case C-159/09 *Lidl* EU:C:2010:696, [56]; Case C-122/10 *Ving Sverige* [22]; Case C-453/10 *Jana Perenicova* EU:C:2012:144, [47] and Opinion EU:C:2011:788, [99]; Case C-428/11 *Purely Creative* EU:C:2012:651, [56].

actor. However, when assessing the average consumer in the context of the fairness of advertising account should be taken of social, cultural and linguistic.

The requirement that the average consumer be reasonably well informed, observant and circumspect is premised on the assumption that uninformed consumers lead to an inefficient market, and has been developed by the Court in a consistent line of jurisprudence which developed from *Nissan*,³⁵ through *Mars*³⁶ and was confirmed in *Gut Springenheide*.³⁷ In *Nissan* the Court considered a preliminary reference made by the French Courts which asked whether advertising as a vendor of imported Nissan cars, in circumstances where the vendor was not an authorised Nissan dealer, should be considered misleading under the Directive.

In his Opinion, the Advocate General noted that the average consumer is prompted to make 'careful comparison of the process on offer and to enquire of the seller sometimes very meticulously about the accessories with which the vehicle is equipped.'³⁸ Continuing, the Advocate General noted EU law thus reflected the principle '*vigilantibus, non dormientibus iura succurunt*.'³⁹

In *Mars* the Court was asked to consider whether a sign indicating '10% free' should cover only 10% of the total surface area of a product wrapping on which it appeared.⁴⁰ The Advocate General pointed to the standard of normal care required for the justification of the existence of an obstacle to the free movement of goods and opined that the appropriate standard was that it be clear to the careful consumer that a degree of exaggeration was inherent in any promotion.⁴¹ The Court similarly concluded a reasonably circumspect consumer would be fully aware of the exaggeration and rejected the argument of the applicant.⁴²

The approach in both these cases was confirmed in *Gut Springenheide*.⁴³ In that case, the court was whether a marketing slogan (which was also a trademark) was misleading as a result of its incompleteness. In his Opinion the Advocate General indicated that in its case law the Court had consistently referred to an average, reasonably circumspect consumer as the benchmark of the Union's consumer policy and agreed that the definition of a consumer was 'one who takes in the information about the product on sale and hence the overall characterisation of the products

³⁵ Case C-309/94 *Nissan* EU:C:1996:57.

³⁶ Case C-470/93 *Gewerbe Köln v Mars* EU:C:1995:224.

³⁷ Case C-210/96 *Gut Springenheide* EU:C:1998:369.

³⁸ Case C-309/94 *Nissan* EU:C:1995:457, [7].

³⁹ The law assists those that are vigilant with their rights, and not those that sleep thereupon.

⁴⁰ Case C-470/93 *Mars* EU:C:1995:224.

⁴¹ Case C-470/93 *Mars* EU:C:1995:87.

⁴² Case C-470/93 *Mars* EU:C:1995:87.

⁴³ Case C-210/96 *Gut Springenheide* EU:C:1998:369, [15].

attentively.⁴⁴ The Court followed this Opinion and underlined that national courts should take the average consumer who is reasonably well informed, observant and circumspect as a benchmark.⁴⁵

Against this analysis of the consumer as a rational, market actor, the regard to social, linguistic and cultural factors which is deployed in advertising cases might seem to offer a basis for a social understanding of the consumer re-emerging. However, such analysis has been read restrictively by the CJEU which has had regard in their application of the average consumer standard to such factors only in the exceptional cases. Examples of such cases include *Clinique*⁴⁶ and the subsequent decisions in *Fratelli Graffione*⁴⁷ and *Lifting*.⁴⁸

In *Clinique* the Court was asked to consider whether a trademarked name was sufficiently similar to the German word for hospital to constitute misleading advertising. The Advocate general noted⁴⁹ that linguistic, social or cultural factors could be taken into account, however, the Court noted that the context in which the products were sold in the instant case sufficiently differentiated them and made no reference to linguistic, social or cultural factors.⁵⁰

Subsequently, in *Fratelli*⁵¹ the dispute before the Court considered whether a prohibition on the marketing of toilet paper and handkerchiefs under the trademark *Cotonelle* could mislead customers as to whether the product contained cotton. In his opinion in the case, Advocate General Jacobs agreed with the Opinion given by the Advocate General in the previous case of *Gulmann*⁵² and noted that determining whether advertising was misleading would depend on linguistic, social and cultural conditions and noted that the word *Cotonelle* might be misconstrued by English, French or Italian speakers but not by German or Spanish speakers.⁵³ The Court agreed with the Advocate General's analysis, noting that such differences might indeed result in differing consumer attitudes.⁵⁴

Yet it is notable that, even by the standards of the CJEU, the endorsement of such factors is almost incidental. Subsequently, the CJEU afforded a more substantive consideration to social, cultural and linguistic factors in *Lifting*.⁵⁵ In that case the Court was asked to consider whether the use of

⁴⁴ *Gut Springenheide* EU:C:1998:102, [56].

⁴⁵ Case C-210/96 *Gut Springenheide* EU:C:1998:369, [37].

⁴⁶ Case C-315/92 *Clinique* EU:C:1994:34.

⁴⁷ Case C-313/94 *Fratelli* EU:C:1996:450.

⁴⁸ Case C-220/98 *Estée Lauder* EU:C:2000:8.

⁴⁹ Case C-315/92 *Clinique* EU:C:1993:823, [18].

⁵⁰ Case C-315/92 *Clinique*, [21].

⁵¹ Case C-313/94 *Fratelli* EU:C:1996:450.

⁵² Case C-313/94 *Fratelli* EU:C:1996:224.

⁵³ *Ibid*, [23].

⁵⁴ *Ibid*, [22].

⁵⁵ Case C-220/98 *Estée Lauder*.

the word ‘lifting’ in advertising was misleading, and in particular, whether it was misleading for German consumers for linguistic reasons such that its use should be banned in Germany. The Court found that it would be necessary, in determining whether a product was misleading, to have regard to ‘the presumed expectations of an average consumer who is reasonably well informed and reasonably observant and circumspect’ which might include linguistic factors. The Court found that it was for the referring court to decide, by reference to the average consumer, whether the name at issue was misleading.⁵⁶

The result of this approach is that, while the Court’s recourse to social, cultural and linguistic factors might appear to indicate the emergence of a reversion to the understanding of the consumer as a social as well as market actor, in practice the Court has adopted a strict approach integrating the considerations only as part of a market driver analysis of the average consumer. This is reinforced by the final aspect of the CJEU’s jurisprudence of the average consumer which is that, as outlined by the Court in *Hoekstra*,⁵⁷ only the Court is competent to provide an interpretation of the average consumer as it has its own, autonomous, meaning.⁵⁸ The Court clarified this in *Hadadi*,⁵⁹ stating that it follows from the need for uniform application of Community law and the principle of equality that where a provision of Community law makes no express reference to the law of Member States its meaning and scope must be given an autonomous and uniform interpretation throughout the Community having regard to the context of the provision and objective pursued by secondary law in question.⁶⁰

The result is a continuation of the pattern, following from *Cassis*, of the Union’s marketization of the consumer. This understanding of the consumer, defined purely as a market actor, rather than a citizen or a complex social and market actor remains strong.⁶¹ The May 2012 publication by the European Commission of ‘A European Consumer Agenda—Boosting confidence and growth’ confirmed this with the Commission presented an image of the consumer as an empowered and confident market actor but not as a social one.⁶²

More recently, the 2018 legislative package ‘A New Deal for Consumers’ is notable for its continued focus on enabling consumers as market actors through information requirements

⁵⁶ *Ibid*, [27]; [29]-[31].

⁵⁷ Case C-75/63 *Hoekstra* EU:C:1964:19.

⁵⁸ *Ibid*.

⁵⁹ Case 168/08 *Hadadi* EU:C:2009:474.

⁶⁰ Case C-168/08. *Hadadi*; See also Case C-122/10 *Ving Sverige* and Case C-342/97 *Lloyd Schuhfabrik Meyer* EU:C:1999:323.

⁶¹ Vanessa Mak, 'The Consumer in European Regulatory Private Law' in Dorota Leczykiewicz et al. (ed), *The Images of the Consumer in EU Law* (Bloomsbury 2016) 381.

⁶² European Commission, ‘A European Consumer Agenda – Boosting confidence and growth’ COM(2012) 225.

promoting greater transparency and efficiency in particular in the digital market as part of the Digital Single Market strategy.⁶³ As with the DSM, whose focus is on efficient and rational markets and market participants the New Deal for Consumers, in fact introduced little in the way of substantive change, instead providing new iterations and extensions of existing market based information and disclosure requirements, in place of national standards.⁶⁴ Indeed, as chapter one examined, the disproportionate focus of the Union's DSM strategy has been efficiency, market access and maximising economic growth and potential.

9.2.2 *Solving the Divergence between Constitutional and Functional Understandings of Consumers*

The EU's marketisation of the consumer as a means of completing the internal market beginning with *Cassis* has resulted in a reduction of consumers to market actors. Micklitz ultimately views this trend and its contributors as part of a much broader shift from consumer protection law to what he describes as consumer law without protection.⁶⁵ Weatherill has made a similar point, arguing that the Commission has over-emphasised economic empowerment at the expense of traditional, social, consumer values of autonomy and welfare, as reflected in the Union's preferences for information based standards over substantive protection, and the decline of the vulnerable consumer standard.⁶⁶

The decisions of the CJEU as well as the Union's policy and legislative developments have progressively diminished the understanding of the consumer as a social actor as necessary in the realisation of the single market. In its place a rational, economically oriented, consumer has emerged - who requires protection only from anti-competitive and economically-hostile market practices.

This view of consumers as market actors is not problematic in and of itself. What is problematic is its dominance in legal and policy development within the Union. Consumer protection by its nature is, and should be, concerned with more than mere economic empowerment.⁶⁷ Fundamentally, consumer protection offers one of the few mechanisms which seek to reconcile the disembodied

⁶³ See, (<https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=620435>) accessed 22 October 2019.

⁶⁴ European Commission, 'A Digital Single Market Strategy for Europe' COM(2015) 192.

⁶⁵ Micklitz, 'The Consumer: Marketized, Fragmentised, Constitutionalised' 21.

⁶⁶ Geraint Howells, 'Europe's (lack of) Vision on Consumer Protection: a case of rhetoric hiding substance' in Dorota Leczykiewicz et al. (ed), *The Images of the Consumer in EU Law* (Bloomsbury 2016) 431; G Howells, 'The Scope of European Consumer Law' (2005) 1 *European Review of Contract Law* 360.

⁶⁷ Stephen Weatherill, 'Empowerment is Not the Only Fruit' in Dorota Leczykiewicz et al (ed), *The Images of the Consumer in EU Law* (Bloomsbury 2016), 203.

market and social spheres in liberal political systems – ensuring social goods such as public health and public safety.

Even in ordoliberal theories which favour only conservative interventions in the market these minimal safeguards for consumers are replicated. The market could function, and could arguably function more efficiently from the point of view of business, without such restrictions. As such, they are not market oriented, but rather seek to secure social goods.

The inclusion of consumer protection within the Charter can be read as an attempt to re-orientate the Union's view towards this fact, and to recall the Union's origins in which consumers were both market and social actors. Significantly, the Charter includes consumer protection as an aspect of solidarity within Chapter IV of the text whose other guarantees include environmental protection,⁶⁸ the entitlement to social security and social protection,⁶⁹ the right of access to preventative health care,⁷⁰ the prohibition of child labour and the protection of young people at work,⁷¹ as well as more general protections regarding collective bargaining and labour conditions.⁷² These provisions, while in certain instances oriented towards market activities are notable for their explicit intervention to secure social goods as part of the European Social Model.

While, as the previous chapter noted, the protection of consumer protection in Article 38 is inherently limited by its status as a principle rather than a right, the constitutionalisation of consumer protection and its 'elevation' to Charter status as part of an explicit agenda for the achievement of solidarity is a recognition of the societal importance and political relevance of consumer protection.

In this respect, it is notable that the place of consumer protection within the Treaties, under Article 114 TFEU in providing that the Commission shall ensure a high base level of consumer protection also links consumer protection with the health, safety and environmental protection of European citizens – areas which broadly map onto those included under the solidarity guarantees of the Charter. The areas are also, similar to those in chapter IV, socially oriented while containing incidental market applications.

⁶⁸ Article 37, 'a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.'

⁶⁹ Article 34.

⁷⁰ Article 35.

⁷¹ Article 32.

⁷² See, Article 27-31.

The implication is that the Union's constitutional and functional understandings of consumer protection diverge. It may be that this divergence can be traced to activism on the part of the CJEU in leading the diminution of the vulnerable, and the move towards the adoption of the average, consumer. However the policies and secondary laws developed by the Union display marked preferences for consumers understood as market actors. In either case mapping the source of this divergence is beyond the scope of this work, involving an analysis of the socio-political and legal considerations which motivated it and which cannot be accommodated within the length of the present research and which has, additionally, been undertaken elsewhere.⁷³ What is relevant, however, is the existence of a constitutional framing of consumers which is more holistic and offers the potential for the re-emergence of an understanding of the consumer as a social as well as a market actor.

In this respect, Micklitz has pointed to the increase in the instances of consumer protection conflicts reaching national appellate courts as well as the European Courts⁷⁴ first with *Aziz*⁷⁵ and more notably *Asbeek*⁷⁶ as evidence of such a shift in the popular understanding of, and desire to return to, an understanding of consumers as social actors.

In *Aziz*, the appellant secured a mortgage on his family home on which he subsequently defaulted. However, in the course of attempts by the mortgagor to recoup their losses the appellant challenged a clause of his mortgage permitting the respondents to stipulate the amount of the debt outstanding, on the basis that it was unfair under the Directive on Unfair Terms in Consumer Contracts. The appellant asserted that, given the potential for the imposition of an order for the payment of a disproportionately high sum and in the absence of interim relief given the absence of any means of challenging a vesting of the property in the mortgagor under Spanish law the term was unfair.⁷⁷

⁷³ See, Dorota Leczykiewicz and Stephen Weatherill, 'Images of the Consumer in EU Law' in Dorota Leczykiewicz et al eds 'The Images of the Consumer in EU Law' (Bloomsbury, 2016); T Wilhelmsson, 'The Average European Consumer: A Legal Fiction' in J Devenney and M Kenny eds 'European Consumer Protection: Theory and Practice' (Kluwer, 2007); Hans Micklitz, 'The Consumer: Marketized, Fragmentised, Constitutionalised' in Dorota Leczykiewicz et al eds, 'The Images of the Consumer in EU Law' (Bloomsbury, 2016); Gareth Davies, 'The Consumer, The Citizen and The Human Being' in Dorota Leczykiewicz et al. eds 'The Images of the Consumer in EU Law' (Bloomsbury, 2016); Michelle Everson, 'Legal Constructions of the Consumer' in Frank Trentman, 'The Making of the Consumer: Knowledge, Power and Identity in the Modern World' (Berg, 2006) 99; Geraint Howells, 'Europe's (lack of) Vision on Consumer Protection: a case of rhetoric hiding substance' in Dorota Leczykiewicz et al., 'The Images of the Consumer in EU Law'; (Bloomsbury, 2016).

⁷⁴ Hans Micklitz, *The Constitutionalisation of European Private Law* (Oxford University Press 2014), chapter 1.

⁷⁵ Case C-415/11 *Aziz* EU:C:2013:164.

⁷⁶ Case C-488/11 *Asbeek* EU:C:2013:341, [52].

⁷⁷ Case C-415/11, [53]-[58].

In finding that the Directive precluded national legislation such as that challenged (which did not permit interim relief) the CJEU emphasised the weak position of the consumer relative to a seller or supplier⁷⁸ also noting, briefly, the social vulnerability of consumers in matters concerning family homes.⁷⁹ The implication was an understanding of the consumer as understood under the Charter as a market participant but also a social actor who must be contextualised as such.

In the subsequent decision in *Asbeek*⁸⁰ the social aspects implicated in consumer protection cases were more overtly articulated by the Court. In that case the appellants were tenants of the respondent company who had failed to pay rent on the property in which they resided, but challenged the compensation subsequently sought by the respondents as disproportionate under the Directive on Unfair Terms in Consumer Contracts. In its decision the CJEU noted the need to protect consumers given the a-symmetry of information and bargaining power operating in such cases and specifically emphasised the social necessity and vulnerability of consumers implicated in housing cases.⁸¹ Significantly, the language of the case exceeds that of the vulnerable consumer in *Buet* specifically averring to a broader social context – an invocation which is reminiscent of the solidarity themes under the Charter.

In the more recent decision of *Kusionova* the CJEU ventured a step further, openly addressing consumer protection as a constitutional issue.⁸² In that case, the appellant claimed a contractual term permitting the respondent to take possession of her home without court review was impermissible under the Directive on Unfair Terms in Consumer Contracts. In keeping with its previous decision in the similar case of *Aziz*, the Court found that a term permitting recovery of a debt was not precluded where there was court review prior to the loss of the property.

In the instant case, however, the Court specifically contextualised the loss of the appellant's family home in the case as undermining her rights as a consumer as well as placing her family in a vulnerable position.⁸³ Given this vulnerability the Court found that the Directive should be read in light of the fundamental rights protected under Articles 7 and 38 of the Charter⁸⁴ namely privacy and consumer protection.⁸⁵

⁷⁸ Ibid, [43], [45]-[47], [77].

⁷⁹ Ibid, [61]. See also the subsequent decision of Case C-169/14 *Sanchez Marcillo* EU:C:2014:2099.

⁸⁰ Case C-488/11, [31]-[32].

⁸¹ Case C-488/11, [31]-[32].

⁸² Case C-34/13 *Kusionova* EU:C:2014:2189. See also, Federico Della Negra, 'The uncertain development of the case law on consumer protection in mortgage enforcement proceedings: Sanchez Morcillo and Kusionova' (2015) 52 Common Market Law Review 1009.

⁸³ Case C-34/13, [63], referring to *Sanchez* *ibid*, [11].

⁸⁴ Ibid, [64] referring to *McCann v United Kingdom* App no 19009/04 (ECHR, 13 May 2008), [50] and *Rousk v Sweden* App no 27183/04 (ECHR, 25 October 2013), [137].

⁸⁵ Ibid, [65]-[68].

The loss of a family home is not only such as to seriously undermine consumer rights, but it also places the family of the consumer concerned in a particularly vulnerable position ... In that regard, the European Court of Human Rights has held, first, that the loss of a home is one of the most serious breaches of the right to respect for the home and, secondly, that any person who risks being the victim of such a breach should be able to have the proportionality of such a measure reviewed ... Under EU law, the right to accommodation is a fundamental right guaranteed under Article 7 of the Charter that the referring court must take into consideration when implementing Directive 93/13.⁸⁶

Significantly, these cases have been represented before the CJEU as merely national problems presented for resolution according to EU law. Yet, they are in fact instances which illustrate a tentative return to the Union's original understanding of the consumer contextually - as both a market participant and a social actor. The indication is thus that the CJEU is amenable to the argument that consumer protection implicates the vindication of further fundamental rights and consumers as socially situated individuals, and that the failure of consumer protection may thus result in reductions or harms to other fundamental rights.

The implicit re-orientation toward an understanding of the consumer as a social as well as market actor in these decisions indicate EU law has the potential to return to the origins of the consumer as a social actor and consumer protection as fundamentally related to matters of individual autonomy and protection.⁸⁷ Specifically, and building on these dicta as well as the constitutional context of the consumer in contemporary EU law, this work argues that consumers should be understood as social actors who are reasonably well informed and observant in market interactions but who lack the expert knowledge sufficient to reduce the a-symmetries of information present in complex commercial contracts.

9.3 The Emergence of a Rights-Oriented Agenda in EU Secondary Law

The flickering of a rights aware application of consumer protection law evident in *Kusionova* is not a solely judicial trend. Indeed, there is evidence in recent secondary law of the emergence of a similar view of fundamental rights and consumer protection as mutually complementary legislative as well as constitutional forces. As chapter seven examined, the legislature enjoys a significant role in assuring the actualisation and enforcement of fundamental rights, and the Commission is

⁸⁶Ibid, [63]-[65].

⁸⁷ Micklitz, 'The Consumer: Marketized, Fragmentised, Constitutionalised'21.

increasingly involved in defining fundamental rights standards and the scope of the Union's fundamental rights jurisdiction through its legislative efforts.

9.3.1 *Fundamental Rights in Secondary Laws – From Accessory Powers to Orientating Values*

There are two primary means through which fundamental rights find expression in legislative instruments. The first, is through secondary laws (or legislation) explicitly developed to further such rights. This is typified by the Union's data protection and anti-discrimination law. The second means through which fundamental rights find expression in legislative instruments, is through secondary laws designed to implement 'ordinary' EU competences which have an incidental impact on setting fundamental right standards.

This occurs where, in the process of giving shape to policies or secondary laws not concerned with fundamental rights, the legislature is required to balance a non-rights related objective with a resulting impact on fundamental rights protection. Such balancing is common in the development of competition and customs policy, areas in which the EU enjoys significant regulatory powers and which have ancillary impacts on fundamental rights. In such situations Ladenburger argues the political institutions of the EU have 'functional' or 'accessory' powers to enact fundamental rights.⁸⁸

In addition to these two established means of expressing fundamental rights in secondary law, a trend of legislative incorporation of fundamental rights is also discernible in the Union's secondary laws - what De Schutter has referred to as fundamental rights 'mainstreaming.'⁸⁹ Mainstreaming requires that fundamental rights should not be pursued only via distinct fundamental rights policies but should be incorporated in all fields of law and policy making. Fundamental rights should thus be seen as an integral part of all public policy making and implementation.⁹⁰

De Schutter advocates for the adoption of mainstreaming on the basis that it serves as a source of institutional learning, improves the involvement of civil society organisations in policy-making, and promotes transparency, accountability, and coordination between institutions with a view to identifying and addressing the root cause of the fundamental rights infringements rather than merely

⁸⁸ Ladenburger, *Protection of Fundamental Rights post-Lisbon: The interaction between the Charter of Fundamental Rights, the European Convention of Human Rights and National Constitutions*, 2012), 23.

⁸⁹ Olivier Deutt Schutter, 'Mainstreaming Human Rights in the European Union' in P Alston and O de Schutter (ed), *Monitoring Fundamental Rights in the EU - The Contribution of the Fundamental Rights Agency* (Hart 2005).

⁹⁰ Christopher McCrudden, 'Mainstreaming Equality in the Governance of Northern Ireland' (1999) 22 *Fordham International Law Journal* 1969.

their effects.⁹¹ In a complementary argument Olivier has suggested that fundamental rights mainstreaming avoids ghettoization, encouraging policy-makers to reflect on the interdependencies between fundamental rights and general public policy.⁹²

The development of mainstreaming within the Union is relatively recent, indeed for the majority of the Union's development, fundamental rights have not been perceived as an objective to be achieved through legislative action, an understanding of rights protection linked to concerns over competence creep and the ordoliberal conviction, articulated in a 1956 report by the International Labour Organisation, that social rights within the European order would find natural expression through the free market.⁹³ However, beginning with Alston and Weiler's appeals for the adoption of a coherent European fundamental rights policy,⁹⁴ the subsequent introduction of the Charter and accompanying institutional reforms⁹⁵ there has been a gradual adoption of *ex ante* fundamental rights review by the Union.

A year after the Charter's proclamation in March 2001 a Commission Decision provided that all legislative proposals would be subject to scrutiny for compatibility with the Charter. Though the Decision received little publicity, it marked the beginning of the Union's *ex ante* fundamental rights review.⁹⁶ The Decision was replaced, in 2005, by a Communication which sought to 'lock in' a culture of fundamental rights in EU secondary law⁹⁷ through a methodology which includes the use of impact assessments (IAs), explanatory memoranda and recitals examining the compliance of proposed secondary laws with the Charter during the process of development.

⁹¹ Schutter, 'Mainstreaming Human Rights in the European Union' 46-49.

⁹² Olivier de Schutter, 'The New Architecture of Fundamental Rights Policy in the EU'

⁹³ International Labour Office, *Social Aspects of European Economic Co-Operation*, 1956).

⁹⁴ Weiler, 'An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights'; P Alston and JHH Weiler, 'The European Union and Human Rights: Final Project Report on an Agenda for the Year 2000', *Leading by Example: A Human Rights Agenda for the European Union for the Year 2000: Agenda for the Comité des Sages and Final Project Report* (Academy of European Law, European University Institute 1998).

⁹⁵ Including the creation of DG Justice, a Commissioner for Fundamental Rights and the establishment of the Fundamental Rights Agency (FRA).

⁹⁶ European Commission, *Decision on the Application of the Charter of Fundamental Rights of the European Union SEC (2001) 380/3* (2001).

⁹⁷ European Commission, *Communication on Compliance with the Charter of Fundamental Rights in Commission Legislative Proposals: methodology for systemic and rigorous monitoring COM(2005) 0172* (2005); European Commission, *Press Release IP/05/494* (2005).

The Commission's 2009 report on the success of this methodology⁹⁸ which built on recommendations made in the 2007 Voggenhuber Report⁹⁹ proposed a separate fundamental rights IA as well as the improvement of targeting of fundamental rights in recitals, consistent use of explanatory memoranda which addressed fundamental rights concerns and an increased use of the expertise of the Agency for Fundamental Rights (FRA).¹⁰⁰ The rights-oriented approach to secondary law which these developments have fostered has been enabled significantly by this adoption of pre-legislative scrutiny in the form of fundamental rights IA as part of the Union's Better Regulation agenda.¹⁰¹

The solution this work proposes to the rights harms identified draws on motivations similar to those which Olivier and De Schutter have articulated regarding mainstreaming. However, by re-asserting a holistic understanding of the consumer as a social as well as market actor, EU law can move beyond mainstreaming's emphasis on *ex ante* review for compliance with fundamental rights and can actively incorporate fundamental rights as the orienting values of consumer protection law. In doing so it can seek to affirmatively vindicate fundamental rights rather than merely review to ensure non-infringement, thus securing a higher standard of fundamental rights protection in the digital market. Crucially, in the absence of a competence to develop a fundamental rights policy, the approach suggested enables public normative standards to be reintroduced into the space currently dominated by the private standards set by private actors.

9.3.2 *Rights-Oriented Secondary Laws Concerning the Digital Market*

Several legislative texts which seek to govern the digital market already evince tentative steps towards a rights-based understanding of consumer protection – albeit one which has been subordinated in practice to the market orientated nature of their content. In this context data protection law originally adopted as an internal market instrument on the basis of the equivalent of today's Article 114 TFEU and given force through the GDPR is specifically designed to give shape to the fundamental right to data protection recognised by Article 16 TFEU and guaranteed by Article 8 of the Charter. As a result, data protection is frequently cited as an illustration of the potential of the Union's secondary law to ensure fundamental rights protection.

⁹⁸ European Commission, *Report on the Practical Operation of the Methodology for a Systemic and Rigorous Monitoring of Compliance with the Charter of Fundamental Rights COM(2009) 205* (2009)

⁹⁹ European Parliament, 'Report on compliance with the Charter of Fundamental Rights in the Commission's legislative proposals: methodology for systematic and rigorous monitoring, Committee on Civil Liberties, Justice and Home Affairs (Rapporteur Johannes Voggenhuber)' (2007) .

¹⁰⁰ Sionadh Douglas Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 *Human Rights Law Review* 645.

¹⁰¹ Commission, Better Regulation Action Plan, COM(2002) 276. On the practical operation of fundamental rights impact assessments see European Commission, 'Impact Assessment Guidelines SEC(2009) 92' (2009) and Vasilliki Kosta, *Fundamental Rights in EU Internal Market Legislation* (Hart 2015).

The GDPR and the proposed e-Privacy Regulation have as their stated aims, the protection of the fundamental rights to data protection and privacy under Articles 7 and 8 of the Charter. In this respect the GDPR explicitly orientates its objectives relative to the protection of the fundamental right to data protection in Recital 1. The Recitals in the Regulation go on to note that the Regulation is a continuation of the attempts of Directive 95/46/EC to harmonise and protect the fundamental right to data protection¹⁰² and that the processing of personal data should ‘serve mankind.’¹⁰³

This emphasis is reinforced by Article 1(2) which states that the Regulation aims to ‘protect fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data.’ The Regulation is, in fact, permeated by allusions to fundamental rights, with some thirty references to the need to protect fundamental rights, and the Regulations putative function in doing so, throughout the text.¹⁰⁴

Similar trends are evident in the e-Privacy Directive¹⁰⁵ and the proposed e-Privacy Regulation. Among the references to fundamental rights in the Directive¹⁰⁶ Recital 51 in particular mirrors the GDPR’s emphasis on the necessity of ensuring the protection of the fundamental rights to privacy and confidentiality, with respect to the processing of personal data. Recital 56 of the Directive notes that while communications technologies offer the potential to contribute positively to the internal market their use must be acceptable to citizens and that ‘[t]o achieve this aim, it is necessary to ensure that all fundamental rights of individuals, including the right to privacy and data protection, are safeguarded.’

The content of these Recitals is reinforced by Article 2 which emphasises the protection of fundamental rights, in particular the right to privacy and confidentiality as the aim of the Directive. The Proposed e-Privacy Regulation¹⁰⁷ Recital 1 of which specifically orients the Regulation as seeking to protect the right to privacy and confidentiality under Article 7¹⁰⁸ mirrors the Directives

¹⁰² Regulation (EU) 2016/679, Recital 3.

¹⁰³ Ibid, Recital 4.

¹⁰⁴ See, Recitals 1, 2, 3, 4, 8, 10, 11, 47, 51, 52, 53, 69, 102, 109, 111, 113, 114, 153, 166 and 173 GDPR and Articles 1(2), 4(24), 6(f), 9(2)(b), 9(2)(g), 9(2)(j), 23 Güneş Acar1, *Facebook Tracking Through Social Plugins*, 50(b), 51 ibid and 88(2) GDPR.

¹⁰⁵ Directive 2009/136/EC.

¹⁰⁶ See Recitals 29, 30, 51, 56, 52 and Article 2 Güneş Acar1, *Facebook Tracking Through Social Plugins* ibid.

¹⁰⁷ As in previous chapters the work is referring to the September 2018 draft of the proposed Regulation, available at (<https://iapp.org/media/pdf/resource_center/ePrivacyReg-2018-09-20-draft.pdf>) accessed 18 July 2019.

¹⁰⁸ Further references to fundamental rights, in particular Article 7 rights, are found in Recitals 20 and 26, ibid.

in its emphasis in Article 1 of the aim of the Regulation as the protection of fundamental rights in respect for private life and communications, an aim which is repeated throughout the text.¹⁰⁹

These texts, while they were subject to the *ex-ante* fundamental rights review established by the Commission from 2001 onwards - and in that respect represent a mainstreaming of fundamental rights, fail to translate this rhetorical acknowledgement into substantive vindications of the social aspects of the rights they seek to protect. This illustrates the necessity for a more fundamental approach than *ex ante* review. In particular the need to combine an understanding of the consumer as social as well as market actor with consumer protection standards which are explicitly rights based, that is, oriented to ensure the social aspects of the right and not merely its market oriented aspects are secured.

The CJEU has acknowledged that EU consumer protection law is capable of having extensive effects on additional fundamental rights – in particular where it fails in achieving its aims.¹¹⁰ In the digital market where individuals are inevitably acting as consumers, but in which they simultaneously exercise many functions which are inherently related to their citizenship and social values protected by fundamental rights such an approach is particularly appropriate.

9.4 Towards a Rights-Based Model of Consumer Protection

Julie Brill, writing in a North American context, has noted a movement towards a unified understanding of consumer protection and fundamental rights in the context of the threat posed by digital technologies to fundamental rights as part of a more hybrid model of individual protection.¹¹¹ The most recent, and most high profile example, is perhaps the Californian Consumer Privacy Act yet on a close analysis that law would, in a European context, be more accurately likened to the e-Privacy Directive and GDPR's market based notice and choice architecture.¹¹²

¹⁰⁹ See, Articles 1(a), 3(2a), 6(2), 6Güneş Acar1, *Facebook Tracking Through Social Plug-ins*(aa) and 11 *ibid*, *ibid*.

¹¹⁰ *Ibid.*, [48]-[56].

¹¹¹ Julie Brill, 'The Intersection of Privacy and Consumer Protection' in Jules Polonestsky and Omer Tene Evan Selinger (ed), *The Cambridge Handbook of Consumer Privacy* (Cambridge University Press 2018), 355.

¹¹² In particular the Act grants consumers rights to be informed of what personal data is being collected about them, whether it is sold and to whom it is disclosed, to refuse permission for such sale or disclosure, to access and request the deletion of personal data and the right not to be discriminated against for exercising their privacy rights. See, (<https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB375>) accessed 17 October 2019.

Moreover, this unification or hybridisation is less a conscious choice as part of a broader pattern in the US context, and more a result of the sectoral regulation of privacy rights in that jurisdiction, as part of which specific laws have been created to govern privacy in the context of financial data,¹¹³ medical data,¹¹⁴ consumer credit data¹¹⁵ and children's information in specifically consumer contexts.¹¹⁶ A more substantive, hybrid understanding of fundamental rights and regulatory law in the area of consumer protection is as absent in the United States as in the European Union.

This work does not advocate for the adoption of the US sectoral approach. However, what the US example does offer is an illustration of how rights-based harms in the digital market can be understood as issues of consumer protection. Similarly, the rights-based harms identified by this work while they are broadly classified as matters governed by technology law and fundamental rights are unified by their common concern with consumer interactions with digital actors.

There is, of course, a more fundamental argument to be made concerning the need for a coherent European fundamental rights policy - and indeed a more coherent judicial understanding of the content of rights and how they are implicated when individuals interact with digital technologies. The former argument raises concerns over the structure and function of the Union which implicate sovereign and political concerns whose complexity and potential for practical resolution exceeds both the scope of this research and, arguably, the will of the Union of her Member States.

The latter argument is a matter which is, as it were, in the hands of the Court. While familiarity with, and more precise submissions from counsel on, the interaction of rights and digital technologies can contribute to the alleviation of the concerns this work has identified in the future, a realistic means of minimising the negative impacts of shortcomings is necessary. Moreover, given the contractual origins of private policy, the harms identified are not likely to reach the CJEU in the absence of a relevant legislative developed under a complementary competence. A resolution must therefore be located within the Union's competences.

Given the Union's historic acceptance of consumer protection as a functional limit on freedom of contract, the apparent embrace of a return to a view of the consumer as a social actor implied by the decisions outlined above as well as the constitutionalisation of a solidarity led vision of consumer protection in the Treaty and Charter, a rights-oriented model of consumer protection

¹¹³ 15 USC, s.6801-09.

¹¹⁴ Health Insurance Portability and Accountability Act Pub L No 104-191, 110 Stat. 1936 (1996).

¹¹⁵ Fair Credit Reporting Act 15 USC s1681 *et seq.*

¹¹⁶ Children's Online Privacy Act 15 USC 6501-06.

offers a means of redressing the rise of private policy by permitting the Union to re-assert publicly promulgated normative standards.

Crucially, a rights-based model of consumer protection contributes to ameliorating the three trends identified in this work. First, such a model acknowledges by its creation that the digital and traditional markets attach divergent patterns of risk distribution for consumers such that a functionally equivalent approach is not sufficient.

Secondly, a rights-based model acknowledges that while there are market concerns implicated by the digital market which require market-based solutions (in the form of competition law) there are also social concerns which require an intervention specifically oriented towards their amelioration in their own right. As such the model intervenes to actively (rather than responsively) ensure the protection of social values rather than hoping such values will be protected as a happy by-product of an efficient market.

The third and final trend which has contributed to the rise of private policy is that of brittle constitutionalism. A rights-based model of consumer protection cannot hope to ameliorate this issue which is systemic and goes to both the character of the Union as well as institutional reluctance to engage with the social aspects of the Union's constitution. However, a rights-based model can offer a means of redressing some of the more damaging aspects of this trend by seeking to minimise the space in which judicial activism can operate and providing clearer understandings of the rights conflicts implicated in business to consumer interactions in the digital market. While the model does not fix the Union's brittle constitutionalism, neither does it exacerbate it.

This solution must, of course, pass the test established under Article 114 of having as its primary and genuine objective the improvement of the conditions for the functioning of the internal market.¹¹⁷ Ironically, in the context of the argument advanced by this work, a rights-based model of consumer protection must therefore satisfy the requirement that its core motivation is the improvement of market efficiency. It must thus be established in what way consumer protection operates to improve the functioning of the internal market.

¹¹⁷ Case C-547/14 *Philip Morris* EU:C:2016:325, [60]; Case C-58/08 *Vodafone* EU:C:2010:321, [36]; Case C-137/12 *Commission v Council* EU:C:2013:675, [76]; Case C-187/93 *European Parliament v Council* EU:C:1994:265, [23]; Case C-376/98 *Germany v European Parliament and Council* EU:C:2000:544, [79].

Consumer protection through its capacity to clearly define regulatory burdens and legal standards¹¹⁸ possesses a unique bifocal capacity - to improve the functioning of the market while also offering an, albeit indirect, mechanism for protecting fundamental rights through a return to an understanding of the consumer as a social and not only a market actor.¹¹⁹ This holistic understanding views the institutional construction of the consumer as necessarily premised on the need to preserve individual autonomy and the derived fundamental rights of individuals which are impacted by consumer decisions.¹²⁰

In this way the model moves beyond the rights mainstreaming— seeking not merely to identify potential conflicts of rights within proposed secondary laws and endeavouring to generate a body of consumer protection law whose orienting objective is to place the consumer as a fully realised social actor with autonomy concerns, and whose fundamental rights must be protected to maximise such autonomy. By placing this understanding of the consumer an individual who is actively engaged as both a social and economic actor the solution thus seeks to reduce not only the autonomy reductions but also the individual alienation and Rule of Law concerns currently attendant on the Union's understanding and regulation of the digital market.

9.5 Conclusion

The inter-dependence of consumer protection and fundamental rights has been afforded increasing emphasis over the last decade in EU law. Much of the consideration of this inter-relationship has centred on the recognition of consumer protection *as* a fundamental right. However, more recent decisions of the CJEU indicate that a more nuanced understanding of consumer protection as a principle constitutionally related to the attainment of other fundamental rights under the Charter, may emerge in future.

This reading finds further support in a contextual reading of the constitutional guarantees of consumer protection as an aspect of solidarity within the Charter and as one of several socially-orientated areas which should be afforded a high degree of protection under Article 114 lends

¹¹⁸ M Mousmouti, 'Operationalising Quality of Legislation through the Effectiveness Test' (2012) 6 *Legisprudence* 191, 194; W Voermans, 'Concern about the Quality of EU Legislation: What Kind of Problem, by What Kind of Standards' (2009) 2 *Erasmus Law Review* 59, 223-225.

¹¹⁹ Richard Bellamy, *Political Constitutionalism* (Cambridge University Press 2007); Jeremy Waldron, 'The core of the case against judicial review' (2006) 115 *Yale Law Journal* 1346; J Habermas, 'Why Europe Needs a Constitution' (2001) *New Left Review* 11; J Habermas, *The Crisis of the European Union* (Polity Press 2012) 15-20.

¹²⁰ Honneth, 'Redistribution as Recognition: A Response to Nancy Fraser', 258-9; Sen, *The Idea of Justice*, 223.

weight to an understanding of the consumer in EU law as more than a market actor and as one whose protection incorporates but also exceeds purely economic concerns.

Drawing on this shift towards a more complete view of the consumer as both an economic but also a social actor, and of consumer protection as a contextual constitutional principle complementary to fundamental rights the potential for a rights-based model of consumer protection begins to emerge. Given the consumer centric nature of the rights-based harms identified in this work such a model offers a unique means of securing fundamental rights against the rise of private policy.

CONCLUSION

‘We shape our tools and, afterwards, our tools shape us’¹

In 1915, Louis Brandeis testified before the US Congress on the dangers of corporations which had become sufficiently large to achieve near-sovereignty, which were ‘so powerful that the ordinary social and industrial forces existing are insufficient’ to counteract their power.² Contemporaneously, Tim Wu has echoed those concerns in the context of the digital market noting, ‘no sector exemplifies more clearly the threat of bigness to democracy than Big Tech ... When a concentrated private power has such control over what we see and hear, it has a power that rivals or exceeds that of elected government.’³

Just as the corporate dominance of the American gilded age was not pre-ordained or organic, the rise of private policy has not been spontaneous. Rather, as this work has illustrated, it has resulted from three distinct but inter-related trends within EU law and policy. Enabled by a fragmented understanding of fundamental rights, a deference towards functionally equivalent regulatory approaches which prioritise freedom of contract and a preference for market-oriented legal and policy standards, private actors have developed integrated standards and practical systems which have subverted publicly promulgated rights standards.

Despite the location of this redefinition within the market, and its perpetuation as between commercial undertakings and consumers the Union has failed to aver to a broader relationship between the rights reductions such private policy occasions and the need for consumer protection measures to alleviate them. More fundamentally, the Union in those cases where it has recognised existing rights harms enabled by the digital market has continued to view those harms as the result of failures of the market – and in particular of competition policy which can be redressed through further, market oriented measures.

As early as 2015 Buttarelli called attention to the potential of competition law to be used to enhance the rights of consumers in the digital market.⁴ Yet, as Wu notes much of the focus to date has been on acquisitions by large digital undertakings which, while they pass the *de jure* standards imposed by traditional competition law, nonetheless generate *de facto* monopolies.⁵ Ezrachi and Stucke have

¹ McLuhan, *Understanding Media*.

² Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia Global Reports 2018), 81.

³ *Ibid.*

⁴ Giovanni Buttarelli, *Antitrust, Privacy and Big Data*, 2015).

⁵ Wu, *The Curse of Bigness: Antitrust in the New Gilded Age*, 119; Privacy International, *Competition and Data*, 2019); Privacy International, *Submission to the Competition and Markets Authority’s call for information on digital mergers*, 2019).

similarly questioned the capacity of traditional competition law to identify and remediate the behavioural discrimination, coercion and autonomy harms which characterise the digital market.⁶ Khan has similarly argued, in a US context, that current competition law cannot redress the power imbalances in the modern, digital market. Specifically, Khan argues, current doctrine underappreciates how the risk of predatory activities and cross platform integration can lead to anticompetitive market outcomes.⁷

Decisions such as the German *Bundeskartellamt*⁸ ruling that Facebook's dominant position in the German market⁹ permitted the company to deploy the coercive and exploitative privacy standards to the detriment of consumers, offer some tentative acknowledgement of that a more consumer focused approach is necessary. Indeed, the European Commission in its report 'Competition in the digital era' highlighted features of current business models in the digital market which raise concerns for competition.¹⁰ However, these analyses afford little attention to the potential of competition law to secure consumer interests beyond the existence of a more efficient market.

The traditional view of consumer law is that it includes two distinct spheres - both consumer protection, oriented toward social concerns, and competition law, oriented towards economic or market based objectives. The complementarities between competition law and consumer protection are well established, most fundamentally, both seek to maximize consumer welfare, with competition policy focusing on market failures and consumer protection emphasizing social harms in circumstances in which, despite ample competition, consumer welfare is nevertheless threatened by information asymmetries and market practices.

In the European Union, the market aspect of this diptych, both in the form of competition law and in the guise of a market led understanding of the consumer, has received disproportionate attention. Moreover, in the context of the digital market such an attitude appears institutionally embedded. In September 2019 the European Commission announced that the roles of the Commissioner of digital policy and competition would be combined in an apparent acknowledgement that competition and digital policy are inextricably connected.¹¹

⁶ Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy*, p.vii.

⁷ Lina M Khan, 'Amazon's Antitrust Paradox' (2017) 126 *Yale Law Journal* 710. See also Shaoul Sussman, 'Prime Predator: Amazon and the Rationale of Below Average Variable Cost Pricing Strategies Among Negative-Cash Flow Firms' (2019) 1 *Journal of Antitrust Enforcement* 1.

⁸ *Bundeskartellamt, Bundeskartellamt prohibits Facebook from combining user data from different sources.*

⁹ Both in its own right and due to its subsidiary companies the company enjoys a market share of more than 95%.

¹⁰ Jacques Crémer, *Competition policy for the digital era*.

¹¹ Jennifer Rankin, 'Margrethe Vestager gets second term in EU competition job' *The Guardian* (<<https://www.theguardian.com/world/2019/sep/10/margrethe-vestager-gets-second-term-in-eu-competition-job>> accessed 30 October 2019).

In contrast, the social aspect of this diptych, in the form of consumer protection has received less attention and where present has focused on understandings of the consumer as a market actor, and consumer protection as best actualised through informational and notice requirements that maximise market efficiency.

This is not to say that competition law concerns are not raised only that a competition led approach, alone, will be insufficient to redress the social nature of the harms raised, which go to the reduction of individual autonomy through the influence of private policy on the content and aspects of individuals' lives otherwise protected by fundamental rights.

Where individuals lose the power to autonomously direct their own welfare and activity they also lose the means to engage in democratic participation and develop the preferences, desires and thus personality and what that enable them to act to direct their political future. Private policy thus threatens not only individual autonomy but the health of democratic governance and the Rule of Law.

The uncoupling of market from social separates market activities from other social life in a manner which is artificial in the context of the digital market and seeks to diminish the very real social impacts market conditions have, in the name of market efficiency. The result is a pattern of autonomy reduction and consequent alienation of individuals from the means of self-determination, from the democratic institutions which govern them and ultimately from themselves.

The Union's ordoliberal model has sought to maximise market freedom through minimal intervention and deliberate regulation to ensure competition. Yet this approach – which admittedly extends market freedom has, in the digital market, restricted individual autonomy by permitting a context to develop in which private actors have limited the scope of individual rights which form the normative infrastructure through which social aims are achieved.

To avoid a system in which increased market freedom is commensurate with the progressive reductions (however unintended) of individual autonomy, market development and social protections must accompany each other. This can be achieved only by reassociating the ideas of the consumer as a market participant and social actor and engaging with the practical reality that individuals, when they lose control of their welfare within the market, suffer a reduction in their autonomy which impacts their capacity to direct their political future and thus threatens the Rule of Law.

As such this work proposes a solution which seeks to re-embed the social aspects of the consumer, and the rights-based elements of the Union's constitutional identity within the market orientated

framework and outlook which is presently dominant. The consumer law based solution thus has two aspects. The first, is a retrenchment of the idea of the consumer as both a social and a flawed market actor – a turn away from the idealised, rational view of the marketized consumer identified in the previous chapter. In this respect the model would reinforce the existing reluctance to further marketise social values as a means of securing their content in digital spaces – a trend evidenced (and rejected by the EDPB) in Purtova’s suggestions that individual data could be treated as property.¹²

The second is the embedding of this view of the social aspects of fundamental rights within the Union’s secondary law governing consumers in the digital environment. The primary aim this rights-based model of consumer protection would be to ensure that within a notice and consent framework (which for reasons of practicality would likely endure) those choices or practices damaging to the social aspects of consumers’ fundamental rights were effectively ‘regulated out’ of the choice landscape.

The criticisms made by this work of the notice and choice architecture adopted in the Union to date must thus be contextualised as insufficient to remedy the challenges the digital market poses to fundamental rights not because of their inherent character but because of their contextual operation in a manner which deprives the operation of consent of its normative force by failing to offer practical and practicable alternatives to consumers.

Such a model recognises that consumers are not perfectly placed and rational actors in line with a homo economicus model but operate with imperfect information concerning, and understandings of, the impacts of their choices on their fundamental rights, and their autonomy, in the long term.

In the proposed model, consumer law would not displace existing safeguards but, rather, would operate alongside them. In this respect, the GDPR for example, would remain the primary data protection and privacy protecting secondary law but would be supplemented by consumer protections standards which gave legal force to the social aspects of its guarantees currently relegated to a non-binding status under the recitals.¹³

¹² Nadezhda Purtova, ‘Property Rights in Personal Data: A European Perspective’ (Kluwer Law International, 2011). On the reluctance to treat data as property see, EC (European Commission). 2017a. Study on Emerging Issues of Data Ownership, Interoperability, (Re-)usability and Access to Data, and Liability” (<<https://ec.europa.eu/digital-single-market/en/news/study-emerging-issues-data-ownership-interoperability-re-usability-and-access-data-and>>) accessed 10 January 2020; EC (European Commission). 2017b. Commission Staff Working Document on the Free Flow of Data and Emerging Issues of the European Data Economy” (<<https://ec.europa.eu/digital-single-market/en/news/staff-working-document-free-flow-data-and-emerging-issues-european-data-economy>>) accessed 14 October 2020.

¹³ The proposed model would also operate, as noted, alongside solutions to monopoly power and market dominance in the digital market under consideration already by other scholars and policy makers.

The proposal of this work is limited as a necessary, and natural, result of the need to define a discrete scope for the research undertaken. First, the model proposed by the work does not consider the development of a broader integration of the social aspects of the Union's constitutional identity through rights-based secondary law more generally. There are two main reasons for this limitation – the first is that such projects have been touched on elsewhere but the second is that the focus of this work is particularly on the digital environment and the problems raised by the Union's brittle constitutionalism in that context – not on the sources and remediation of that brittle character in and of itself.

It is intended that future work will more comprehensively chart the nature and emergence of the brittle constitutionalism raised in this work which leads, somewhat naturally to the second limitation of the proposed solution. The second, is that the proposed model by its nature can seek to direct but cannot effectively eliminate the aspects of the trends identified which result from judicial developments or interpretations.

Thus, the model can attend to limit the space which the CJEU can develop a jurisprudence which permits, unbundling, the development of private jurisprudence and which evidences an unprincipled understandings of fundamental rights and their relationships to each other but cannot effectively prevent judicial activity which may, however unintentionally, generate such outcomes. How a more coherent jurisprudence of fundamental rights might be fostered within the Union's judiciary – and as a part of a broader project addressing the Union's brittle constitutionalism is thus, similarly, beyond the scope of this work.

Finally two notes of caution must be sounded. The first, is that the trends mapped in this research are unique to the European Union, and the constitutional limitations and challenges the Union's institutional and normative architectures both require and provide. As such, while some of the criticisms identified are more broadly applicable and while some of the trends outlined may be present in other jurisdictions – the manifestation of those trends, the reasons for their emergence and the solutions offered are particular to their European context.

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