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# The Constitutional Approach to Basic Consumer Rights

## 1. Introduction

Awareness of consumer rights as basic rights began when US President John F. Kennedy outlined in his special message to the United States Congress, on 15 March 1962, four fundamental consumer rights.\*<sup>1</sup> From a Constitutional point of view, this declaration of certain consumer rights as ‘fundamental rights’ does not in itself have any specific value. Nevertheless, the speech attracted widespread attention elsewhere, descriptive of, and contributing to, the emergence of new social and legal phenomena.

Over the last 50 years, consumer law has developed considerably, influenced by growth in trade and wealth, globalisation, and the strengthening of the consumer movement. As a result of these trends, numerous regulations have been adopted to balance the greater power of professional suppliers over individuals.

Today, we have put behind us the era of declarative policies and embrace consumer rights at the highest Constitutional level, both in the EU’s primary law and in several EU member states. At the same time, the discussion of the substantive meaning of consumer rights as a new type of fundamental rights has been rather modest in the specialist literature. The main purpose of this paper is to explore the extent to which consumer rights are recognised as fundamental rights at the international and national level, and to analyse whether the declaration of basic consumer rights as Constitutional rights can improve the standard of consumer protection or is merely a symbolic instrument, not associated with any major changes.

This paper is structured as follows. In the first part of the article, the author examines whether consumer rights have potential to be recognised as the universal human rights of the new generation insofar as these rights have several shared features. In the second section, the author explores to what extent the main rights of the consumer are accepted as fundamental rights at an international level in agreements, conventions, and the primary law of the European Union. As the Charter of Fundamental Rights has become part of the European Union’s primary law, the author is keen to find an answer to questions related to the legal meaning that the charter ascribes to consumer rights. In the final part of the paper, the author focuses on consumer rights as fundamental rights in national constitutions. Firstly, the Constitutional provisions of EU member states that, *expressis verbis*, highlight consumer rights are addressed. Then the author analyses the status of consumer rights in Estonian law, attempting to find an answer to the question of whether or not consumer rights that are not directly mentioned in the Estonian Constitution could be treated as fundamental rights that carry Constitutional value. For this purpose, the author interprets consumer rights in the context of §10 of the Constitution. This section includes a special development clause, which allows rights not expressly mentioned in the Constitution to be treated as fundamental rights by way of interpretation. Finally, the author presents his opinion as to whether the potential recognition of consumer rights as Constitutional fundamental rights would ensure a greater level of protection for Estonian consumers.

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<sup>1</sup> Public Papers of the United States. J. F. Kennedy – Public Messages, Speeches and Statements of the President, 1.1.– 31.12. pp. 235–240, United States. Office of the Federal Register. U.S. Govt. Print. Off., 1962.

## 2. Consumer rights and universal human rights

To counterbalance market inequalities, there have been continuous attempts to create global ethical values through a declaration of fundamental consumer rights.

One may argue that recognition of certain 'basic' higher-order consumer rights may be derived from the fact that being a consumer of some kind is a basic human condition.

The concept of human rights traditionally refers to the notion of human beings as having universal rights. These rights are commonly understood as 'inalienable fundamental rights to which a person is inherently entitled simply because she or he is a human being'<sup>2</sup>. Human rights are, therefore, conceived of as universal and equally applicable rights. These rights may exist as legal rights, in both national and international law.

In a number of respects, consumers benefit from human rights protection if they are viewed in the broader context of consumer activity. For example, interests in human health and physical integrity—which indeed feed in to the right to life—are already well established in the canon of protection, and their projection as consumer rights is then a matter of context.<sup>3</sup> Consumer law may also be connected indirectly to human rights issues of other kinds, such as the fight against child labour or against discrimination. To a lesser extent, perhaps, the same could be said of economic self-determination.

The UN International Covenant on Economic, Social and Cultural Rights<sup>4</sup>, which is part of the International Bill of Human Rights, refers to the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions (Article 11 (1)). These goals are at least partly reachable through effective consumer protection legislation.

Some legal scholars, such as S. Deutch, suggest that consumer rights have the potential to become 'soft human rights', because they possess the three main characteristics of human rights. Deutch argues for his novel thesis by referring to the following circumstances. First, there is increasing international recognition of consumer rights in international treaties, which shows the universal acceptance of such a right. Consumer rights are rights of all individuals, as every person is a consumer from time to time. Second, consumer rights to fair trade, safe products, and access to justice are granted to maintain human dignity and well-being, notwithstanding the economic market impact. Third, consumer rights are similar to other accepted human rights in that they are intended to protect individuals from arbitrary infringements by governments.<sup>5</sup>

This point of view has not, however, become widely accepted in the legal literature.<sup>6</sup> The author is also of the opinion that the treatment of consumer rights as modern human rights of the new generation is not sufficiently justified.

The author does not share the viewpoint of Deutch that enshrining of consumer rights is intended to protect individuals from arbitrary infringements on the part of governments, because the primary goal with consumer rights has been the protection of individuals against market failures.<sup>7</sup>

A distinctive feature with respect to human rights as universal rights is the satisfaction of fundamental interests and needs, which is seen if their violation or neglect could cause death or dire suffering. Violation of consumer rights is not normally accompanied by such drastic consequences.

Another of the key features of human rights is their abstractness. Unlike human rights, consumer rights have been set out in legislation as relatively clear-cut rights whose scope of application is limited to the legitimate (primarily economic) interests of the consumer.

<sup>2</sup> M. Sepulveda *et al.* Human Rights Reference Handbook. Ciudad Colón, Costa Rica: University of Peace 2004, p. 3.

<sup>3</sup> C. Harding, U. Kohl, N. Salmon. Human Rights in the Market Place: The Exploitation of Rights Protection by Economic Actors. Ashgate Publishing 2008, p. 69.

<sup>4</sup> United Nations. International Covenant on Economic, Social and Cultural Rights, 16.12.1966. Available at <http://www2.ohchr.org/english/law/cescr.htm> (most recently accessed on 28.5.2012).

<sup>5</sup> S. Deutch. Are consumer rights human rights? – *Osgoode Hall Law Journal* 1995 (32)/3, pp. 551–552.

<sup>6</sup> I. Benöhr, H.-W. Micklitz. Consumer protection and human rights. – G. Howells, I. Ramsay, T. Wilhelmsson (eds). *Handbook of Research on International Consumer Law*. Edward Elgar 2010, p. 25.

<sup>7</sup> For more about market failures, see T. Bourgoignie. Foundations, features and instruments of European Union consumer law and policy. – *Summer Programme in European Community Consumer Law*. Centre de droit de la consommation, Université Catholique de Louvain 1996, pp. 3–4.

## 3. Recognition of consumer rights as fundamental rights at the international level

### 3.1. Consumer rights in international treaties

At the international level, eight fundamental consumer rights were first declared in the 1985 UN Guidelines for Consumer Protection.<sup>\*8</sup> These rights include the right to safety, to choice, to redress, to consumer education, and to a healthy and sustainable environment, along with the right to satisfaction of basic needs, the right to be informed, and the right to be heard. In 1999, the above-mentioned UN guidelines were supplemented by a new principle—the right to sustainable consumption. The guidelines are not binding but do provide a set of basic consumer protection objectives upon which governments have agreed, thereby providing a policy framework for implementation at national level. Although these fundamental consumer rights are not mandatory, they have significantly influenced international legal thinking. This influence has resulted in the enactment of binding laws elsewhere in the world.

A review of international treaties at a European level reveals that considering consumer rights to be fundamental rights is a rare exception. Neither the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>\*9</sup> (commonly known as the 1950 European Convention on Human Rights) nor the European Social Charter<sup>\*10</sup> mentions consumer rights explicitly. However, Article 11 of the European Convention on Human Rights declares a freedom of assembly and association, and the European Social Charter refers to the right of health protection (Article 11), which might indirectly be considered a consumer right. The right to life is among the oldest of declared human rights and is enshrined in Article 6 of the European Convention on Human Rights. With this right, citizens are given a foundation for expecting the state to bear a certain responsibility to protect them against risks to their health and safety.

### 3.2. Consumer rights in EU primary law

In the legal literature, it is remarked that without a guarantee that fundamental rights are properly protected at the EU level, the conferral by Member States of competencies on the EU might have entailed a lowering of the level of protection of human rights.<sup>\*11</sup>

The Treaty establishing the European Economic Community<sup>\*12</sup> does not make any reference to consumers or human rights. Article 2 of the Treaty on European Union also indirectly provided protection for consumers by providing that said union pursues ‘a highly competitive social market economy’. Health and safety are mentioned in Article 30 of the Treaty of Rome, which is aimed at restricting trading in dangerous products and services.

The Treaty of European Union does not contain a catalogue of fundamental rights, of the sort found in the national constitutions of individual Member States, although it does include individual statements related to fundamental rights.

Remarkable change appeared in 1975, when the Council of the European Union issued its first special programme for a consumer protection and information policy.<sup>\*13</sup> The council set out five fundamental consumer rights: the right to the protection of health and safety, the right to the protection of economic interests, the right to claim for damages, the right to an education, and the right to legal representation (or the right otherwise to be heard).<sup>\*14</sup> This programme and its successors have served as a basis for a still

<sup>8</sup> United Nations Guidelines for Consumer Protection (as expanded in 1999). New York: United Nations 2003.

<sup>9</sup> Council of Europe. Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by protocols 11 and 14). Available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG> (most recently accessed on 28.5.2012).

<sup>10</sup> Council of Europe. European Social Charter (as revised in 1996). Available at [http://www.coe.int/t/dghl/monitoring/social-charter/default\\_en.asp](http://www.coe.int/t/dghl/monitoring/social-charter/default_en.asp) (most recently accessed on 28.5.2012).

<sup>11</sup> J.-C. Piris. *The Lisbon Treaty – a Legal and Political Analysis*. Cambridge University Press 2010, p. 146.

<sup>12</sup> Treaty establishing a European Economic Community (EEC) (1957). Available at <http://eur-lex.europa.eu/en/treaties/index.htm#founding> (most recently accessed on 28.5.2012).

<sup>13</sup> Council Resolution of 14.4.1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy. – OJ C-092, 25.4.1975.

<sup>14</sup> First Consumer Programme (FN.2). – OJ (1975) EU C 92/1, p. 3.

growing corpus of directives and regulations in the area of consumer protection. The right to protection of health and safety is reflected most clearly in the General Product Safety Directive (2001/95/EC).<sup>\*15</sup> The right to claim damages is addressed mainly by the Product Liability Directive, 85/374/EEC.<sup>\*16</sup> The right of protection of the economic interests of the consumer constitutes the foundation of several directives aimed at protection of consumers against unfair commercial practices and ensuring reasonable contract terms.

Before the 1992 Treaty of Maastricht, consumer protection was mentioned in the treaties only as a distinct European Community policy.<sup>\*17</sup> In the Treaty of Maastricht, consumer protection was established for the first time as a Community common policy (in Article 3).

The Charter of Fundamental Rights, which enshrines a set of political, social, and economic rights in EU law, also names, alongside other rights and freedoms, consumer rights. In modified form, this charter constituted part of the defunct Treaty Establishing a Constitution for Europe. Its legal status was unclear, and it did not have full legal effect until the entry into force of the Lisbon Treaty, on 1 December 2009. Article 6 (1) of the Lisbon Treaty now expressly states that the 'Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000 [...] which shall have the same legal value as the Treaties'. Accordingly, the treaty suggests that the charter would have the status of 'primary law'.

The charter clarifies the legal status and freedoms of the Union's citizens in respect of the institutions of the Union. According to Article 51 of the charter, 'the provisions of the Charter are addressed only to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.' This means that the charter does not address itself to the Member States in nation-specific situations and these rights are obligatory only for EU institutions, not for the national public authorities, except when they implement EU law.

The right to consumer protection is enshrined in Article 38 of the charter, which is the last article of Chapter IV ('Solidarity'). The charter refers to solidarity in a number of senses and does not define the term. Therefore, one may argue that the notion of solidarity offers considerable creative opportunities for interpretation.<sup>\*18</sup> In the legal literature, solidarity has been expressed as preparedness or a duty to share resources with others in need thereof, in a spirit of mutual support.<sup>\*19</sup>

Article 38 of the charter states that 'union policies shall ensure a high level of consumer protection'<sup>\*20</sup>. Does this mean that consumer rights are now accepted for the first time as fundamental substantive rights at the EU primary-law level? Official explanations associated with the Charter of Fundamental Rights state that the principles set forth in that article have been based on Article 169 of the Treaty on the Functioning of the European Union.<sup>\*21</sup> The above-mentioned article establishes a task for the Union to ensure a high level of consumer protection. For this, the Union shall contribute to protection of the health, safety, and economic interests of consumers, as well as to promotion of their right to information, to education, and to organise themselves in order to safeguard their interests.

Whenever anyone has a Constitutional right, there must be a valid norm of Constitutional rights that grants them that right. Only norms according to which Constitutional rights are granted are taken to be Constitutional-rights norms.<sup>\*22</sup> While all rights listed in the European Convention on Human Rights are

<sup>15</sup> Directive 2001/95/EC of the European Parliament and of the Council of 3.12.2001 on general product safety. – OJ L 11, 15.1.2002, p. 417.

<sup>16</sup> Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. – OJ L 210, 7.8.1985.

<sup>17</sup> M. Hesselink. *European contract law: A matter of consumer protection, citizenship, or justice?* – S. Grundmann (ed.). *Constitutional Values and European Contract Law*. Wolters Kluwer 2008, p. 242.

<sup>18</sup> M. Ross. *Solidarity: A new constitutional paradigm for the EU?* – M. Ross, Y. Borgmann-Prebil (eds). *Promoting Solidarity in the European Union*. Oxford University Press 2008, p. 44.

<sup>19</sup> C. Hilson. *EU environmental solidarity and the ecological consumer: Towards a republican citizenship.* – M. Ross, Y. Borgmann-Prebil (eds). *Promoting Solidarity in the European Union*. Oxford University Press 2010, p. 137.

<sup>20</sup> Article 38 of the Charter of Fundamental Rights of the European Union. – OJ C 303/10, 14.12.2007.

<sup>21</sup> Explanations relating to the Charter of Fundamental Rights. – OJ C 303/28, 14.12.2007.

<sup>22</sup> R. Alexy. *A Theory of Constitutional Rights*. Oxford University Press 2004, p. 19.

also substantive rights of the citizens, the equivalent is not true for the charter.<sup>\*23</sup> In any event, no clear line has been drawn to indicate when a true right is granted.<sup>\*24</sup> Therefore, for one to understand the meaning and the scope of the content of Article 38 of the charter, it is important to clarify whether Article 38 establishes a new subjective fundamental right or a mere principle. Basic distinctions established in R. Alexy's structural theory of fundamental rights allow us to establish the basis for a systematisation of the provisions of the Charter of Fundamental Rights, given that we can distinguish between fundamental rights formulated as individual rights and fundamental rights that are formulated as collective good.<sup>\*25</sup>

Explanation of Article 52 of the charter clarifies the distinction between 'rights' and 'principles'. Under that distinction, subjective rights shall be respected, whereas principles shall be observed (Article 51 (1)). Principles may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers and by the Member States only when they implement Union law); accordingly, they become significant for the courts only when such acts are interpreted or reviewed. They do not, however, give rise to direct claims for positive action by the Union's institutions or Member States' authorities.<sup>\*26</sup> These provisions may only be considered to be 'Union objectives', as they require public institutions to reach a certain objective or goal, without giving rise to any subjective fundamental position—that is, without assigning to individuals rights counter to those set forth by the legislator.

As the charter contains no clear list of rights and principles, it is the way in which a given provision is drafted that enables it to be made clear. There is no doubt that the content of Article 38 refers to the 'principle', because it does not describe everyone's right, instead referring to the Union's policy. Such provisions have been referred to as 'policy clauses', something rather equivalent to what Alexy might term 'collective goods' or as provisions affirming principles supported by collective goods, which do not necessarily give rise to subjective individual rights.<sup>\*27</sup>

It may be concluded that the formulation of Article 38 neither considers consumer protection to be a substantive right of European citizens nor establishes a right to a minimum threshold of consumer protection. Nevertheless, it certainly forms part of the broader Constitutional view that a high level of consumer protection is part of the Union's mission.

## 4. Constitutional recognition of consumer rights

### 4.1. Recognition of consumer rights in national constitutions of EU member states

Any theory of fundamental rights presupposes a distinction between Constitutional and non-fundamental rights. Such a distinction refers to a hierarchical relationship between the Constitution and ordinary laws and lies at the very root of the idea of fundamental rights as binding on the legislature. Consumer rights are nowadays fixed in the ordinary legislation of every EU member state and even included in modern national constitutions as a new generation of welfare-state rights. Some Member States, such as Spain and Portugal, have incorporated fundamental or basic consumer rights into their national constitution. The Constitution of the Portuguese Republic acknowledges consumer rights in its Article 60 (1), by stating that consumers shall possess the right to good quality of the goods and services consumed; to training and information; to the protection of health, safety, and their economic interests; and to reparations for damages.<sup>\*28</sup>

Article 60 (3) of the Portuguese Constitution contains an institutional guarantee of consumer associations and co-operatives and grants them the 'procedural right to sue in order to protect the interests of

<sup>23</sup> U. Lõhmus. Põhiõiguste kaitse kolmnurgas riik – Euroopa Nõukogu – Euroopa Liit (The Protection of Fundamental Rights in the Triangle State—Council of Europe, European Union). – *Juridica* 2010/5, p. 359 (in Estonian).

<sup>24</sup> K. Stern. Von der Europäischen Menschenrechtskonvention zur Europäischen Grundrechte-Charta. Perspektiven des Grundrechtsschutzes in Europa. – K. Stern, P. Tettinger (eds). *Die Europäische Grundrechte-Charta im wertenden Verfassungsvergleich*. Berlin 2005, p. 24.

<sup>25</sup> A.J. Menéndez. Some elements of a theory of European fundamental rights. – A.J. Menéndez, E.O. Eriksen (eds). *Arguing Fundamental Rights*. Springer 2006, p. 163.

<sup>26</sup> Explanations relating to the Charter of Fundamental Rights: Explanation on Article 52. – OJ C 303/35, 14.12.2007.

<sup>27</sup> Menéndez (see Note 25), p. 165.

<sup>28</sup> Constitution of the Portuguese Republic, seventh revision (2005). Available at <http://www.en.parlamento.pt/Legislation/CRP/Constitution7th.pdf> (most recently accessed on 28.5.2012).

members or common interests'. These rights have been included in the catalogue of fundamental rights within the category of economic, social, and cultural rights and duties (Title III).

The Constitution of Spain similarly lays out basic consumer rights, in its Article 51. This article states that the public authorities shall guarantee the protection of consumers and shall, by means of effective measures, safeguard their safety, health, and legitimate economic interests. Article 51 is part of Chapter III of the Spanish Constitution, which deals with 'Guiding Principles of Economic and Social Policy' but not with fundamental rights as in Portugal. These guiding principles contain only provisions indicating the principles of the state's policy. It would seem erroneous, therefore, to read these principles as granting subjective rights to the individual.<sup>\*29</sup> Article 51 of the Spanish Constitution has, however, prompted the legislator to enact several important acts especially aimed at enhancing the protection of consumers' economic interests.<sup>\*30</sup>

Some new EU member states too have emphasised the importance of consumer rights through Constitutionalisation of the state obligation to ensure consumer protection.

According to Article 76 of the Polish Constitution, the state has to protect consumer interests and the Constitutional Court has the possibility of testing laws' compliance with the principles of consumer protection.<sup>\*31</sup> In the legal literature it is mentioned that Article 76, despite being contained in the chapter on rights and freedoms (in its subchapter on economic, social, and cultural rights and freedoms), contains only 'framework provisions' indicating the principles of the state's policy. This article does not indicate the standards for the realisation of these policies, nor does it create any subjective rights or constitute a basis for specific legal claims.<sup>\*32</sup>

Article 46 of the Lithuanian Constitution also declares that the state shall defend the interests of the consumer. Neither the Polish nor the Lithuanian Constitution gives a catalogue of subjective consumer rights. Although the status of consumer rights in the constitutions of the above-mentioned EU member states varies, it must nevertheless be borne in mind at least that integration of consumer rights into the Constitution is a strong indication of their role as important new social rights.

The provisions mentioned here reflect the apprehension of the fundamental responsibility of the state to protect consumers. It means that the state is responsible to its citizens not only for economic efficiency but also for social justice and looking after consumers' legitimate interests.

Some other Member States, among them Germany, Finland, Great Britain, Sweden, and also Estonia, do not mention consumer rights in their various constitutions and are therefore far from awarding consumer rights the status of fundamental rights.

Some legal scholars maintain that the inclusion of fundamental consumer rights in national constitutions would result in the promise of a certain standard of living, which changing economic and financial circumstances might make it impossible to sustain.<sup>\*33</sup>

Such a position is, however, not quite acceptable. The main rights of the consumer, as set out in the constitutions of the above-mentioned Member States, do not directly require that a certain living standard be guaranteed by the government to consumers. Instead, the goal of constituting consumer rights is to ensure that consumers are treated fairly in market conditions that are unfavourable for the consumer. This, established as a Constitutional principle, obliges governments to take measures to ensure that consumers are effectively protected. Here, one might agree with E.-U. Petersmann, who has concluded that economic welfare and the welfare of consumers is clearly related to their Constitutional guarantees of freedom, property rights, and other human rights.<sup>\*34</sup>

<sup>29</sup> G. Brüggemeier *et al.* *Fundamental Rights and Private Law in the European Union I – a Comparative Overview*. Cambridge: Cambridge University Press 2010, pp. 651–652.

<sup>30</sup> H. Schulte-Nölke, C. Twigg-Flesner, M. Ebers. *EC Consumer Law Compendium – the Consumer Acquis and Its Transposition in the Member States*. Sellier European Law Publishers 2008, p. 70; A. Ferreres-Comella, C. Ayo-Ferrándiz. *Spain: Consumers protection/product liability legal framework in Spain [sic]*. Available at <http://www.mondaq.com/article.asp?articleid=23461> (most recently accessed on 28.5.2012).

<sup>31</sup> E. Letowska. *The Constitutional aspect of consumer protection in Poland*. – N. Reich, L. Thévenoz (eds). *Droit de la consommation – Konsumentenrecht – Consumer law*. Liber amicorum Bernd Stauder. Zürich/Geneva 2006, p. 227 *et seq.*

<sup>32</sup> Brüggemeier *et al.* (see Note 29), p. 542.

<sup>33</sup> Benöhr, Micklitz (see Note 6), pp. 24–25.

<sup>34</sup> E.-U. Petersmann. *Taking human dignity, poverty and empowerment of individuals more seriously: Rejoinder to Alston*. – *EJIL* 2002 (13)/4, p. 849.

## 4.2. Fundamental consumer rights in Estonian ordinary legislation

While the Portuguese Constitution refers explicitly to fundamental consumer rights, the Estonian Constitution does not. Unlike the countries that have incorporated basic consumer rights into their constitution, in Estonia the rights of consumers are regulated in detail by ordinary legislation. Consumer law in Estonia consists of a variety of legal rules, which are concentrated for the most part in two statutes—namely, the Consumer Protection Act<sup>\*35</sup> and the Law of Obligations Act.<sup>\*36</sup> The latter consists of regulations pertaining to various types of consumer contracts.

The Consumer Protection Act expressly names basic consumer rights as fundamental rights in a statute. A similar approach is employed in Italy.<sup>\*37</sup> Section 3 of the Consumer Protection Act enumerates six fundamental consumer rights: the right to obtain goods and services which meet the requirements and are harmless; the right to the protection of a consumer's health and safety; the right to appropriate information; the right to claim for damages; the right to advice and assistance; and the right to be heard.

However, these fundamental rights have not been explicitly recognised by court practice as Constitutionally protected interests. The idea of 'Constitutionalising' consumer rights fixed in ordinary legislation has also not been on the agenda of the legal debate.

Therefore, it seems that there is no clear tendency to Constitutionalise the basic rights of consumers fixed in ordinary legislation.

## 4.3. Fundamental consumer rights and the developmental clause of the Estonian Constitution

Constitutional provisions confer a Constitutional legal power on the values listed in the catalogue of fundamental rights by setting them apart from other values.<sup>\*38</sup> Although the author has stated above that the Estonian Constitution does not mention the consumer rights in its catalogue of fundamental rights and freedoms, there is a backdoor in the Constitution that could be used, if necessary, to elevate consumer rights to the level of Constitutional values: §10 of the Constitution includes a rare clause in the international plane, which allows consideration of the needs and changes due to the dynamic development of the legal order without direct amendment to the text of the Constitution. Section 10 of the Estonian Constitution states that '[t]he rights, freedoms and duties set out in this Chapter shall not preclude other rights, freedoms and duties which arise from the spirit of the Constitution or are in accordance therewith, and conform to the principles of human dignity and of a state based on social justice, democracy, and the rule of law'. This clause may be treated as a development clause of the Constitution, as this provision gives rise to the possibility of broadening the catalogue of fundamental rights.<sup>\*39</sup> The clause allows for treating as subjective fundamental rights also rights that are not included in the open catalogue of the fundamental rights as contained in the Constitution.<sup>\*40</sup>

Section 10 of the Constitution allows the Constitutional review court the creation of new rights, freedoms, and obligations that arise from the spirit of the Constitution or are in compliance with it. Section 152 of the Constitution assigns the obligation, competence, and mandate of constitutional review to the Supreme Court, allowing the court to revoke any law or legislation that is contrary to the provisions and spirit of the Constitution.<sup>\*41</sup>

<sup>35</sup> Tarbijakaitseseadus. – RT I 2004, 13, 86; 2010, 31, 158 (in Estonian).

<sup>36</sup> Võlaõigusseadus. – RT I 2001, 81, 487, RT I, 4.2.2011, 2 (in Estonian).

<sup>37</sup> C. Comandé. Co-determining European private law(s) and Constitutionalization process(es). – S. Grundmann (ed.). Constitutional Values and European Contract Law. Wolters Kluwer 2008, p. 183.

<sup>38</sup> E.-J. Truuväli *et al.* (eds). Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (Constitution of the Republic of Estonia. Commented Edition), 2nd, revised edition. Tallinn: Juura 2008, p. 75 (in Estonian).

<sup>39</sup> The possibility of broadening the protection of fundamental rights was also foreseen by the authors of the Constitution. See Põhiseadus ja Põhiseaduse assamblee (The Constitution and the Assembly of the Constitution). Tallinn: Juura 1997, p. 528 (in Estonian).

<sup>40</sup> The right to elect has been treated as a right not covered by the catalogue of fundamental rights in the Estonian Constitution. See M. Ernits. Tõlgendamisest Riigikohtu praktikas (About Interpretation in the Supreme Court Case Law). – Juridica 2010/9, p. 666 (in Estonian).

<sup>41</sup> Ernits (see Note 40).

In his analysis of the Estonian Constitution, Alexy has mentioned that, pursuant to the meaning or spirit of the Constitution, other rights, freedoms, and obligations must be derived from the meaning of the Constitution.<sup>\*42</sup> Thus the development clause of §10 of the Constitution leaves the catalogue open, subject to the new fundamental rights being in concord with the fundamental principles of the Constitution.<sup>\*43</sup> Section 10 of the Constitution refers to four important fundamental principles—human dignity, the social state, democracy, and the rule of law. Next, the author considers the extent to which the consumer rights might comply with these important fundamental principles.

The principle of human dignity arises from Article 1 of the Universal Declaration of Human Rights, pursuant to which '[a]ll people are born free and equal in dignity and rights'. By nature, the principle of human dignity is abstract, and it is expressed through the medium of several elements. One of the elements of human dignity is the guarantee of decent living conditions in the meaning of §28 (2) of the Constitution.<sup>\*44</sup> Alongside social support mechanisms, consumer law aids in reaching of this goal by setting out the requirements related to the quality of housing, food, and other consumer goods.

The Supreme Court has treated the right to informational self-determination as one of the elements of human dignity.<sup>\*45</sup> One aspect of the right to informational self-determination is the right of consumers to receive truthful and necessary information about the goods and services being provided, so that they can make an informed choice. The protection of the fundamental rights of the consumer in the collection and processing of personal data is regulated in Estonia by the Personal Data Protection Act<sup>\*46</sup>, which sets in place significant restrictions on the collection and processing of information about the purchasing behaviour, habits, and preferences of consumers.

The Estonian Constitution does not explicitly declare that Estonia is a social state; however, Section 10 implies that the principles of a social and democratic state based on the rule of law form the bases of any rights, freedoms, and obligations not mentioned in the Constitution. The idea of a social state is that the state has a general obligation to take care of social justice. This is a counter-reaction to the individual liberal rights and freedoms: the freedom of contract, the freedom of entrepreneurship, and the freedom of inviolability of property.<sup>\*47</sup> Consumer law has been treated in the legal literature as one of the clearest cases of restriction to the principle of freedom of contract.

The principle of a social state requires that the powers of the state ensure social justice, so that all people are treated equally and in consideration of their human dignity and so that the state cannot leave its citizens without help. The consumer is the weaker party in relations with a professional trader holding a stronger economic position; accordingly, the consumer must be guaranteed a certain minimum base of rights based on social justice.

In academic discussions, social justice has been considered to be one of the values of a welfare state, which should also be taken into account in the developments to contract law. In relation to this, T. Wilhelmsson has remarked that if welfarism is understood as signifying mandatory rules protecting the alleged weaker party to the contract, including a fairness principle giving the courts and other decision-makers the right to interfere with unfair contract terms, then practically the whole contract law *acquis* is of this kind, with the most important examples being the Consumer Sales Directive and the Unfair Contract Terms Directive.<sup>\*48</sup>

The basic rights of the consumer also comply with the fundamental principle of democracy. Fundamental rights create conditions precedent to the functioning of a democratic public order. Democracy is reflected in such important fundamentals to consumer rights as the right to free self-realisation (§19 of the Constitution), the freedom to collect information (§44 of the Constitution), and the right to organise into voluntary consumer organisations and associations in order to protect people's rights (§48 of the Constitution).

<sup>42</sup> R. Alexy. Põhiõigused Eesti põhiseaduses (Fundamental Rights in the Estonian Constitution). – *Juridica* 2001, special issue, p. 108 (in Estonian).

<sup>43</sup> Lõhmus (see Note 23), p. 355.

<sup>44</sup> Truuväli *et al.* (see Note 38), p. 113.

<sup>45</sup> Supreme Court Criminal Chamber decision of 26.8.1997, 3-1-1-80-97, paragraph 1 (in Estonian).

<sup>46</sup> Isikuandmete kaitse seadus. – RT I 2007, 24, 127; RT I, 30.12.2010, 2 (in Estonian).

<sup>47</sup> R. Maruste. Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse (Constitutionalism and Protection of Fundamental Rights and Freedoms). Tallinn: Juura 2004, p. 122 (in Estonian).

<sup>48</sup> T. Wilhelmsson. Varieties of welfarism in European contract law. – *European Law Journal* 2004 (10)/6, p. 714.

The Supreme Court holds the position that the fundamental principle of democracy implies that the powers are to be effected with public involvement and that important decisions of governance are to be made on the most extensive and co-ordinated basis.<sup>\*49</sup> This principle is directly related to the fundamental right of the consumer to be heard—i.e., to have his interests taken into account.

The right of non-governmental consumer organisations to participate in the development and implementation of consumer protection policy has been laid down in §15 of the Consumer Protection Act. Consumer rights also comply with the requirements of the rule of law insofar as they reflect, in a material sense, the main idea of the social state: the guaranteeing of social justice.

In interpreting the Constitution, besides the fundamental rights set out in the Estonian Constitution, one must take into account both the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union.

The Supreme Court noted already back in 2004 that the Charter of Fundamental Rights is not directly binding for Estonia; however, as is expressed in the preamble to the charter, this instrument is based, *inter alia*, on the shared Constitutional traditions of the EU member states and the principles of democracy and the rule of law. The principles of democracy and the rule of law, as well as the other general principles of law effective in the European legal space, are valid in Estonia too.<sup>\*50</sup> Insofar as consumer rights have been included in the Charter of Fundamental Rights of the EU, they comply with the principles of democracy and the rule of law.

Given the above, the author believes that consumer rights are in compliance with the fundamental principles of the Constitution, which is necessary if such rights are to be recognised as Constitutional fundamental rights.

However, there is no clear evidence of the practical importance of formal declaration of consumer rights at the Constitutional level. One may argue that there is no need for a judicial intervention through Constitutionalisation in this field. In general, the Constitutional rights guaranteed by the Constitution are not addressed to individuals. The Estonian Constitution does not provide for the binding force of fundamental rights between private parties. Instead, §14 of the Estonian Constitution states that guaranteeing the rights and freedoms is the duty of the legislative, executive, and judiciary powers, and of local governments. Such individuals may not rely on them against one another in private litigation directly. Constitutional rights are in play in private litigation only **indirectly** as duties of the respective public authorities and, in particular, the civil courts to respect Constitutional rights in the legislation and interpretation of private law.<sup>\*51</sup> The option of direct application of fundamental rights should be avoided also because this would destroy the mutual private autonomy between the parties.<sup>\*52</sup> Relevant Estonian legal literature has also concluded that, insofar as direct application of the Constitution in civil law should be eschewed, the Constitution as a source of civil law has the meaning mostly of a basic norm and that fundamental rights and freedoms should be protected via civil-law norms.<sup>\*53</sup>

The legal consumer protection system in Estonia operates appropriately, and protection at a higher level is not actualised today. Estonia has fulfilled its duty of high-level protection of consumers by enacting specific consumer laws (which are strongly influenced by EU law) and, when necessary, modifying them over the course of time. The conformity of the consumer protection legislation with the Constitution is ensured by §139 of the Constitution, which states that the Chancellor of Justice shall review the legislation of the legislative and executive powers and of local governments for conformance with the Constitution.

To the author's mind, the acknowledgement of consumer rights as Constitutional rights is more rhetorical than real, amounting simply to a formal acceptance of the legal instruments already in place.

<sup>49</sup> Supreme Court Constitutional Review Chamber decision of 21.12.1994, III-4/1-11/94 (in Estonian).

<sup>50</sup> Supreme Court Constitutional Review Chamber decision of 17.2.2004, 3-4-1-1-03 (in Estonian).

<sup>51</sup> M. Kumm. Who is afraid of the total Constitution? Constitutional rights as principles and the Constitutionalization of private law. – German Law Journal 2006 (7)/4, p. 352.

<sup>52</sup> For more about this, see D.W. Belling. Põhiõiguste tähendus eraõigusele (Implication of Fundamental Rights in Respect of Private Law). – Juridica 2004/1, p. 4 (in Estonian).

<sup>53</sup> I. Kull. Eesti tsiviilõiguse allikate tugev ja nõrk kohustuslikkus (Strong and Weak Mandatoriness of Estonian Civil Law Sources). – Juridica 2010/7, p. 464 (in Estonian).

## 5. Conclusions

Our analysis of consumer rights has shown that, in a number of respects, consumers benefit from human rights protection if these rights are viewed in the broader context of consumer activity. Although some legal scholars suggest that consumer rights have potential to become soft human rights, the author does not believe that the treatment of consumer rights as a new generation of human rights is sufficiently justified.

Unlike abstract human rights, consumer rights have been designated in legislation as specific rights whose scope is relatively clear-cut.

The violation or ignoring of consumer rights is not normally accompanied by grave consequences, in contrast to what may be the case with a violation of human rights.

A review of international treaties at the European level reveals that the consideration of consumer rights as fundamental rights is a rare exception and treaties protect consumers only indirectly. Although the right to consumer protection is now enshrined in Article 38 of the Charter of Fundamental Rights, this does not grant a substantive right to European citizens; rather, it refers to the Union's objective of ensuring a high level of consumer protection.

In its catalogue of fundamental rights and freedoms, the Estonian Constitution does not mention consumer rights. However, its §10 allows the Constitutional review court to create new rights, freedoms, and obligations that arise from the meaning of the Constitution or are in compliance with it. Hence, the author analysed whether or not consumer rights could be elevated, if necessary, to the level of a Constitutional value and concluded that for consumer rights, the condition of compliance with the fundamental principles of the Constitution, necessary for their recognition as fundamental rights, has been met.

Nevertheless, the author believes that there is no direct need to recognise consumer rights among fundamental Constitutional rights in Estonia, insofar as many important fundamental principles of consumer law are reflected through other fundamental rights and freedoms in the Estonian Constitution. The specific consumer protection system in Estonia works properly, and the state has fulfilled its duty of the high-level protection of consumers by enacting specific consumer laws and, when necessary, modifying them over the course of time. Consumer protection legislation being in line with the Constitution is ensured by §139 of the Constitution, which states that the Chancellor of Justice shall review the legislation of the legislative and executive powers and of local governments for conformity with the Constitution.