COMPANIES AND THEIR FUNDAMENTAL RIGHTS: A COMPARATIVE PERSPECTIVE

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Abstract This article explores the case law of the European Court of Human Rights, the European Court of Justice and the US Supreme Court on the fundamental rights of commercial companies. The rights considered include property, the privilege against self-incrimination, freedom of speech, double jeopardy, the right to make political donations, and the freedom of religion. The article highlights the dangers of taking the fundamental rights of companies too far, as has recently occurred in the US; and it advocates a cautious and coordinated approach to this delicate issue, which has become increasingly important on both sides of the Atlantic.

Keywords: companies, comparative law, EU law, human rights, US law.

> 'Did you ever expect a corporation to have a conscience, when it has no soul to be damned and no body to be kicked?'[1]

I. INTRODUCTION

Some might claim that companies[2] should not enjoy any fundamental rights at all. Surely, though, any doubts on this issue should be dispelled by the egregious treatment of Yukos at the hands of Russia: that country had imposed an exorbitant and arbitrary tax bill on the mammoth company and committed major procedural irregularities in prosecuting it for tax fraud, resulting in its

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[1] This quip is attributed to Lord Thurlow (1778–1792) Lord Chancellor by J Poynder, *Literary Extracts* (J Hatchard and Son 1844) vol 1, 268 and frequently quoted eg by Advocate General Sharpston in Case C-58/12P *Groupe Gascogne* [2014] OJ C39/3, para 128 and JC Coffee Jr, '"No Soul to Kick: No Body To Be Damned": an Unscandalized Enquiry into the Problem of Corporate Punishment' (1981) 79(3) MichLRev 386.

[2] The words 'company' and 'corporation' will be used here interchangeably to denote commercial entities unless otherwise indicated.

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demise.[3] Needless to say, such action wholly undermines the rule of law, quite apart from its catastrophic effect on the economy and thus the welfare of the population as a whole. Moreover, as we shall see, in many instances the fundamental rights of companies need to be recognized and enforced not merely in their own interest but in the public interest. The question then is not whether companies should have such rights, but rather: how extensive should those rights be?

Whilst the thrust of this article will be that the fundamental rights of companies should in many cases be more limited than those of human beings, in some instances it would be wrong to treat companies less favourably than natural persons. The most obvious example is the right to property without which companies cannot operate at all.

In its recent judgment in *Burwell v Hobby Lobby Stores Inc.*,[4] the US Supreme Court ruled that commercial companies enjoy the right to the 'free exercise of religion'. This follows the equally controversial ruling of the same court in *Citizens United v Federal Election Commission*,[5] where it held that legal persons enjoy the right to make political donations in the same way as natural persons.

Although very few courts in Europe are likely to go so far, these two judgments should give lawyers on this side of the Atlantic pause for thought. The plain fact is that neither the Court of Justice of the European Union ('the Court of Justice') nor European legal literature has paid sufficient attention to this crucial question. Accordingly, in this article we shall explore this issue in relation both to US law and to European law.[6]

This article is essentially concerned with commercial corporations, and we shall have occasion to consider how their fundamental rights differ from those of non-profit entities. What we will not be able to do is to explore the possible distinctions between different categories of company (eg private or publicly quoted, or State-owned companies) or the status of individuals acting in an economic or professional capacity.

Space does not permit us to consider the other side of the coin, namely the *obligations* borne by companies as a consequence of fundamental rights enjoyed by others—a highly important topic which has spawned various notable international initiatives in recent decades, largely in the form of 'soft law'.[7] Suffice it to say that, while the rights and obligations of corporations

[3] The European Court of Human Rights ('ECtHR') found Russia in breach of art 1 of Protocol 1 to the European Convention of Human Rights (right to property) and art 6 ECHR (right to a fair trial) (*Oao Neftyanaya Kompaniya Yukos v Russia*, App No 14902/04 (2012) 54 EHRR 19); and the Court subsequently awarded the shareholders €1.9bn damages (ibid, [2014] ECHR 853).

[4] 573 US ___ (2014), available at <http://www.supremecourt.gov/opinions/13pdf/13-354_olp1.pdf>.

[5] 558 US 310 (2010).

[6] 'European law' is used here to mean the European Convention on Human Rights ('ECHR') and EU law.

[7] eg the OECD Guidelines for Multinational Enterprises at <http://mneguidelines.oecd.org> and the UN Guiding Principles on Business and Human Rights at <http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>. See A Clapham, *Human*

complement one another in a very broad sense, they cannot be a mirror image of one another. Companies' obligations in international law generally concern multinationals operating in countries where grave breaches of fundamental rights are committed, and are closely linked to considerations of corporate social responsibility. As we shall see, the fundamental rights which companies enjoy or should enjoy are of a quite different nature.

The structure of this article is as follows. In Part II we shall briefly consider the various theories relating to corporate personality. Part III will be devoted to the fundamental rights of companies in American law, whereas in Part IV we shall consider the position in European law. Part V contains a brief foray into German constitutional law, while Part VI is concerned with the utilitarian rationale for conferring fundamental rights on corporations. The conclusions are set out in Part VII.

II. CORPORATE PERSONALITY: WHAT DOES IT MEAN?

For generations, a debate has raged on the theoretical nature of the corporation. In a celebrated article published in 1926,[8] John Dewey poured scorn over the entire discussion, claiming that it served little purpose and that none of the theories was completely satisfactory. Yet the steady stream of literature on the subject continues unabated to this day.[9] Within the confines of this article, we cannot discuss the various theories. Suffice it to say that there are essentially three (and variants thereof), namely: the artificial entity theory, which views the corporation as a creature of the State so that the State is free to curtail its rights at will; the aggregate entity theory, which views the corporation as an aggregate of its members or shareholders; and the real entity theory, which views the corporation as a separate entity.

On this point, one cannot do better than refer to the celebrated judgment in *Salomon v Salomon and Co. Ltd*.[10] Salomon had formed a company to purchase his business; his wife and five children each owned one share as his nominees

Rights Obligations of Non-State Actors (OUP 2006) ch 6; M Korvas, *Corporate Obligations under International Law* (OUP 2013); and J Ruggie, *Just Business: Multinational Corporations and Human Rights* (Norton 2013). For a rare binding measure, see Directive 2014/95 of the European Parliament and the Council [2014] OJ L330/1, which requires large undertakings to disclose *inter alia* their performance regarding 'environmental, social and employment matters, respect for human rights, anti-corruption and bribery matters' (art 1).

[8] J Dewey, 'The Historic Background of Corporate Legal Personality' (1926) 35 YaleLJ 655.

[9] eg RS Avi-Yonah, 'The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility' (2005) 30 DelJCorpL 767 and '*Citizens United* and the Corporate Form' [2010] WisLRev 999; M Petrin, 'Reconceptualising the Nature of the Firm—From Nature to Function' (2013) 118 Penn State Law Review 1; B Stephens, 'Are Corporations People? Corporate Personhood under the Constitution and International Law' (2013) 44 RutgersLJ 1; and A Tucker, 'Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in *Citizens United*' (2011) 61 CaseWResLRev 497.

[10] [1897] AC 22.

and he owned the remaining 20,001 shares. When the company ran into difficulties, the holders of the debentures forced the liquidation of the company, which then sought indemnification from him. The House of Lords dismissed the action unanimously. Its reasoning is neatly encapsulated in the splendid words of Lord Halsbury LC:

> Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon. If it was not, there was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not.[11]

Only this down-to-earth view wholly recognizes that and does full justice to the fact that companies enjoy limited liability and the potential to survive their founders by centuries. That view is not in any way at variance with the incontrovertible fact that companies are legal constructs created for the benefit of human beings—not merely of the stakeholders, but of society as a whole, since a modern economy could not exist without them.

Of course, in some cases the courts are prepared to pierce the veil of incorporation, but they remain exceptional. For instance, it was recently held that in English law 'the corporate veil may be pierced only to prevent the abuse of corporate legal personality'.[12] Similarly, in the US, piercing the corporate veil has been authoritatively described as 'the rare exception, applied in the case of fraud or certain other exceptional circumstances, and is usually determined on a case-by-case basis'.[13] That is also the position in international law.[14] Usually, piercing the veil works to the disadvantage of the stakeholders,[15] as it renders them liable for acts of the corporation. When it is acceptable to pierce the veil for the *benefit* of stakeholders who are the victims of a breach of fundamental rights is a question which will be explored in this article.[16]

In short, whatever the theories about corporate personality, for nearly all legal purposes corporations are treated as what Maitland referred to as 'right-and-duty bearing units';[17] and there is no reason why it should be otherwise when it comes to fundamental rights.

[11] [31]. See also *Lee v Lee's Air Farming Ltd* [1961] AC 12 (PC).

[12] Per Lord Sumption delivering the leading judgment in *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [34]. See also Gower and Davies, *Principles of Modern Company Law* (9th edn, Thomson Reuter 2012) 214ff.

[13] N Helfman, (2010) 114 *American Jurisprudence, Proof of Facts 3d* 403.

[14] *Belgium v Spain (Barcelona Traction)* [1970] ICJ Rep 4; *Agrotexim v Greece*, App No 14807/89 (1995) 21 EHRR 250.

[15] The term 'stakeholders' will be used here to denote individuals involved in the company as shareholders, directors or (other) members of staff.

[16] This phenomenon is recognized in international law: *Barcelona Traction* (n 14) paras 59ff and *United States v Italy (ELSI)* [1989] ICJ Rep 15. However, these rulings would appear to have no direct bearing on municipal law.

[17] FW Maitland, *Collected Papers* (HAL Fischer (ed), 3rd vol) (CUP 1911) 307.

III. US LAW

A. The Fundamental Rights of Companies: A General Survey

In the eighteenth century when the US Constitution and Bill of Rights were adopted, extremely few businesses were incorporated. Consequently, these instruments were not drafted with companies in mind. Some of the fundamental rights enshrined in the US Constitution have been held to apply for the benefit of corporations; others have not. It has been said that '[n]o unified theory governs when or to what extent the Constitution protects a corporation'.[18] According to the Supreme Court in *First National Bank of Boston v Bellotti*, whether a particular constitutional provision has this quality will depend on its 'nature, history and purpose'.[19] Whilst this approach appears manifestly sound, precisely what it means is uncertain. As we shall see, the Court of Justice has similarly failed to lay down a coherent approach to this important question.

Corporations enjoy some fundamental rights, but not others.[20] As is only to be expected, they enjoy the right to property under the Fifth Amendment.[21] Apart from that, they can reap the benefits of freedom of speech under the First Amendment.[22] The Supreme Court's stance is justified by two forceful considerations: that, if this right were confined to individuals, then it would be an empty letter, since the corporations which publish their writings could be gagged; and that, to ensure 'the market place of ideas' which is indispensable for democracy, the right of the 'hearer' is at least as important as that of the 'speaker'.[23] Companies also enjoy Fourth Amendment rights so that 'unreasonable searches and seizures' cannot be ordered against them without a warrant, which can only be issued if 'probable cause' is shown;[24]

[18] D Miller, 'Guns, Inc.: *Citizens United, McDonald*, and the Future of Corporate Constitutional Rights' (2011) 86 NYULRev 887, 909 and sources cited there.

[19] 435 US 765 (1977) 779ff.

[20] What follows in no way purports to be an exhaustive survey. See P Blumberg, 'The Corporate Entity in an Era of Multinational Corporations' (1990) 15 DelJCorpL 283, 291; C Mayer, 'Personalizing the Impersonal: Corporations and the Bill of Rights' (1990) 41 HastingsLJ 577; Miller (n 18); M Tushnet, 'Do For-Profit Corporations Have Rights of Religious Conscience?' (2013) 99 CornellLRev Online 70, 71; S Willis, 'Corporations, Taxes, and Religion: the *Hobby Lobby* and *Conestoga* Contraceptive Cases' (2013) 65 SCLRev 1, 35.

[21] *Covington & Lexington Turnpike Road Co v Sandford*, 164 US 578 (1896) 592.

[22] *New York Times v Sullivan* 376 US 254 (1964) (media corporations); *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council* 425 US 748 (1976) (commercial speech, ie advertising).

[23] The best-known proponent of the importance of the 'hearer' was Alexander Meiklejohn. His major work was *Free Speech and its Relation to Self-Government* (Harper 1948), expanded and retitled as *Political Freedom: The Constitutional Principle of the People* (Harper Collins 1960). See Sir John Laws, 'Meiklejohn, the First Amendment and Free Speech in English Law' in I Loveland (ed), *Importing the First Amendment – Freedom of Speech and Expression in Britain, Europe and the USA* (Hart 1998) 123, 136.

[24] *Marshall v Barlow's, Inc*. 436 US 307 (1978), 325 (finding a corporate right against inspections by workplace safety regulators without a warrant). However, the Fourth Amendment does not prevent the issue of subpoenas compelling the production of pre-existing documents:

but 'corporations can claim no equality with individuals in the enjoyment of a right to privacy'.[25] In addition, the rule against double jeopardy under the Fifth Amendment applies to them.[26] In view of its importance in the present context, the prohibition in the same Amendment on compelling a person 'in any criminal case to be a witness against himself' will be considered separately in Part IIIB below.

At all events, all these provisions initially applied only to acts of the federal authorities, but were subsequently extended to the several states by the Due Process Clause of the Fourteenth Amendment, according to which states may not 'deprive any person of life, liberty, or property, without due process of law'. Moreover, corporations are 'persons' for these purposes.[27] They are also 'persons' for the purposes of the Equal Protection Clause of the Fourteenth Amendment which prohibits every state from 'deny[ing] to any person within its jurisdiction the equal protection of the laws'.[28]

For completeness, a brief mention of the *Lochner* era is in order, even though it ended around 80 years ago. In its 'now infamous' judgment in *Lochner v New York* (1905),[29] the Supreme Court struck down a labour law of the State of New York prohibiting bakers from employing staff for more than 60 hours per week, on the grounds that it constituted an unreasonable interference with the liberty of the person and the freedom of contract contrary to the Due Process Clause of the Fourteenth Amendment. Countless judgments followed, in which the Court invalidated a variety of economic regulations adopted at state level, principally concerning labour laws, price regulations and restrictions on entry into business.[30] At the same time, the Supreme Court adopted a highly restrictive interpretation of the Commerce Clause in Article 1, Section 8 of the Constitution, which empowers Congress to 'regulate Commerce … among the several States …'. For instance, in *Adair v United States*[31] it found that federal legislation protecting union membership fell outside the concept of 'commerce'; and in *Hammer v Dagenhart*[32] it quashed a federal prohibition on the interstate transport of goods manufactured in factories employing child labour, on the grounds that it regulated 'manufacturing', not 'commerce'.[33] The *Lochner*

US v Hubbell 530 US 27 (2000), [34]–[36] and C Slobogin, 'Subpoenas and Privacy' (2005) 54 DePaulLRev 805.

[25] *United States v Morton Salt Co.* (1950) 338 US 632, 651–2; and see generally *Federal Communications Commission v AT&T*, 562 U.S. __ (2011).

[26] *United States v Martin Linen Supply Co*. 430 US 564 (1977).

[27] *Pembina Mining Co. v Pennsylvania* 125 US 181 (1877).

[28] ibid 184.

[29] 198 US 45 (1905). The 'now infamous' description is to be found in JE Nowak and RD Rotunda, *Constitutional Law* (8th edn, West 2010) 472.

[30] eg *Coppage v Kansas* 236 US 1 (1915) (state law making it a criminal offence for an employer to preclude his staff from joining a trade union) and *Adkins v Children's Hospital* (1923) 261 US 525 (setting minimum wages for women).

[31] 208 US 161 (1908).

[32] 247 US 251 (1918).

[33] See also *Schechter Poultry v United States*, 295 US 495 (1935) (federal labour standards in the National Industrial Recovery Act 1933, arguably the cornerstone of the New Deal, held *ultra vires* the Commerce Clause on the grounds that it regulated interstate commerce only 'indirectly').

era came to an abrupt end in the 1930s,[34] when the Supreme Court finally accepted President Roosevelt's New Deal to combat the Depression, and began to uphold measures of this kind taken at both state and federal level.[35]

Why mention *Lochner* now? The answer is that this is not merely of historical interest. According to Cass Sunstein, the demise of *Lochner* is not so complete as is generally supposed, because much important case law which is still valid today is founded on the same premise, which he describes as follows: 'Governmental intervention was constitutionally troublesome, whereas inaction was not: and both neutrality and inaction were defined as respect for the behaviour of private actors pursuant to the common law, in light of the existing distribution of wealth and entitlement.'[36]

B. The Privilege against Self-Incrimination

Corporations cannot rely on the privilege against self-incrimination in the Fifth Amendment according to which 'no person' shall be 'compelled in any criminal case to be a witness against himself'.[37] The Supreme Court has explained the rationale behind this rule as being to prevent the use of '[p]hysical torture and other less violent but equally reprehensible modes of compelling the production of incriminating evidence' and the draftsmen of the Fifth Amendment 'cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations so as to nullify appropriate governmental regulations'.[38] It is also worth noting that in *Hale v Henkel*, the antitrust case in which the principle was first established, the Court declared that, if it were otherwise, 'the privilege claimed would practically nullify the whole act of Congress' (the Sherman Act).[39] Having said that, any stakeholder[40] can of course plead the Fifth Amendment to protect herself.

This reasoning is by no means new: since the Middle Ages, the prevention of torture has been one of the main reasons for the privilege against self-incrimination.[41] This strongly suggests that the privilege should not be extended to corporations, since they cannot be physically tortured. Of course, there is always the possibility—fortunately theoretical in all or most Western jurisdictions—that a company which refuses to confess will suffer persecution of the kind meted out to Yukos by the Russian authorities,

[34] *Nebbia v New York* 291 US 502 (1934), *West Coast Hotel v Parrish* 300 US 379 (1937) 397, expressly reversing *Adkins* (n 30).

[35] eg *National Labor Relations Board v Jones & Laughlin Steel* 301 US 1 (1937) upholding the National Labor Relations Act.

[36] C Sunstein, '*Lochner*'s Legacy' (1987) 87 ColumLRev 873, 874. See also C Fried, 'The Supreme Court, 1994 Term' (1995) 109 HarvLRev 13, 33.

[37] *Hale v Henkel* 201 US 43 (1906), 69–70, *United States v White* 322 US 694 (1944) and *Curcio v United States* 354 US 118 (1957) 122.

[38] *United States v White* (n 37) 698–700.

[39] *Hale v Henkel* (n 37) 70.

[40] See (n 15).

[41] RH Helmholz *et al.* (eds), *The Privilege against Self-Incrimination: Its Origins and Development* (University of Chicago Press 1997).

leading to its demise. But such reprehensible treatment itself entails various breaches of fundamental rights which are relatively easy to prove.

For good measure, it should also be pointed out that historically the second basis for the privilege was the individual's right to confess his wrongdoings to a priest in private to save his soul, without being compelled to divulge them in public.[42] Leaving aside the fact that this point may have less resonance today, this rationale is plainly not relevant to companies either.

Finally, the privilege was grounded in the belief that the prosecution should be able to obtain a conviction without enlisting the help of the accused.[43] Alone of the three reasons this is equally valid for legal persons,[44] but in the absence of improper coercion it carries relatively little weight in any event.

C. Discrimination

As already mentioned, corporations may rely on the Equal Protection Clause of the Fourteenth Amendment.[45] An interesting example occurred in *City of Richmond v Croson Co*.[46] There, the Supreme Court struck down a plan requiring contractors with city construction contracts to subcontract at least 30 per cent of the value of their contract to minority-owned businesses. The Court held that this plan violated the Equal Protection Clause because the city had failed to demonstrate a compelling government interest to justify the plan, and the plan was not 'narrowly tailored' to remedy the effects of prior discrimination against minority businesses. In short, the Court found that a measure which treated companies differently on the basis of the race of their owners would be unconstitutional in the absence of some highly exceptional justification. In a sense, since companies themselves are bereft of any racial origin, this involved piercing the veil of incorporation, although the Court did not speak in those terms. Surely, this is wholly warranted, as the discrimination was really targeted at the stakeholders.[47] Precisely the same principle applies where corporations suffer discrimination on the basis of the gender of their stakeholders.[48] As we shall see, the position in EU law is very similar.

D. Political Donations: Citizens United

As we noticed earlier, the First Amendment provides in material part that 'Congress shall make no law … abridging the freedom of speech'; and the

[42] ibid 17ff (RH Helmholz), 100 (J Langbein) and 185–6 (A Alshuler). [43] ibid 21ff.

[44] A O'Neill, *Constitutional Rights of Companies* (Legal Books 2007) 95 (this book focuses primarily on Irish constitutional law).

[45] See the text accompanying (n 28). [46] 488 US 469 (1989).

[47] For present purposes, the fact that the case concerned affirmative action is not relevant.

[48] *Concrete Works of Colorado, Inc. v City of Denver* 36 F 3d 1513 (10th Circuit, 1994) 1515. However, the courts will then employ a less stringent standard of scrutiny than for racial discrimination, in line with *Craig v Boren* 429 US 190 (1976).

States are subject to the same rule by virtue of the Due Process Clause of the Fourteenth Amendment.

Ever since *Buckley v Valeo*,[49] it has been established that making a political donation is a form of 'speech' for these purposes.[50] By equalizing participation in the political realm, the government argued, campaign finance reform did not undermine, but promoted free speech. The Court dismissed this claim on the basis that 'the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment'.[51] This ruling has encountered considerable criticism,[52] not least from Cass Sunstein, who sees it as 'a direct heir to *Lochner*'.[53]

Limits on 'contributions' (payments made directly by or to candidates or parties, or money spent in their support and under their control and coordination) are generally treated favourably, whereas the contrary applies to 'independent expenditures'. The rationale for this distinction is said to be that 'contributions' merely involve 'a general expression of support for the candidate and his views, but [do] not communicate the underlying basis for the support', whereas 'independent expenditures' are directly related to the expression of political views.[54] To what extent this distinction is sound and whether it is really possible to ensure that candidates are not involved either directly or indirectly with 'independent expenditures' are not issues which require our consideration here.

In *Bellotti*,[55] the Supreme Court struck down a Massachusetts law prohibiting corporate expenditure for the purpose of influencing the vote on any referendum submitted to the voters other than one materially affecting the property, business or assets of the corporation. The majority belittled the dangers of undue influence of corporations on the political process, declaring: 'To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it.'[56] They saw no reason to favour the 'speech' of individuals over corporate speech. Four members of the Court dissented. Justice White, with whom Justices Brennan and Marshall joined, declared: '[W]hat some have considered to be the principal function of the First

[49] 424 US 1 (1976).

[50] *Buckley v Valeo* [39]. This proposition has by no means gone unchallenged: eg D Hellman, 'Money Talks but It Isn't Speech' (2011) 95 MinnLRev 953 and S Wright, 'Politics and the Constitution: Is Money Speech?' (1976) 85 YaleLJ 1001.

[51] [49]–[50].

[52] Pronouncing this assertion 'demonstrably incorrect', David Strauss states: 'We do not think of "one person, one vote" as an example of reducing the speech of some to enhance the relative speech of others' ('Corruption, Equality and Campaign Finance' (1994) 94 ColumLRev 1369, 1383); and Elena Kagan has described it as 'one of the most castigated passages in modern First Amendment case law' ('Private Speech, Public Purpose: the Role of Governmental Motive as First Amendment Doctrine' (1996) 63 UChicLRev 415, 464).

[53] Sunstein (n 36) 883–4.

[54] *Buckley* (n 50) [20]ff.

[55] (n 19) [790].

[56]

Amendment, the use of communication as a means of self-expression, self-realization and self-fulfilment, is not at all furthered by corporate speech.'[57] Justice Rehnquist was equally pointed in his dissent.

Because *Bellotti* concerned a referendum, there was no danger of corruption. The same cannot be said of *Citizens United v Federal Election Commission*.[58] Citizens United was a conservative group organized as a non-profit corporation, a political action committee (PAC). In 2008, it produced and released a feature-length documentary criticizing Hillary Clinton, who was seeking the Democratic nomination for President of the United States. To promote this film, it produced various advertisements which fell foul of a federal prohibition on 'electioneering communications' by corporations and unions within 30 days of a primary election.[59] A bare majority of the Supreme Court found this provision to be in breach of the First Amendment. Delivering the judgment for the majority, Justice Kennedy described the contested provision as an 'outright ban' on free speech[60] by 'certain disfavoured speakers', namely corporations and unions.[61] With more than a touch of hyperbole, he added: 'The censorship we now confront is vast in its reach.'[62] In his view, the corporate identity of the 'speaker' was irrelevant.[63] Thus limits on 'independent expenditures' by corporations are unlawful. Although Citizens United was a non-profit corporation, this ruling would seem to apply equally to commercial entities: the Court spoke of 'corporate identity', which covers both these categories.[64]

For the minority, Justice Stevens pointed out the key characteristics of corporations which natural persons do not share, notably limited liability, 'perpetual life' and the fact they can be controlled by foreign interests[65]—as well as the fundamental fact that they cannot run for office or vote.[66] In short, 'although they make enormous contributions to our society, corporations are not actually members of it'.[67] At great length, he listed the numerous public interest reasons for upholding the restriction, including: a distortion of the political process; the risk of corruption; and the need to ensure that the electors' voices on political issues are not drowned by corporate interference. None of these considerations weighed with the majority.

[57] [804].

[58] 558 US __ (2010), reversing *Austin v Michigan Chamber of Commerce* 494 US 652 (1990) and partially reversing *McConnell v Federal Election Commission* 540 US 93 (2003).

[59] Section 203 of the Bipartisan Campaign Reform Act 2002. [60] [20]. [61] [25]. [62] [38].

[63] eg [26], [30], [34]–[35] and [48]–[49]. See also Roberts CJ concurring at [9] and Scalia J concurring. The latter described corporations as associations of individuals ([7]), thereby denying the fact that corporations are separate legal persons.

[64] S Saval, 'Corporations United: Reassessing *Citizens United v Federal Election Commission* to Propose that Political Speech Regulations of For-Profit Corporations Should Be Given the Same Reduced Judicial Scrutiny as Commercial Speech Regulations' (2011) 41 StetsonLRev 175, 195.

[65] [75]. As pointed out there, in state elections even American 'out of State' companies are equivalent to foreign companies. [66] [2]. [67] [2].

From these judgments it is plain that, in the absence of exceptional circumstances, corporate donors must be subject to no greater restrictions than human donors.[68] Predictably, even though various restrictions on electoral expenditure by natural and legal persons remain,[69] these rulings, together with others striking down limits on political donations,[70] have led to inordinately high electoral spending.[71] Apart from the ills listed by Justice Stevens, this saps the political process in another way: it requires politicians to devote a considerable part of their working day to raising funds to be re-elected, when they should be fulfilling the duties of their office.[72] No doubt, the marked increase in the appointment of political fundraisers to US ambassadorships[73] is also a consequence of *Citizens United*.

E. Religious Freedom and Hobby Lobby

The opening words of the First Amendment to the US Constitution read: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof'. The first limb is known as the Establishment Clause, but we are concerned here with the second limb, the Free Exercise Clause, which was subsequently extended to acts of the states

[68] Amongst the critics of this ruling was President Obama himself in his State of the Union speech of 27 January 2010 <http://www.whitehouse.gov/the-press-office/remarks-president-state-union-address>. He focused particularly on the fact that foreign companies would benefit. On this point, see also R Hasen, '*Citizens United* and the Illusion of Coherence' (2011) 109 MichLRev 581, 605ff.

[69] That is largely because of the Court's general tolerance of restrictions on 'contributions'. However, in *McCutcheon v Federal Election Commission* 572 US __ (2014), a statutory provision limiting 'contributions' was held contrary to the First Amendment. See generally S Issacharoff, 'On Political Corruption' (2010) 124 HarvLRev 118; J Levitt, 'Confronting the Impact of *Citizens United*' (2010) 29 YaleL&Pol'yRev 217, 220ff; and D Winik, 'Citizens Informed: Broader Disclosure and Disclaimer for Corporate Electoral Advocacy in the Wake of *Citizens United*' (2010) 120 YaleLJ 622.

[70] *Randall v Sorrell* 548 US 230 (2006) and *Davis v Federal Election Commission* 554 US 724 (2008).

[71] See, or preferably listen to, this report from National Public Radio entitled 'Take the Money and Run for Office' (30 March 2012) <http://www.thisamericanlife.org/radio-archives/episode/461/transcript>.

[72] ibid. This problem had been drawn to the attention of the Supreme Court in *Randall v Sorrell* (n 70), but this argument was dismissed at [245]–[246] on the grounds that it would not have influenced the Court in *Buckley* (n 49).

[73] Editorial Board, 'Ambassadorships are President Obama's Political Plums' *Washington Post* (Washington DC, 13 February 2014) <http://www.washingtonpost.com/opinions/ambassadorships-are-president-obamas-political-plums/2014/02/13/c605a892-9349-11e3-83b9-1f024193bb84_story.html>. The recent appointment of a soap opera producer to be ambassador to Hungary despite her obvious lack of qualifications for the post has aroused particular controversy: A Saenz, 'Soap Opera Producer Is Now an Ambassador and John McCain Isn't Happy' *ABC News* (New York, 2 December 2014) <http://abcnews.go.com/Politics/soap-opera-producer-now-ambassador-john-mccain-happy/story?id=27307275>; T Lifson, 'Disgraceful choices for ambassadors to Hungary and Argentina confirmed by Senate' *American Thinker* (California, 3 December 2014) <http://www.americanthinker.com/blog/2014/12/disgraceful_choices_for_ambassadors_to_hungary_and_argentina_confirmed_by_senate.html>.

by the Due Process Clause of the Fourteenth Amendment. According to settled law, one category of corporate persons, namely churches,[74] can rely on the Free Exercise Clause,[75] as one would expect. Prior to *Hobby Lobby*, the Supreme Court had never been called upon to decide whether a company enjoys the freedom of religion.

For an understanding of the issues raised in that judgment, it is necessary to give brief consideration to three earlier cases, namely *Sherbert v Verner*,[76] *Wisconsin v Yoder*[77] and *Employment Division v Smith*.[78] In *Sherbert*, it was held that the State could not deny a Seventh-Day Adventist unemployment benefits when she declined an offer of a job which would have required her to work on Saturdays, her Sabbath. In *Yoder*, the respondent had been fined for refusing to send his children aged 14 and 15 to school in accordance with his religious belief as a member of the Old Order Amish; this was contrary to the law of Wisconsin, which required school attendance up to the age of 16. This was held to be a breach of the Free Exercise Clause, as only interests 'of the highest order' could justify restrictions on the free exercise of religion.

On the other hand, the Supreme Court will not entertain a challenge to taxation on the grounds that public funds are spent in a manner contrary to the litigants' religious beliefs: as it pointed out, the tax system could not function if the tax system was open to challenge on such grounds.[79] Subsequently, the Court explained this ruling on the basis that '[b]ecause of the enormous variety of government expenditures funded by tax dollars, allowing tax-payers to withhold a portion of their tax obligations on religious grounds would lead to chaos'.[80] The same applies to an employer's obligation to make social security payments for her staff.[81]

In stark contrast to these cases (other than those concerning tax or social security for employees), in *Employment Division v Smith*, the prohibition imposed by Oregon on the possession and consumption of a drug known as peyote was held to be compatible with the Free Exercise Clause, although it was part of the religious ritual of the Native American Church, of which Mr Smith was a member. The Supreme Court found against him. Since restricting the exercise of religion was not the object but merely the incidental effect of a 'generally applicable and otherwise valid provision', the court held, there had been no interference with the free exercise of religion within the meaning of the First Amendment.[82]

[74] The term 'church' will be used here to refer to religious bodies of all faiths.

[75] Thus in *Church of the Lukumi Babalu Aye Inc v City of Hialeah* 508 US 520 (1993) a church successfully challenged a local ordinance prohibiting ritual animal sacrifice. In *Hossana-Tabor Evangelical Lutheran Church v Equal Employment Opportunity Commission* 565 US __ (2012), the Free Exercise Clause was even held to shield churches from legislation prohibiting discrimination against the handicapped.

[76] 374 US 398 (1963). [77] 406 US 205 (1972). [78] 494 US 872 (1990).

[79] *United States v Lee* 455 US 252, 260 (1982). [80] Justice Alito for the majority in *Hobby Lobby* at [47]. [81] *United States v Lee* (n 79).

[82] [878].

Such was the hostility provoked by the latter judgment that the Religious Freedom Restoration Act 1993 ('the RFRA') was adopted for the express purpose of reversing it and of restoring the rulings in *Sherbert v Verner* and *Wisconsin v Yoder*. Section 3(a) RFRA lays down the principle whereby 'Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability'. According to the exception enshrined in section 3(b), government may impose such a burden if 'it demonstrates that the application of the burden to the person (1) is in furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering that compelling governmental interest'. The RFRA creates a rule of construction deemed to apply even to subsequent legislation, in the absence of a clear indication to the contrary.[83]

The Affordable Care Act 2010, familiarly known as 'Obamacare', requires employers to cover certain preventive-health services without any contribution being made by the beneficiaries.[84] These services include contraception by all the methods approved by the Food and Drug Administration. The legislation is subject to certain exceptions. In particular, churches were exempted, as were employers with fewer than 50 full-time employees. Failure by a non-exempted employer to pay for such coverage gave rise to the obligation to pay a substantial penalty.

Hobby Lobby Stores Inc. is a national chain of 500 arts and crafts stores with more than 13,000 employees. The five individuals who own the company ('the Green family') are devout Christians and maintain a sincere conviction that human life begins at conception. Although they do not oppose contraception as such, they have a profound objection to four out of the twenty methods of contraception approved by the FDA, since they consider those four methods to be a form of abortion.[85] No doubt, many of its employees do not share these beliefs, as the company is required by law to refrain from religious discrimination in its recruitment policy.[86]

According to the Dictionary Act,[87] unless the context indicates otherwise, the word 'person' includes 'corporations, companies, associations, firms,

[83] *Gonzales v O Centro Espirita Beneficente Uniao do Vegetal* 546 US 418 (2006) appears to be the only Supreme Court judgment giving a substantive interpretation of the RFRA prior to *Hobby Lobby*. It was held there that the RFRA allowed a Christian Spiritist sect to obtain an exemption from a federal law which prevented its members from receiving communion in the form of a sacramental tea.

[84] That Act was challenged on other grounds with partial success in *National Federation of Independent Business et al. v Sebelius* 567 US—(2012). Those proceedings have no bearing on the issues considered here.

[85] The case was joined with *Conestoga Wood Specialities Corp. et al. v Burwell*. Since the facts of that case are the same for all material purposes, it does not require separate consideration.

[86] 42 US Code section 2000e (see Justice Ginsburg's opinion at [16]–[17]). Also, there is a constitutional right to contraception (*Griswold v Connecticut* 381 US 479 (1965)) and, under certain conditions, to abortion (*Roe v Wade* 410 US 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania v Casey* 505 US 833 (1991)).

[87] 1 US Code section 1 (2012 edn).

partnerships, societies, and joint stock companies, as well as individuals'.[88] Consequently, the question before the Supreme Court in *Hobby Lobby* was whether the context indicated that commercial companies were not persons for the purposes of section 3 of the RFRA.

By a majority of five judges to four, the Supreme Court found for the company. The Green family, it held, did not 'forfeit all RFRA protection when they decided to organize their businesses as corporations rather than sole proprietorships or general partnerships'.[89] Congress provided protection for people like the Greens by treating corporations as 'persons' within the meaning of the RFRA; 'the purpose of this fiction is to provide protection for human beings' and a corporation is 'simply a form of organization used by human beings to achieve desired ends'.[90]

Equally, the majority dismissed the contention that a commercial entity could not 'exercise' a religion. In the Court's view, it could perfectly well have a dual purpose, namely to make a profit and to promote certain values such as environmental protection or particular religious beliefs.[91] On this basis, the Court did not appear to see any material distinction between companies and churches.

With respect, this reasoning appears flawed on several counts. Most importantly, it fails to take into account the crucial fact that a company is a legal entity in its own right which grants its owners the immense benefit of limited liability and which can outlive its owners. In return for these invaluable advantages, the owners have to be prepared to forfeit certain rights of their own. As we shall see, it may well be justified to pierce the veil of incorporation for the benefit of a company's stakeholders, where the company suffers discrimination by reason of their gender, race, religion or other characteristic; but that is another matter. Second, churches are fundamentally different from companies: the purpose of the former is to practise and disseminate their particular religion, whereas companies exist for the purpose of making profits; any other values or beliefs which they may seek to promote must be regarded as secondary to that overarching purpose.[92] It is submitted that corporations can no more exercise a religion (or profess to be a freethinker or an atheist, for that matter) than they can have a race or a gender.

Hobby Lobby Stores Inc. was a 'closely held corporation' (ie a private company owned by a very small group of individuals). The majority of the Court did not exclude the possibility that publicly quoted companies might also be able to rely on the RFRA, but merely stated that they were 'unlikely' to assert such claims.[93] This is not convincing. In any case, as Justice

[88] This definition bears a striking similarity to the provision of the Interpretation Act 1978 (UK) which defines 'person' to include 'a body of persons corporate or unincorporate' unless the contrary intention appears.

[89] Justice Alito's judgment at [2]. [90] Justice Alito at [18]. [91] Justice Alito at [22]ff.

[92] Justice Ginsburg at [16]–[18]. Similarly, Tushnet (n 20) 76; contrast Willis (n 20).

[93] Justice Alito at [29].

Ginsburg pointed out,[94] not all 'closely held corporations' are small: Mars Inc. and Cargill Inc. fall into this category but each has a turnover of several billion dollars.

The majority claimed that employees of companies with religious objections could continue to receive the necessary health coverage for the contraceptives concerned, the most straightforward way of achieving this being simply for the Government to assume the cost itself.[95] Apparently, the majority were oblivious to the competitive advantage gained by such companies.[96] They went on to rule that the contested measure did 'substantially burden the exercise of religion' within the meaning of section 3(a) RFRA but did not fall within the exception in section 3(b) because less restrictive alternatives were available.[97] Accordingly, it was unlawful as being contrary to that statute. In these circumstances, there was no need to consider the Free Exercise Clause of the First Amendment.[98]

Finally, the majority claimed that their judgment was limited to the measure in issue in the case at hand: in other circumstances, different considerations would apply. Justice Ginsburg was not convinced that the repercussions of this ruling are so restricted.[99]

In her forceful dissenting opinion, Justice Ginsburg, with whom Justice Sotomayor concurred, took issue with the majority on every significant point. In particular, she spoke of the 'havoc' which the majority judgment would create.[100] Justices Breyer and Kagan also agreed with this dissenting opinion except on the point which interests us here, namely the question as to whether companies can rely on the RFRA; they found it unnecessary to decide that point in *Hobby Lobby*.

In short, five judges found in favour of the company on this crucial point, while only two endorsed the opposite view. Of course, the Court had the luxury of being able to decide this case, knowing that the RFRA or the Act of 2010 could be amended with relative ease—unlike the First Amendment. The outcome might well have been different under the Free Exercise Clause, since the test is not the same; but crucially the Court's ruling that a company may 'exercise' a religion would appear to apply equally to that Clause.[101]

[94] At [19]–[20]ff.

[95] Justice Alito at [41]. This is compounded by the majority's assurance that there would be no difficulty in ascertaining whether a company's religious objection is sincere (Justice Alito at [29]).

[96] Contrast Justice Ginsburg at [32].

[97] Justice Alito at [31]ff. On this part of the case, Justice Kennedy delivered a concurring judgment. under the RFRA.

[98] Justice Alito at [49].

[99] Especially at [33]–[34].

[100] At [2].

[101] A profusion of articles appeared even before the judgment was delivered. Those advocating the approach subsequently taken by the majority include Willis (n 20); contrast CM Corbin, 'Corporate Religious Liberty: Why Corporations Are Not Entitled to Religious Exemptions' American Constitution Society for Law and Policy Issue Brief, January 2014 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2384136>. Tushnet (n 20) tentatively endorsed the latter position.

IV. EUROPEAN LAW

A. The Link between Union Law and the European Convention on Human Rights

Although all its 28 Member States are party to the European Convention on Human Rights ('the ECHR' or 'the Convention'), the EU itself is not yet. Article 6(2) TEU requires the EU to accede to the Convention and an accession Agreement was duly signed.[102] However, on 18 December 2014, the Court of Justice held this Agreement incompatible with the EU Treaties in several respects.[103] The Agreement will therefore require substantial renegotiation, a process which can be expected to take several years.

In any case, ever since 1974—long before the Treaty on European Union came into existence—the Court has constantly had regard to the ECHR. Indeed, the Court has repeatedly stated that the ECHR holds 'special significance' for EU law.[104] Now Article 6(3) TEU provides: 'Fundamental rights, as guaranteed by the [ECHR] … and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.' In addition, the Charter of Fundamental Rights of the European Union[105] contains a number of provisions which mirror those of the ECHR; and according to Article 52(3) those provisions in the Charter have the same meaning and scope as their counterparts in the Convention. Consequently, the ECHR must be the starting point for any consideration of fundamental rights in Union law.

B. Fundamental Rights of Companies under the ECHR

The ECHR, which was concluded under the auspices of the Council of Europe, is not linked to any kind of political union. Although it innovated in providing for the right of individual petition, it is unquestionably an instrument of classic international law. Consequently, it differs profoundly from the American Constitution and from EU law. Needless to say, the former is the constitution of a sovereign State, while the EU Treaties aim to create 'an ever closer union among the peoples of Europe'[106] founded on 'a new legal order of international

[102] See Final Report to the CDDH, 'Fifth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights' (Strasbourg, 10 June 2013) at <http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports/47_1(2013)008rev2_EN.pdf>. This Agreement provides for the Union to accede to Protocols 1 and 6 to the ECHR, since all Member States are party to them, but not to the other substantive Protocols.

[103] Opinion 2/13 [2015] OJ C64/2.

[104] eg Cases C-274/99P *Connolly v Commission* [2001] ECR I-1611, para 37 and C-415/05P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, para 283. The Court first referred to the ECHR in Case 4/73 *Nold* v *Commission* [1974] ECR 491.

[105] 'The Charter'. The Charter was first promulgated in 2000 ([2000] OJ C364/1). The current version is published in [2007] OJ C303/1 and again in [2012] OJ C326/391.

[106] Preamble to, and Article 1 of, the Treaty on European Union [2008] C115/13.

law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals'.[107]

At all events, unlike the American Constitution, the ECHR, which was opened for signature in 1950, contains various indications that some of its provisions apply for the benefit of companies.[108] First, Article 10 contains a sentence stating: 'This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema *enterprises*'.[109] Second, Article 34 of the Convention provides: 'The Court may receive applications from any person, non-governmental organisation or group of individuals'. This has been interpreted widely to cover companies. What is more, Article 1 of Protocol 1 to the Convention, which was opened for signature in 1951, contains a sentence which reads: 'Every natural or *legal person* is entitled to the peaceful enjoyment of his possessions.'[110]

The very first case in which a company succeeded in an action before the European Court of Human Rights ('the ECtHR' or 'the Strasbourg court') was *Sunday Times v United Kingdom*, where that Court found a breach of Article 10 on the freedom of expression,[111] taking its cue from the above-mentioned ruling in *New York Times v Sullivan*.[112] Since then, the ECtHR has applied several other provisions of the Convention in favour of companies.[113] What is more, in *Airey v Ireland*, the ECtHR held that, while the rights enshrined in the Convention are 'essentially civil and political', 'many of them have implications of a social or economic nature'.[114] At the same time, as one would expect, the Court has repeatedly asserted that economic rights are less deserving of protection than political and civil rights.

This is clearly illustrated by the case law on Article 8 ECHR, the first paragraph of which reads: 'Everyone has the right to respect for his private and family life, his home and his correspondence.' A series of public interest exceptions is contained in Article 8(2). In *Niemietz v Germany*,[115] the ECtHR held a police search in the offices of a self-employed lawyer where he also lived

[107] Case 26/62 *van Gend en Loos v Netherlands* [1962] ECR 3, 12.

[108] See N Bratza, 'The Implications of the Human Rights Act 1998 for Commercial Practice' [2000] EHRLR 1; O De Schutter, 'L'accès des personnes morales à la Cour européenne des droits de l'homme' in SM Helmons, *Mélanges offerts à Silvio Marcus Helmons* (Bruylant 2003) 83; M Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (OUP 2006); E Fura-Sandström, 'Business and Human Rights – Who Cares?' in L Wildhaber, *Liber Amicorum Luzius Wildhaber: Human Rights – Strasbourg Views* (Engel 2007) 159.

[109] Emphasis added.

[110] Emphasis added.

[111] App No 6538/74, (1979–80) 2 EHRR 245 ('thalidomide'). See also *Autronic AG v Switzerland* App No 12726/87, (1990) 12 EHRR 485, para 47.

[112] (n 22).

[113] eg art 6(1) ECHR on the right to a fair trial: *Terra Woningen v Netherlands*, App No 20641/92 (1996) 24 EHRR 456, *Comingersoll v Portugal*, App No 35382/97 (2001) 31 EHRR 31 *Capital Bank v Bulgaria*, App No 49429/99 (2007) 44 EHRR 48. The applicant in that case was a natural person.

[114] App No 6289/73 (1980) 2 EHRR 305, para 26.

[115] App No 13710/88 (1993) 16 EHRR 97.

to be an interference with his 'home'; but it added that the discretion enjoyed by the Contracting Parties under Article 8(2) 'might well be more far-reaching where professional or business activities or premises were involved than would otherwise be the case'.[116] This was followed by *Société Colas Est v France*, where it was held that the concept of a 'home' in Article 8(1) extended to a company's offices.[117] Whilst this interpretation may seem questionable as a matter of English, the Court pointed out that it is fully consonant with the French text, since the word '*domicile*' has a broader connotation than the word 'home' and may extend to a professional person's office.[118] However, the Court suggested that, under the public interest exception in Article 8(2) ECHR, the Contracting Parties might have broader powers to conduct inspections on such premises than in the home of a natural person, at least when she is acting in a personal capacity.[119]

Another example relates to freedom of expression under Article 10 ECHR. Whilst this provision has been held to extend to commercial expression (ie advertising and promotion), the ECtHR has repeatedly stressed that political expression, including expression on matters of public interest and concern, qualifies for a higher level of protection.[120]

That is not to say, however, that companies always enjoy more limited rights under the Convention than natural persons; nor should they. As we saw at the outset, the *Yukos*[121] case graphically illustrates how companies cannot function at all if they are deprived of their right to property under Article 1 of Protocol 1 or the right to a fair trial under Article 6. Generally speaking, there is no reason why they should be less favourably treated as regards these rights than natural persons, since otherwise they cannot enforce such substantive rights as they have.

C. The Fundamental Rights of Companies under Union Law Generally

The founding treaties of what is now the EU were concluded in the 1950s. Their focus was exclusively economic, but with successive treaty amendments social policy has assumed increasing importance,[122] and a host of other policies such as consumer protection and environmental protection have been added. Today, Article 3(3) TEU provides that the Union 'shall work for … a highly competitive social market economy, aiming at full employment and social progress'. What is more, the Treaties contain a plethora of 'mainstreaming' provisions which require the Union to take account of various needs in all its policies and activities. Examples include: social policy, education and health

[116] para 31.
[117] App No 37971/97 (2004) 39 EHRR 17, confirmed in *Bernh Larsen Holding v Norway*, App No 24117/08 (2014) 58 EHRR 8, para 104. [118] para 40. [119] para 49.
[120] *Hertel v Switzerland*, App No 25181/94 (1998) 28 EHRR 534, para 47; *Verein gegen Tierfabriken v Switzerland*, 24699/94, (2002) 34 EHRR 4, para 66; *Steel and Morris v United Kingdom*, 68461/01, (2005) 41 EHRR 403, para 88.
[121] (n 3). [122] P Watson, *EU Social and Employment Law* (2nd edn, OUP 2014) ch 3.

(Article 9 TFEU); environmental protection (Article 11 TFEU); and consumer protection (Article 12 TFEU). No doubt, in the most unlikely event that the Court of Justice were ever minded to pursue an approach in any way similar to that in *Lochner*, these provisions would preclude it from doing so. Having said that, by its very nature, EU law remains far more focused on economic rights than the ECHR.

The founding treaties contained no provisions on fundamental rights. However, following its seminal judgment in *Internationale Handelsgesellschaft*,[123] the Court of Justice began to build up its own body of fundamental rights law, based on 'the constitutional traditions common to the Member States'.[124] Beginning with *Nold*,[125] it also had regard to the ECHR. As we saw in Part IVA above, Article 6(3) TEU now requires the EU to respect both the ECHR and the constitutional traditions common to the Member States as general principles of law. Furthermore, this body of case law is now largely enshrined in the Charter, which was first 'solemnly proclaimed' in 2000[126] and then again in an amended form in 2007.[127] On the entry into force of the Lisbon Treaty in December 2009, it became binding with the same value as the Treaties: Article 6(1) TEU.

The Charter contains both 'rights' and 'principles'. 'Rights' are directly enforceable, whereas 'principles' only take effect once the requisite implementing acts are in place: Article 52(5). The language of each article may give an indication as to whether it provides for a right or a principle, as may the official Explanations to the Charter,[128] which the courts are required to take into account by virtue of Articles 6(1) TEU and 52(7) of the Charter. The core freedoms in Titles I and II of the Charter such as the right to life (Article 2), freedom from torture (Article 4), respect for private and family life (Article 7) and freedom of religion (Article 10), expression (Article 11) and association (Article 12) are 'rights' in this sense. The same applies to such economic rights as the right to conduct a business (Article 16) and the right to property (Article 17). In contrast, it now seems clear that Article 26 of the integration of persons with disabilities and Article 27 on workers' rights to information and consultation by their employer are mere 'principles';[129] and the same probably holds true for most of the articles relating to social and labour law[130] as well as environmental and consumer protection. Arguably, then, the Charter leans more heavily towards economic rights than the Treaties

[123] Case 11/70 [1970] ECR 1125. [124] para 4. [125] (n 104).
[126] [2000] OJ C364/11; see JP Jacqué, 'The Explanations Relating to the Charter of Fundamental Rights of the European Union' in S Peers *et al.* (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart 2014) 1715. [127] (n 106).
[128] [2007] OJ C303/17
[129] Cases C-356/12 *Glatzel* [2014] OJ C253/5, paras 74ff and C-176/12 *Association de Médiation Sociale* [2014] OJ C184/5 respectively.
[130] See Vice-President Lenaerts 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 EuConst 375, 399–400.

themselves; but naturally the Treaties and the Charter must be read as a coherent whole.

Indeed, the four fundamental freedoms enshrined in the Treaties (free movement of goods, persons, services and capital), which are generally not regarded as constituting fundamental rights as such,[131] can weigh as heavily —or sometimes more heavily—than some rights enshrined in the Charter. At least, that is the picture which emerges from the hotly debated judgments in *Viking*[132] and *Laval*,[133] where it was held—to simplify somewhat—that, while workers enjoy the right to take collective industrial action under Article 28 of the Charter, that must not be taken so far as to thwart the essence of free movement.

According to Article 51(1) of the Charter, this instrument applies to the EU's institutions and bodies as well as to the Member States, but 'only where they are implementing Union law'.[134] As already mentioned, Article 52(3) provides that, insofar as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same. However, it also states that Union law may provide more extensive protection than the ECHR. Given that by its very nature the Union is more concerned with economic activities than the ECHR, Union law naturally tends to give greater prominence to fundamental rights in the economic sphere. That is precisely what occurred in *DEB*,[135] where the Court of Justice held that in some circumstances companies enjoy the right to legal aid under the third paragraph of Article 47 of the Charter.[136]

At all events, the Charter contains no provision indicating which articles apply to legal persons—which is all the more surprising when it is recalled that it came 50 years after the ECHR and the German constitution or Basic Law.[137] Exceptionally, Articles 42 to 44 of the Charter (on the rights to access to documents, to submit a complaint to the Ombudsman and to

[131] However, the Court has been known to refer to the free movement of goods as a fundamental right: Case C-228/98 *Dounias* [2000] ECR I-577, para 64, and the free movement of natural persons has unsurprisingly been graced with that description more frequently: Case 152/82 *Forcheri v Belgium* [1983] ECR 2323, para 11; see also Case 222/86 *UNCTEF v Heylens* [1987] ECR 4097, para 14, and AG Lenz in Case C-415/93 *Bosman* [1995] ECR I-4921, para 203. See P Oliver and WH Roth, 'The Internal Market and the Four Freedoms' (2004) 41 CMLRev 407 and P Oliver *et al., Free Movement of Goods in the European Union* (5th edn, Hart 2010) 11–13.

[132] Case C-438/05 [2007] ECR I-10779.

[133] Case C-341/05 [2007] ECR I-11767.

[134] As to the meaning of this phrase, see Case C-617/10 *Åkerberg Fransson* (European Court of Justice, judgment of 26 February 2013).

[135] Case C-279/09 [2010] ECR I-13849, noted by P Oliver in (2011) 48 CMLRev 2023.

[136] In *VP Diffusion Sarl v France*, App No 14565/04 (ECthR, decision of 26 August 2008), the ECtHR had upheld a national measure providing for legal laid to non-profit entities but not to companies. After the ruling in *DEB*, the ECtHR delivered a judgment which may rule out the possibility of companies enjoying such a right: *Granos Organicos Nacionales v Germany*, App No 19508/07 (ECtHR, judgment of 22 March 2012).

[137] Basic Law for the Federal Republic of Germany as amended to 11 July 2012 <http://www.gesetze-im-internet.de/englisch_gg/basic_law_for_the_federal_republic_of_germany.pdf>; see Part V below.

petition the European Parliament, respectively) expressly confer rights on them; but these are hardly the most important rights.[138]

The first sentence of Article 1 states: 'Human dignity is inviolable.' Plainly, only natural persons fall within the scope of this provision.[139] This follows not only from the word 'human', but also from the fact that this sentence is lifted word for word from the opening sentence of Germany's Basic Law; and, as we shall see in Part V below, the latter provision does not extend to legal persons. The official Explanations[140] state: 'The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights'. Despite this highly authoritative statement, companies enjoy a number of fundamental rights under the Charter, although they are not underpinned by Article 1.

Unsurprisingly, companies may rely on the right to property in Article 17.[141] That is not least because the official Explanations state that Article 17 is based on Article 1 of Protocol 1 to the ECHR; and, as mentioned earlier, the latter provision is expressed to apply in favour of companies. Equally, as is only to be expected, they enjoy the freedom to conduct a business under Article 16 of the Charter.[142] Other provisions of the Charter which confer rights on companies include: the first paragraph of Article 47 (the right to an effective judicial remedy),[143] the first paragraph of Article 48 (presumption of innocence)[144] and the second paragraph of the same article (rights of defence).[145]

The Court took a more nuanced approach in *Schecke*, a case relating to the protection of personal data. The applicants challenged EU measures which provided for the publication of the names of the beneficiaries of funds paid under the Common Agricultural Policy and the amounts which they had received. As regards natural persons, this was held to be in breach of Articles 7 (respect for private life) and 8 (protection of personal data) of the Charter. As to companies, the Court ruled that they could only claim to the extent that their 'official title' identified one or more natural persons.[146]

The Court has yet to develop a systematic approach to the question as to which provisions of the Charter apply in favour of companies and, if so, in what circumstances. The closest it has come to doing so was in *DEB*,[147] a preliminary reference from a German court which related to the third

[138] Indeed, the rights under arts 43 and 44 are not even (fully) enforceable: Cases T-103/99 *Associazione delle cantine sociali venete v European Ombudsman and European Parliament* [2000] ECR II-4165 and C-261/13P *Schönberger v European Parliament* [2015] OJ C46/8 respectively.

[139] Catherine Dupré, Commentary on Article 1 in 'The EU Charter of Fundamental Rights: A Commentary' (n 127) para 1.28.

[140] (n 128).

[141] Cases C-275/06 *ProMusicae v Telefónica de España* [2008] ECR I-271, paras 61ff and C-70/10 *Scarlet Extended* [2011] ECR I-11959.

[142] Cases C-70/10 *Scarlet Extended* [2011] ECR 11959 and C-426/11 *Alemo-Herron* [2013] OJ C260/6.

[143] *ProMusicae* (n 141).

[144] Case T-474/04 *Pergan v Commission*, [2007] ECR II-4225, para 75.

[145] Case C-550/07 P *Akzo v Commission* [2010] ECR I-8301, para 92.

[146] Cases C-92/09 and C-93/09 [2010] ECR I-11063, paras 45–53.

[147] (n 135).

paragraph of Article 47. That paragraph reads: 'Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.' This provision relates exclusively to civil proceedings, as criminal legal aid is governed by Article 48.[148] The Court held that this provision applied in favour of companies, although it indicated that they are less deserving of legal aid than natural persons and non-profit entities.[149] It gave two reasons for finding that companies could rely on the provision in question.

(1) In the German version, all the paragraphs of Article 47 use the word '*Person*' which can apply to both natural and legal persons. In contrast, numerous other provisions of the Charter such as Articles 1, 2, 3, 6, 29, 34 and 35 employ the word '*Mensch*' which refers exclusively to human beings. This *might* be an indication that legal persons are within the scope of Article 47, the Court held.
(2) Article 47 is to be found in Title VI of the Charter, which relates to justice and which contains various provisions applying both to natural and to legal persons. This *was* an indication that the provision on legal aid extended to legal persons, according to the Court.

While this reasoning was appropriate to the instant case, it cannot be regarded as a comprehensive approach adapted to all circumstances. The first of these criteria is of limited value, as the Court itself acknowledged by saying that this 'may' be an indication as to the personal scope of the provision. When construing a provision of Union law, the Court never relies on one language version alone. In any case, some provisions of the Charter use neither '*Person*' nor '*Mensch*'. For instance, many provisions such as Articles 49(1) and 50 use the word '*niemand*' (no-one), while Article 48 speaks of '*jeder Angeklagter*' (every accused). The second criterion, in contrast, appears to be of general application and could be added with profit the 'nature, history and purpose' test devised by the US Supreme Court in *Bellotti*.[150]

Naturally, in view of the inherent complexity of the subject matter, devising an appropriate general formula can only be the first step. Of greater concern is the fact that, apart from the judgments in *Schecke* and *DEB*, there is little evidence that the Court has directed its mind to the need to proceed with great caution when called upon to decide whether to extend to individuals existing case law on the fundamental rights of individuals. The same may fairly be said of the Advocates-General. A welcome recognition of this need may be found in *SGL Carbon*, where AG Geelhoed asserted that it is 'not possible simply to transpose the findings of the European Court of Human

[148] See the Explanations to art 48.
[149] Clearly, the Court of Justice had in mind the decision of the ECtHR in *VP Diffusion* (n 136).
[150] (n 19).

Rights [on natural persons] without more to legal persons and undertakings'.[151] However, it is by no means obvious that this view is generally shared by the other AGs.[152]

D. The Freedom to Conduct a Business

Article 16 of the Charter reads as follows: 'The freedom to conduct a business in accordance with Union law and national laws and practices is recognised.'[153] This right has no counterpart in the ECHR or its protocols,[154] but derives from the Constitutions of a number of Member States.[155] It was first recognized by the Court of Justice in *Nold*.[156] The overwhelming majority of arguments based on this right have been dismissed,[157] but in two recent cases the Court has ruled in favour of litigants relying on it. In both cases, the facts were extreme.

Scarlet Extended[158] concerned unauthorized file-sharing on the Internet contrary to various provisions of EU law. The Belgian copyright society obtained a judicial injunction against Scarlet Extended, an ISP, requiring it to monitor all electronic communications made on its services and, if necessary, to block them at its own expense and for an unlimited period. In view of its disproportionate nature, this injunction was held to contravene Article 16.

Alemo-Herron,[159] related to Council Directive 2001/23 on safeguarding employees' rights in the event of transfers of undertakings.[160] The UK Supreme Court asked whether 'dynamic clauses referring to collective agreements' were compatible with the Directive and with fundamental rights. These are clauses which have been agreed between the employees and the transferor employer to abide by the conditions set out in future collective agreements, even where the employer cannot be a party to the negotiations leading to that agreement. The Court of Justice stated that, by virtue of

[151] Case C-301/04 P [2006] ECR I-5915, para 63.

[152] See eg the AG's Opinion in Case C-17/10 *Toshiba* [2012] OJ C98/3, discussed in Part IVF below.

[153] See P Oliver, 'What Purpose Does Article 16 of the Charter Serve?' in U Bernitz, X Groussot and F Schulyok (eds), *General Principles of EU Law and European Private Law* (Wolters Kluwer 2013) 281; and F Schmidt, *Die unternehmerische Freiheit im Unionsrecht* (Duncker & Humblot 2010).

[154] However, the ECtHR has held that an existing professional practice or business constitutes 'possessions' within the meaning of art 1 of Protocol 1 to the ECHR: *van Marle v Netherlands* App Nos 8543/79, 8674/79, 8675/79 and 8685/79 (1986) 8 EHRR 483; *Wendenburg v Germany*, App No 71630/01 (2003) 36 EHRR CD 154; this includes goodwill (*Wendenburg*). But this principle does not extend to future earnings (*Ian Edgar (Liverpool) Ltd v United Kingdom*, App No 37683/97 [2000] ECHR 700, as art 1 does not confer the right to acquire property.

[155] eg arts 12(1) of Germany's Basic Law and 45(3) and 41 of the Irish and Italian Constitutions respectively.

[156] (n 104).

[157] eg *Nold* (ibid), Cases 265/87 *Schräder* [1989] ECR 2237, para 15, C-177/90 *Kühn* [1992] ECR I-35, para 16, C-280/93 *Germany v Council* (bananas) [1994] ECR I-497, C-283/11 *Sky Österreich* (European Court of Justice, judgment of 22 January 2013) and Case C-12/11 *Ryanair* [2013] OJ C86/2.

[158] (n 142).

[159] (n 142).

[160] [2001] OJ L82/16.

Article 16, the transferee of the business must be able to assert its interests in a contractual process and to negotiate the aspects determining changes in the working conditions of its employees. Where the transferee could not do so, the very essence of its freedom to conduct a business was liable to be adversely affected. Accordingly, the Directive must be interpreted as precluding Member States from providing for dynamic clauses in such a situation.

E. The Privilege against Self-Incrimination

As we noticed in Part IIIB above, it is settled law in the United States that corporations cannot rely on the privilege against self-incrimination. Moreover, the same is the case in Germany, as we shall see in Part V below. In contrast, the Court of Justice adopted a stance which is more generous to undertakings under investigation for breaches of EU competition law, without fully applying the privilege to them. Articles 101 and 102 TFEU prohibit anti-competitive measures taken by 'undertakings', a concept which covers 'every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed'.[161] Typically, they take a corporate form, but they may also be unincorporated partnerships or even one or more individuals running a business together.[162] We are concerned here with enforcement proceedings by the Commission or a National Competition Authority, since they can lead to the imposition of substantial fines and are therefore of a quasi-criminal nature.[163]

No provision of the ECHR or the Charter expressly mentions the privilege against self-incrimination. However, according to the consistent case law of the ECtHR,[164] notably *Saunders v United Kingdom*,[165] it falls within the broad terms of Article 6 ECHR on the right to a fair trial, which corresponds to Article 47 of the Charter. In keeping with US law, the rationale for the rule was stated to be 'the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6'.[166] The ECtHR has cast this right very broadly: 'the right not to incriminate oneself cannot reasonably be confined

[161] Case C-41/90 *Höfner and Elser* [1991] ECR I-1979, para 21.

[162] The rationale for the privilege against self-incrimination would suggest that it applies in full where the undertaking consists of one or more natural persons: W Wils, 'Self-Incrimination in EC Antitrust Enforcement: A Legal and Economic Analysis' (2003) 26 World Competition 567, 577.

[163] See by analogy *Menarini v Italy*, App No 43509/08 (ECtHR, judgment of 27 September 2011) paras 57ff. The privilege does not apply at all in civil competition proceedings: Case C-60/92 *Otto* [1993] ECR I-5683, paras 15–17.

[164] *Funke v France*, App No 10828/84 (1993) 16 EHRR 297, *John Murray v United Kingdom*, App No 18731/91 (1996) 22 EHRR 29, *Saunders v United Kingdom*, App No 19187/91 (1996) 23 EHRR 313, *Heaney and McGuiness v Ireland*, App No 34720/97 (2001) 33 EHRR 264 and *J.B. v Switzerland*, App No 31827/96 (2001) ECHR 2001-III 435.

[165] *Saunders* (n 164).

[166] ibid para 68.

to statements of admission of wrongdoing or to remarks which are directly incriminating', it held, as even exculpatory information might be relied on by the prosecution.[167] Equally, an individual cannot be compelled to provide documents, at least if they are incriminating.[168] On the other hand, the Court has made it clear that the right 'does not extend to the use in criminal proceedings of material obtained from the accused through the use of compulsory powers but which has an existence independent of the will of the suspect such as, *inter alia*, documents acquired pursuant to a warrant, breath, blood and urine samples and bodily tissue for the purpose of DNA testing'.[169]

Crucially, however, all these cases concern natural persons. As yet there is no authority from the ECtHR as to whether legal persons enjoy the privilege against self-incrimination. Although Article 6 ECHR applies to companies, it does not by any means follow that they can necessarily rely on this privilege.

In EU competition law, the *locus classicus* is the ruling in *Orkem*.[170] At the time, as the Court of Justice indicated,[171] the Strasbourg court had not yet determined whether the privilege against self-incrimination was enshrined in the ECHR, even as regards natural persons. The Court of Justice also noted that '[i]n general, the laws of the Member States grant the right not to give evidence against oneself only to a natural person'.[172] Accordingly, it rejected the claim that companies are entitled to a fully-fledged privilege against self-incrimination. Nevertheless, it found that the rights of defence require certain limitations on the Commission's powers of investigation: the Commission could compel an undertaking to disclose documents, even if such information or documents might be used to establish the existence of a breach of EU competition law;[173] and the Commission could also compel the undertaking to answer factual questions so long as this did not require it to admit infringing EU competition law.[174] Accordingly, questions requiring Orkem to explain the purpose of the step which it had taken were held to be unlawful.[175]

This ruling has been applied and confirmed on several occasions.[176] In particular, in *PVC II* the Court of Justice revisited *Orkem* in the light of the Strasbourg judgments just discussed, and found that it was still good law.[177]

This issue arose once again in *SGL Carbon*. After making the statement cited above,[178] AG Geelhoed referred to *United States v White*,[179] and to the fact that

[167] ibid para 71.
[168] *Funke* (n 164) para 44; *J.B.* (n 164) paras 63ff.
[169] *Saunders* (n 164) para 69. At least in part, these matters fall within art 8 ECHR in any event.
[170] Case 374/87 [1989] ECR 3283
[171] para 30.
[172] para 29.
[173] In the US, subpoenas requiring the production of pre-existing documents are compatible with the Fourth Amendment (see n 24); and the Fifth Amendment does not come into play at all as regards corporations.
[174] paras 34ff.
[175] paras 34ff. See N Khan in C Kerse and N Khan, *EU Antitrust Procedure* (6th edn, Sweet & Maxwell 2012) para 3.033; A Scordamaglia-Tousis, *EU Cartel Enforcement: Reconciling Effective Enforcement with Fundamental Rights* (Wolters Kluwer 2013) 164ff; and Wils (n 162).
[176] eg Cases T-112/98 *Mannesmannröhren-Werke* [2001] ECR II-729 and T-34/93 *Société Générale* [1995] ECR II-545.
[177] Case C-238/99 P *Limburgse Vinyl Maatschappij et al.* [2001] ECR I-8375, paras 273–275.
[178] (n 151).
[179] (n 37).

the ECtHR has been known to grant a lower level of protection to legal persons than to natural persons as regards other rights, as mentioned above. Moreover, recalling that the enforcement of EU competition law is of crucial importance to the internal market, he described the interplay between the fundamental rights of legal persons and competition enforcement as a 'balancing exercise'.[180] On this basis, he concluded that the existing case law should be maintained. Similarly, the Court refused to depart from, or reverse, its ruling in *Orkem*.[181]

Although the subtle distinction drawn by the Court in *Orkem* between self-incriminating and purely factual information may be difficult to apply in practice,[182] its subsequent approach—and the comments of AG Geelhoed—deserve a warm welcome, when the rationale for the privilege against self-incrimination is borne in mind.[183] In *Orkem* the Court already appears to have been more generous to undertakings than it need have been, and to go any further would jeopardize the enforcement of competition law for no good reason. Those who criticize this body of case law as contrary to fundamental rights[184] do so on the doubtful premise that *Saunders* and its progeny necessarily apply to legal persons. Moreover, it should be borne in mind that the enforcement of competition law is 'essential for the accomplishment of the tasks entrusted to the [Union] and, in particular, for the functioning of the internal market'.[185]

F. Double Jeopardy

The rule against double jeopardy (also known as *ne bis in idem*) is enshrined both in Article 4 of Protocol 7 to the ECHR and Article 50 of the Charter, albeit in different terms. Within the confines of the case law of the ECtHR on the former provision,[186] the Court of Justice has construed this rule relatively narrowly in the field of competition law.[187] On the other hand, under the

[180] para 67.

[181] paras 33ff.

[182] AG Bot has even described it as contradictory in some respects: para 462 of his Opinion in Case C-125/07 P *Erste Bank* [2009] ECR I-8681.

[183] Wils (n 162) and Wils, 'EU Anti-Trust Enforcement Powers and Procedural Rights and Guarantees: The Interplay between EU Law, National Law, the Charter of Fundamental Rights of the EU and the European Convention On Human Rights' (2011) 34 World Competition 189, 206.

[184] T Bombois, *La protection des droits fondamentaux des entreprises en droit européen répressif de la concurrence* (Larcier 2012) 171ff; L Idot, *Droit communautaire de la concurrence. Le nouveau système communautaire de mise en œuvre des articles 81 et 82 CE* (Bruylant 2004) 96.

[185] Case C-126/97 *Eco Swiss China Time v Benetton International NV* [1999] ECR I-3055, para 36; see also Protocol 27 to the Lisbon Treaty on the Internal Market and Competition.

[186] eg *Zolotukhin v Russia*, App No 14939/03, (2009) 54 EHRR 503.

[187] See W Devroe, 'How General Should General Principles Be? *Ne Bis in Idem* in EU Competition Law' in Bernitz, Groussot and Schulyok (n 154); G Gaulard, 'Le Principe Non Bis in Idem en Droit de la Concurrence de l'Union' [2013] Cahiers de Droit Européen 703; Khan (n 175) 497–501; P Oliver and T Bombois, '*Ne bis in idem* en droit européen : un principe à plusieurs variantes' [2012] Journal de Droit européen 266; and J Tomkin, Part I: 'Article 50' in 'The Charter of Fundamental Rights: A Commentary' (n 126).

Schengen Agreement[188] on free movement of natural persons, the Court has applied the rule very generously in their favour. For example, it held in *Gözütok* that a settlement whereby a prosecution is barred once the accused has paid a sum to the prosecutor in one Member State precludes prosecution in another.[189]

In *Toshiba*,[190] the AG suggested that the Schengen approach should be extended to undertakings when applying competition law, simply because it was 'detrimental to the unity of the EU legal order' to have more than one test of double jeopardy in EU law.[191] In stark contrast to AG Geelhoed in *SGL Carbon*,[192] she failed to point out that the case law relating to the fundamental rights of natural persons might not be appropriate for undertakings; nor did she allude to the fact that the wording of the Schengen provision is quite different from the language of Article 50. Moreover, neither the case law of the ECtHR nor the wording of Article 50 require the Court to take this step.

In the event, the Court did not heed the AG's advice. That is fortunate because otherwise the effective enforcement of competition law would have been impeded. Simplicity, as Leonardo da Vinci famously declared, is the ultimate sophistication. Obviously, the courts should strive for a simple solution where that is possible; but other considerations should prevail in this instance, it is submitted.

G. Discrimination

Article 21(1) of the Charter prohibits discrimination on a number of grounds, including sex, race and ethnic origin,[193] and religion or belief; for present purposes it is not necessary to consider the other grounds here. The first paragraph of Article 23 reads: 'Equality between men and women must be ensured in all areas, including employment, work and pay.' This provision supplements Article 3(2) TEU and 8 and 157 TFEU, which also concern the promotion of equality between the sexes.

Article 19(1) TFEU empowers the Union to take legislative action to combat discrimination on the basis *inter alia* of the factors just mentioned. Amongst the directives based on this provision are the Gender Equality in Goods and Services Directive[194] and the Race Equality Directive.[195] As is plain from its title, the first of these instruments prohibits (subject to exceptions)

[188] More precisely art 54 of the Convention implementing the Schengen Agreement ([2000] OJ L239/19). The Schengen Agreement applies to most of the Member States of the EU (other than the UK and Ireland), as well as certain other European countries such as Norway.

[189] Case C-187/01 [2003] ECR I-1345. [190] (n 152). [191] para 117 of the Opinion. [192] (n 151).

[193] Neither this provision nor any of the other provisions discussed here defines 'race' or 'ethnic origin', and the difference between the two terms is not clear. For ease of reference, 'race' will be used here to cover both concepts.

[194] Council Directive 2004/113 [2004] OJ L373/37.

[195] Council Directive 2000/43 [2000] OJ L180/22.

'discrimination based on sex in access to and supply of goods and services', while the second extends to racial discrimination relating to the 'access to and supply of goods and services which are available to the public, including housing' (Article 3(1)(h)). What if a company is refused goods or services because it is owned, run or staffed largely by women (or men) or individuals of a particular race? Manifestly, companies are bereft of both gender and race; but anyone discriminating against a company by reason of the gender or race of its stakeholders is in reality targeting them. Consequently, it is submitted that they and/or the company should be able to rely on the Charter read with whichever of the two Directives is in point—subject of course to the exceptions set out there.[196]

On this view, if a company suffers discrimination on such grounds in the award of a large-scale public procurement contract covered by the Public Procurement Directives, that will also be a breach of those Directives.[197]

As to discrimination on the basis of the religion or belief of the stakeholders, a Commission proposal for a Directive[198] covering such discrimination as regards the supply and purchase of goods or services has yet to be adopted. On the other hand, if the award of a large-scale contract covered by one of the Public Procurement Directives[199] is involved, that would appear to be a breach of that Directive. By virtue of Article 51(1) of the Charter, Article 21 (1) of the same instrument can only apply if one of the Public Procurement Directives is engaged, since otherwise the transaction will fall outside the scope of EU law.

Whichever of these provisions is applied, the corporate veil will in a sense be pierced in favour of the stakeholders, even if the action is brought by the company—just as in *City of Richmond v Croson Co*.[200]

H. Political Donations

Neither the ECtHR nor the Court of Justice has been called upon to devote much time to limits on electoral spending and donations. No doubt, that is largely due to the broad consensus in Europe as to the need for such limits so as to avoid giving an unfair advantage to those with the deepest pockets.

[196] See art 6 of Directive 2004/113 (n 195) and the second paragraph of art 23 of the Charter; and art 5 of Directive 2000/43 (n 196). See also the general public interest exception in art 52(1) of the Charter.

[197] Art 3 of Directive 2014/23 on the award of concessions [2014] OJ L94/1, art 18 of Directive 2014/24 on public procurement [2014] OJ L94/65 and art 36 of Directive 2014/25 on public procurement in utilities ([2014] OJ L94/243.

[198] Proposal for a Council Directive on implementing the principle of equal treatment between persons irrelevant of religion or belief, disability, age or sexual orientation COM (2008) 426.

[199] Directive 2014/24 (n 197).

[200] (n 46). For present purposes, it is irrelevant that in that case the US Supreme Court struck down the affirmative action in issue, whereas EU law expressly provides for it (see n 196).

As regards the ECHR, two provisions come into play: Article 10 on the freedom of expression and Article 3 of Protocol 1 on the right to free elections. The most relevant case before the Strasbourg court appears to be *Bowman v United Kingdom*.[201] English law strictly limited electoral expenditure by candidates and their agents, and prohibited third parties from spending more than £5 on communicating information, immediately before or during an electoral campaign, with a view to promoting a particular candidate for Parliament. Mrs Bowman was an anti-abortion activist, who distributed a large number of leaflets calling upon electors to vote for anti-abortion candidates to be distributed in constituencies throughout the United Kingdom. She was charged with an offence under this legislation. Her claim that the provision in issue was contrary to Article 10 ECHR was upheld by the ECtHR, which declared the legislation to be a 'total barrier to Mrs Bowman's publishing information with a view to influencing the voters of Halifax in favour of an anti-abortion candidate'.[202]

Nevertheless, this judgment contains several statements which are strongly supportive of limits on electoral spending. What is more, *Bowman* directly concerned communications; and nothing in the ruling indicates that the ECtHR would necessarily consider statutory limits on electoral donations would fall under either Article 10 ECHR or Article 3 of Protocol 1.[203]

In EU law, no general provision is made for free elections. This is a matter for the Member States, which are all party to the ECHR. However, Article 39(2) of the Charter reads: 'Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.' Those elections are governed by the Act of 1976,[204] Article 2B of which states: 'Each Member State may set a ceiling for candidates' campaign expenses.' Moreover, it follows from Article 6 of Regulation 2004/2003 of the European Parliament and the Council on European political parties and their funding as amended[205] that such parties may not accept donations exceeding €12,000 from any natural person or company.

In short, the position in European law is a far cry from that in the US, and the legality of restrictions on political expenditure by companies has not even arisen.

[201] App No 24839/94, (1998) 26 EHRR 1. [202] para 47.

[203] Also, Recommendation 1516 (2001) on the Financing of Political Parties of the Parliamentary Assembly of the Council of Europe, point 8.A.v advocates ceilings on political donations and 'strict limitations on donations from legal entities'. See <http://www.assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta01/EREC1516.htm>.

[204] Decision 76/787 ([1976] OJ L278/1) amended by Decision 2002/772 ([2002] OJ L283/1).

[205] [2003] OJ L297/1.

Unsurprisingly, the ECtHR has recognized the right of churches to rely on Article 9 ECHR on 'freedom of thought, conscience and religion' and 'belief';[206] but it has not had the opportunity to rule on whether the same applies to companies.

However, there is case law from the European Commission of Human Rights, which was merged with the ECtHR in 1998 with the entry into force of Protocol 11 to the ECHR. In one case, that body held that a private non-religious association engaged in the rehabilitation of young drug abusers could not claim the freedom of conscience under Article 9.[207] Two other cases concerned Finland and Switzerland, where at the material time companies were required to pay taxes to the established church or churches.[208] Both actions were rejected on the basis that commercial entities could not rely on Article 9.[209]

The position advocated in this article is precisely that companies can have neither a religion, nor 'thought', 'conscience' or 'belief' within the meaning of Article 9 ECHR. At the same time, for companies to be required to pay taxes to churches (or indeed organizations of freethinkers or atheists) seems objectionable, since churches serve spiritual and/or philosophical ends wholly alien to the purely economic rationale for which companies are established. Just as it seems exorbitant for a company to claim an exemption from a legal obligation on the basis of a religious belief (as in *Hobby Lobby*), so it appears unacceptable for a public authority to thrust such a belief on a company or treat it as though it could have one. That is why the solution reached by the German Constitutional Court on very similar facts is welcome.[210] The ruling of that Court, which is discussed in Part V below, would indicate that such a tax might be contrary to Article 8 ECHR, a provision not pleaded in the two actions just mentioned.[211]

[206] *Metropolitan Church of Bessarabia v Moldova* App No 45701/99, (2002) 35 EHRR 13 and *Magyar Kerysztény Mennonita Egyház et al v Hungary*, App Nos 70945/11 *et al.* (ECtHR, judgment of 8 April 2014). On the autonomous rights of churches, see *Fernández Martínez v Spain*, App No 56030/07 (2015) 60 EHRR 3, paras 127ff.

[207] *Verein 'Kontakt-Information-Therapie' and Hagen v Austria*, App No 11921/86 (1988) 57 DR 81, para 1.

[208] Needless to say, such a situation would be unthinkable in the United States, where both the federal authorities and the states are precluded from making any law 'respecting an establishment of religion'; see the opening paragraph of Part IIIE above.

[209] *Company X v Switzerland*, App No 7865/77 (1979) 16 DR 85 and *Kustannus oy vapaa ajattelija AB v Finland*, App No 20471/92 (1996) 85-A DR 29.

[210] BVerfGE 19, 206 (1965). As one would expect, just like the US Supreme Court (n 79), the ECtHR has stated that religious objections cannot validly be raised to taxation on the grounds that the proceeds will be used for purposes contrary to the taxpayer's religious beliefs (*Bayatyan v Armenia*, App No 23459/03 (2012) 54 EHRR 15, para 111). The same would of course apply if a company were to object to general taxation on the grounds of its beliefs (or lack of them). But general taxation is different for the reason given by the majority in *Hobby Lobby* (see the text accompanying n 80).

[211] (n 209).

As for EU law, Article 17(1) TFEU provides: 'The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.' Similarly, Article 17(2) states: 'The Union equally respects the status under national law of philosophical and non-confessional organisations.' Furthermore, the freedom of conscience, thought and religion is enshrined in Article 10 of the Charter, which corresponds to Article 9 ECHR.[212] Although this provision is expressed to benefit 'everyone' ('*jede Person*' in the German version), it is hard to imagine that the Court of Justice would ever interpret it as extending to companies. Instead, the choice of '*Person*' rather than '*Mensch*' could be explained by the obvious need to include churches.

References to religion in EU legislation are few and far between.[213] Perhaps the most important is Council Directive 2000/78, generally known as the Framework Employment Directive, which prohibits discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation.[214] One of the exceptions is contained in Article 4(2), which authorizes the *continued* application of national measures whereby 'a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos'. This provision is expressed to apply to employment or occupation within 'churches and other public or private organisations the ethos of which is based on religion or belief'.

Behind this cumbersome and convoluted language, which is too long to cite here in full, lurk some particularly thorny issues; and there appears to be no case law on it to date. On the one hand, is it compatible with Article 10 of the Charter to confine the benefit of this provision to pre-existing national measures and practices? On the other, the class of organizations to which Article 4(2) applies is unusually broad. Nevertheless, it scarcely seems conceivable that the Court would go so far as to regard an employer such as Hobby Lobby as an organization whose ethos is based on its Christian beliefs for the purposes of this provision. Quite apart from that, such an employer would quite clearly not be entitled pursuant to Article 4(2) to recruit only those sharing its particular religious beliefs, any more than it could in the United States: this would not be a 'genuine, legitimate and justified occupational requirement'.

[212] See the Explanations on art 10 (n 128).

[213] But see arts 13 TFEU and 4(4) of Council Regulation 1099/2009 on the protection of animals at the time of killing ([2009] OJ L303/1), providing for a waiver of the requirement to stun animals prior to slaughter, where that is necessary to comply with religious rites.

[214] [2000] OJ L303/16; see E Ellis and P Watson, *EU Anti-Discrimination Law* (2nd edn, OUP 2012) 35 and P Watson 'Equality between Europe's Citizens: Where Does the Union Now Stand?' (2012) 35 FordhamIntlLJ 1426, 1462ff.

In any case, discrimination against certain female employees in their health care coverage would not fall within the scope of Article 4(2). A company in that situation would therefore have to rely directly on Article 10 of the Charter—with little chance of success. The same would apply if a company were to attempt to opt out of a health insurance scheme for its employees without their suffering any disadvantage, as the US Supreme Court envisaged in *Hobby Lobby*. In particular, the Court of Justice would be loath to accept the competitive advantage gained by a company exempted from health care payments in this way: creating a level playing field, in so far as possible, is central to the single market, which lies at the heart of the EU Treaties.

V. GERMAN LAW

Germany is only one of 47 Contracting Parties to the ECHR and one of 28 Member States of the EU whose common constitutional traditions constitute general principles of EU law by virtue of Article 6(3) TEU. Nevertheless, a brief consideration of its constitutional law is in point here in view of its distinct contribution on this area of the law.

In Europe, Germany appears to have been in the vanguard when it comes to conferring constitutional rights on companies: Article 159 of the abortive national Constitution of 1849[215] provided for a right of petition which expressly covered corporations;[216] as early as 1890, academics began to discuss whether companies enjoyed fundamental rights;[217] and Article 93(1) of the Bavarian Constitution of 1919[218] gave legal persons established in Bavaria the right to make a constitutional complaint. This process culminated in 1949 with the adoption of the Basic Law or Grundgesetz ('GG'),[219] Article 19(3) of which reads: 'Fundamental rights also apply to domestic legal persons to the extent that their nature permits.'[220] When applying this provision, the Constitutional Court has regard both to the nature of the right and to the nature of the legal person.[221] Thus legal persons governed by public law

[215] Available at <http://verfassungen.de/de/de06-66/verfassung48-i.htm>.

[216] Today the right to petition Parliament is a fundamental right in German law: it is now enshrined in art 17 of the Basic Law, which appears in the section relating to fundamental rights.

[217] B Remmert, commentary on art 19(3) in T Maunz and G Dürig, *Grundgesetz Kommentar* (Beck Online 2013) paras 3 and 100.

[218] Available at <http://www.verfassungen.de/de/by/bayern19.htm>.

[219] (n 137).

[220] This provision has served as something of a model for subsequent constitutions (eg arts 12(2) of the Portuguese Constitution and art 8(4) of the South African Constitution). On its face, it applies only to 'domestic' legal corporations, which would be at variance with the prohibition on discrimination on the basis of nationality in art 18 TFEU, as regards companies or firms from other EU Member States which meet the requirements of art 54 TFEU: Cases C-398/92 *Mund & Fester v Hatrex* [1994] ECR I-467 and C-43/95 *Data Delecta and Forsberg v MSL Dynamics Ltd.* [1996] ECR I-4661. However, the Constitutional Court has now interpreted art 19(3) broadly so as to encompass these entities: 1 BvR 1916/09 (Order of 19 July 2011) at <http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2011/07/rs20110719_1bvr191609en.html>. See T Ackermann 'Grundrechte juristischer Personen im kartellrechtlichen Sanktionsverfahren: Ein Reformhindernis' 1/2015 Neue Zeitschrift für Kartellrecht 17, 18.

[221] Remmert (n 217) para 27.

(which are to a greater or lesser extent creatures of the State) and State-owned private companies generally enjoy more limited rights than those of other companies.[222] Crucially, according to settled law, legal persons cannot rely on Article 1(1), which provides: 'Human dignity shall be inviolable'.[223]

The Constitutional Court found that the moral dilemma which human beings would suffer if required to incriminate themselves would not be felt by companies, since they cannot be subject to such suffering and at worst can only be fined without any real opprobrium being attached to that sanction. On this basis, it concluded that the privilege against self-incrimination is rooted in human dignity under Article 1 GG and thus applies only to natural persons.[224] This corresponds with the position in US law discussed in Part IIIB above.

On the other hand, companies can rely on Article 2(1) GG which provides: 'Every person shall have the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.'[225] To some extent at least, this provision may be regarded as the equivalent of the right to privacy in Article 8 ECHR.

On this basis, the Constitutional Court quashed an old local law, which imposed a church tax on companies.[226] A string of constitutional provisions, it held, required the State to be neutral between members of different faiths and of no faith at all, so that no-one could be forced to join, or give financial support to, a particular religious community. That principle was also held to apply to legal persons, who by their very nature could not belong to any such communities: they could not be required to bear obligations which could only be imposed on the members of those communities. As mentioned earlier, this conclusion appears far more satisfactory than that that reached by the European Commission of Human Rights on very similar facts.[227]

In addition, companies enjoy such fundamental rights as the freedom of expression (Article 5(1)),[228] privacy of correspondence and telecommunications (Article 10),[229] and the rights to occupational freedom (Article 12(1))[230] and to property (Article 14).[231]

Also worthy of note is the statement of a former judge of the Constitutional Court that '[l]aws restricting personal freedom or political rights are controlled

[222] BVerfGE 75, 196; see H Jarass, commentary on art 19 GG in Jarass and Pieroth, *Grundgesetz für die Bundesrepublik Deutschland* (12th edn, Beck 2012) paras 18 and 25; W Krebs, commentary on art 19 in I von Münch and P Kunig (eds), *Grundgesetz Kommentar* (6th edn, Beck 2012) 47 and Remmert (n 218) paras 65–75.

[223] BVerfG 95, 220 (1997) at 242, BVerfG 118, 168 (2007) at 203.

[224] BVerfGE 95, 220 (1997) at 83–84.

[225] BVerfGE 106, 28 (2002) at 39.

[226] BVerfGE 19, 206 (1965).

[227] (n 209).

[228] BVerfGE 20, 162 (1966) at 171 (the press), BVerfGE 95, 220 (1997) at 234 (radio).

[229] BVerfGE 100, 313 (1999) at 356, BVerfGE 106, 28 (2002) at 43.

[230] BVerfGE 21, 261 (1967) at 266, BVerfGE 118, 168 (2007) at 202 and 205.

[231] BVerfGE 4, 7 (1954) at 17.

more intensively than laws regulating the economy and thus touching economic freedoms'.[232] In this regard, the approach followed by the Constitutional Court parallels that of the ECtHR.

Finally, the provisions of the Basic Law granting access to justice against public authorities (Article 19(4)) and rights to fair judicial procedure (Articles 101(1) and 103(1)) apply to companies without the intervention of Article 19 (3);[233] and the right to establish a company is laid down in Article 9(1) on the freedom of association (subject to the exception in Article 9(2)), again without Article 19(3) coming into play.[234]

VI. THE UTILITARIAN RATIONALE FOR CORPORATIONS TO ENJOY FUNDAMENTAL RIGHTS

As we have observed, companies may enjoy fundamental rights for two reasons: because it is essential to protect their own interests; and because it is necessary for the sake of the public interest. In the latter case, a fundamental right is said to be conferred on corporations on utilitarian grounds. One example has already been cited: corporations benefit from the freedom of political speech at least in part because that is essential for democracy. This example is by no means unique. Thus it is strongly arguable that the rule against double jeopardy (*ne bis in idem*) is not merely a safeguard for the accused, but also serves to prevent the courts being encumbered with repetitious prosecutions.

The suggestion has been advanced that, where corporations enjoy a fundamental right solely in the public interest, that right is more limited than where corporations hold fundamental rights to serve their own ends.[235] However, it is submitted that this theory is flawed on two counts. First, companies never enjoy a particular fundamental right on utilitarian grounds alone; that rationale is always intertwined with the need to protect the companies' own interests. Second, where corporations hold rights in the public interest, that factor should in no way diminish the force of those rights. Quite the contrary is the case, especially where such significant matters as democracy are at stake.

[232] D Grimm, 'Human Rights and Judicial Review in Germany' in DM Beatty (ed), *Human Rights and Judicial Review: A Comparative Perspective* (Brill 1994) 290, citing BVerfGE 4, 7 (1954) at 17ff, BVerfGE 7, 377 at 400 and BVerfGE 50, 290 (1979) at 339ff. See generally D Kommers and R Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd edn, Duke University Press 2012) ch 10.

[233] BVerfGE 80, 244 (1989) at 250, BVerfGE 18, 441 (1965) at 447, BVerfGE 75, 192 (1987) at 200. As these cases show, these rights apply equally to all natural and legal persons regardless of their nationality. The rights enshrined in arts 101 and 103 are assimilated to fundamental rights, although those provisions are not contained in Part I of the Grundgesetz which is devoted to fundamental rights.

[234] BVerfGE 80, 244 (1989) at 253, BVerfGE 84, 372 (1991); Remmert (n 217) paras 104–111.

[235] O'Neill (n 44) 53–4.

VII. CONCLUSION

As should be clear from this survey, corporations must enjoy certain fundamental rights, without which they cannot operate. At the same time the dangers of extending their rights too far are plain: not only does this result in business acquiring exorbitant rights, but it can also lead to other distortions, as we have seen with *Citizens United* and *Hobby Lobby*. Although it is unlikely to venture as far as the US Supreme Court in those two cases, the Court of Justice lacks a coherent approach to this issue and is therefore in danger of accepting exorbitant claims to fundamental rights by companies.

For instance, if it were to be lured by the sirens of finance and industry into recognizing a privilege against self-incrimination for companies on the same basis as for natural persons, that would hamper the effective enforcement of competition law—a key component of the internal market, which is itself the cornerstone of the EU—without any good reason, given that the ECtHR has never ruled on the matter and both the German Constitutional Court and the US Supreme Court have rejected that position on the basis of the most cogent reasoning. Another example is double jeopardy, where the AG's proposal in *Toshiba*[236] to extend the Court's approach under the Schengen Agreement to competition law could also seriously impede the effective enforcement of Articles 101 and 102 TFEU.

The starting point must be that companies are fully fledged legal persons in their own right and must be treated as such, save in the highly exceptional situations where piercing of the corporate veil is appropriate. They differ from natural persons in several crucial respects. For instance, they enjoy privileges such as limited liability and 'perpetual life', but cannot vote or stand for political office.

Equally, different categories of legal person are entitled to different rights. In many contexts, companies' fundamental rights will be more limited than those of non-profit entities, since their goals differ profoundly. In certain circumstances, it may also be appropriate to distinguish between different categories of corporation, an issue which we have not been able to explore here.

Companies must enjoy the fundamental rights essential to their functions and purpose, namely the right to property and the right to run a business (where such a right exists) as well as the right to a fair trial. Furthermore, it is in the interest of third parties or in the public interest for them to hold certain other rights, perhaps the most obvious example being the freedom of expression.[237] However, even where companies do enjoy fundamental rights, those rights are not necessarily so extensive as those of natural persons or non-profit entities.

While a simple formula for determining what fundamental rights corporations should enjoy remains elusive, it is crucial for courts to proceed with great caution when called upon to decide whether to extend to

[236] (n 152).

[237] See the text accompanying nn 22 and 112.

individuals existing case law on the fundamental rights of individuals. In each case, the courts should ask themselves: in view of the 'nature, history and purpose'[238] of the provision or right in question, is it appropriate to extend it to companies and, if so, under what conditions? The courts' reasoning on this question should be clearly set out in the judgment.

Finally, piercing the corporate veil for the benefit of the stakeholders should be confined to highly exceptional situations. One case where this seems permissible is where a company suffers discrimination by reason of the gender, race or religion of its stakeholders: in that case, the stakeholders are the real target of the discrimination.

[238] *Bellotti* (n 19).