Constitutional Reasoning in the European Union and the Charter of Fundamental Rights: In Search of Public Justification

Frantziou, E.

This is an accepted manuscript of an article to be published by Wolters Kluwer in European Public Law, 25 (2), pp. 183-203.

The final definitive version will be available online:

http://www.kluwerlawonline.com/toc.php?pubcode=EURO

Forthcoming in European Public Law (2019) 25(2)

Constitutional Reasoning in the European Union and the Charter of Fundamental Rights: In Search of Public Justification

Eleni Frantziou*

Abstract

This article argues that the CJEU's use of the EU Charter of Fundamental Rights in situations falling within the scope of EU law needs to be supplemented by clearer constitutional reasoning about the role of fundamental rights in the public order of the European Union. The article demonstrates, through an analysis of the Charter's drafting context, that the primary function of this instrument is to highlight the centrality of a set of public goods in the EU, rather than merely to add to the number of individual rights to which EU law gives rise. It is then argued that, in order for this function to be fulfilled, an interpretation of fundamental rights is required that both acknowledges their constitutional value as distinct from other sources of rights protection in the Union and offers adequate reasons for the application of the Charter standard. The idea of public justification provides a suitable starting point, particularly in situations of conflict with national laws, because it would give rise to a much-needed judicial debate about what the best standard of fundamental rights protection would be for the Union. However, such an interpretation of the Charter is currently lacking from the case law which, instead, utilises problematic forms of constitutional and quasi-constitutional discourse, through continued reliance on a conception of rights as tools of enforcement of EU law, which it had advanced in its earlier case law. While this type of reasoning was well suited to the idea of the EU as a social market economy, it structurally precludes the re-imagination of rights as collectively authored claims about good government under the Charter framework.

Keywords

Charter – EUCFR – reasoning – constitutionalism – justification – public sphere – EU public law – fundamental rights

I. Introduction

Several years ago, Douglas-Scott wrote that 'the EU already has some sort of Constitution.'[1] That was the case not only in the broad, terminological sense that its

* Lecturer, University of Westminster. Email address: E.Frantziou@westminster.ac.uk. I am very grateful to the editor and reviewers, François Turpault, Lea Raible and the participants of the 5th Conference on European Law and Policy in Context at the University of Birmingham for comments on earlier drafts.

[1] S Douglas-Scott, 'Constituting Europe: In Defence of Public Reason' (2001) 12 *King's Law Journal* 75, 75.

operation could be defined by reference to a specific set of rules,[2] but also in a deeper legal sense. Its foundational treaties revealed an order delivered through a variety of institutions, set up a system of checks and balances, and identified ascertainable rights.[3] For Douglas-Scott, the key question was how, since that constitution was imperfect, it could be reformed to sustain a developing, and more discursive, EU-wide democracy. She had then called for new forms of public reason (or justification) to be developed, which would involve a conception of justice ensuing from rational argumentation about the common good.[4]

Building upon this analysis, this article focuses on the potential of one aspect of the EU constitutional order in particular in providing the impetus for public justification: the introduction, initially as a non-binding declaratory instrument and, subsequently, as a binding rights list, of the EU Charter of Fundamental Rights (hereafter 'Charter' or 'EUCFR'). The reason for this focus is that, as claims with strong links to existing national identities and visions of the good life, fundamental rights have been both a unifying characteristic and a key point of contestation of the boundaries of EU constitutionalism.[5] National courts have always challenged the primacy principle in this field,[6] highlighting the need for new forms of constitutional discourse. In turn, the article advances two principal claims. On the one hand, it argues that the Charter rendered public justification a feasible and desirable prospect for EU fundamental rights law. Insofar as it signified a commitment to those rights as commonly authored constitutional guarantees, it could serve as a starting point for substantive analysis of the merits of their different interpretations. On the other hand, the Court's current methodology stalls such a possibility. The Court has not acknowledged the break with prior case law that the Charter, in light of its discernibly more political context, could create. Rather, its reasoning has remained one of

[2] Ibid, 76.
[3] Ibid, 76-78.
[4] Ibid.
[5] See JHH Weiler, 'Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights' in NA Newall and A Rosas (eds), *The European Union and Human Rights* (Kluwer 1995) 51, 51-52.
[6] *Solange II – BverfGE 73, 339 (Az: 2 BvR 197/83)*; G Anagnostaras, 'Solange III? Fundamental Rights Protection under National Identity Review' (2017) 42:2 *ELRev* 234. In the UK context, see: *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin); *R (HS2 Action Alliance Ltd) v Secretary of State for Transport* [2014] UKSC 3.

cautious incrementalism often operating through 'shadow effects',[7] rather than robust public justification that uses the constitutional settlement as its point of departure.[8]

The argument develops in the following manner. Firstly, through an analysis of its drafting context, the article demonstrates that the Charter was intended to signal a shift in the Union's constitutional identity, as its symbolism as a predominantly republican commitment to rights, rather than its content as such, was its key import (Section II). Secondly, it is argued that there is a mismatch between such an understanding of the Charter and the Court's case law to date. As illustrated in section III, while references to the Charter have added to a long tradition of the protection of rights in the Union, the case law appears to respond to an individual, case-by-case conception of justice, rather than a broader conception of the EU public good. The constitutionality of EU law has continued to stem from an uncompromising conception of the principle of supremacy,[9] which does not distinguish provisions labelled 'fundamental' from those with a more functional character in the EU legal order.[10] The idea of 'balancing' different interests in the enforcement of EU law thus takes centre stage in the Court's analysis, resulting in a model of constitutional discourse which is especially unsuited to the Charter, if the latter is understood as an essential precondition of legitimacy for other aspects of EU law and, indeed, a structural component of the EU public sphere.

Finally, section IV argues that, against a codified fundamental rights framework, the setting out of mutually adequate reasons for adopting a particular interpretation of rights should, still, be more confidently assumed by the Court of Justice. This could enable the development, if not of agreement on the merits, at least of more discursive, iterative forms of constitutionality in the Union than the case law

---

[7] C Barnard, 'The Charter, the Court – and the Crisis' (2013) Cambridge Legal Studies Research Paper Series, Paper no 18/2013, <http://www.law.cam.ac.uk/ssrn/>, accessed 8/01/2018, 8-9.

[8] The view that the Charter should form the starting point of the Court's rulings had been expressed powerfully by Advocate General Cruz Villalón in his Opinion in *Prigge*, but was not followed by the Court: Opinion of Advocate General Cruz Villalón, delivered on 19 May 2011, in Case C-447/09 *Prigge and Others v Deutsche Lufthansa*, EU:C:2011:321, para 26.

[9] See Case C-399/11, *Melloni*, EU:C:2013:107, paras 56-60; See also LFM Besselink, 'The Parameters of Constitutional Conflict after Melloni' (2014) 39:4 *EL Rev* 531, 545: the trend in *Melloni* can be contrasted to more nuanced utterances of primacy in the fundamental rights context previously, in cases like *Omega* and *Sayn Wittgenstein*, which had been more mindful of national constitutional differences. See Case C-36/02, *Omega Spielhallen- Und Automatenaufstellungs v Oberbürgemeisterin Der Bundesstadt Bonn* [2004] ECR I-9609; Case C-208/09, *Sayn-Wittgenstein v Landeshauptmann von Wien* [2010] ECR I-13693.

[10] D Grimm, 'The Democratic Costs of Constitutionalisation: The European Case' (2015) 21:4 *European Law Journal* 460, 469-471.

has so far provided.[11] A shift away from the terminology of balancing of individual interests to that of justification of rights based on the common good would amount to a procedurally more principled means of constitutional reasoning in the EU legal order that could, eventually, enable conflicting views about the proper reach of EU constitutionalism to be more fully developed – and ultimately resolved – in their appropriate locus: the political realm.

II. The symbolic value of the Charter in EU constitutionalism

The Charter has often been understood as a document which does not introduce new rights, but merely enhances the visibility of existing rights within EU law, as is clear from its Preamble.[12] That has been a source of doubt regarding its constitutional value, not only in the Member States but also within the Union's institutions: empirical research at the Court of Justice has revealed that the attribution of binding effect to the Charter did not alter judges' perceptions of how they should decide fundamental rights cases.[13] Respondents generally felt that there was no reason to change their existing fundamental rights discourse, because fundamental rights were already 'for the informed observer, there in the Court's case law prior to the entry into force of the Charter, in the form of general principles.'[14]

While the question of whether the Charter created or bolstered rights merits further analysis, particularly in respect of rights associated with data protection, public administration, and solidarity (which it elevated to fundamental status),[15] the idea that its contribution to the EU legal order should be assessed solely, or even primarily, based on how much content it added to fundamental rights protection in the

[11] See N Walker, 'The Rule of Law in the EU: Necessity's Mixed Virtue' in G Palombella and N Walker (eds), *Relocating the Rule of Law* (Bloomsbury 2008) 129.
[12] House of Lords EU Select Committee, 'The Treaty of Lisbon: An Impact Assessment' (HL Paper 62, August 2007) paras 5.37–5.41.
[13] S Morano-Foadi and S Andreadakis, 'Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights' (2011) 17 *European Law Journal* 595.
[14] Ibid, 599.
[15] Some of the Charter's provisions were not previously protected as fundamental rights and did not have 'general principle' status: see, e.g. Case C–101/08, *Audiolux and Others v Groupe Bruxelles Lambert SA (GBL) and Others* [2009] ECR I– 9823. The Charter also clarifies the 'fundamental rights' status of a number of provisions going beyond the protections of the ECHR, such as developing rights to privacy and data protection (Art 8 EUCFR), and settles the status of social rights, such as the rights to information and consultation within the undertaking and collective bargaining, including the right to strike (Articles 27 and 28 EUCFR, and the Solidarity chapter, more broadly).

Union is problematic. As public law claims, fundamental rights do not only recognise basic needs, but also define how a political community can be legitimately governed.[16] Geneviève Souillac has usefully pointed out that, particularly when constitutional transitions are taking place, fundamental rights lists assume an 'architectural role'.[17] They have a constructional function for a nascent public sphere because they institutionalise the conditions for 'appropriate forms of governance' to be developed and provide structural legitimacy to newly founded political institutions and processes.[18] Its drafting history indeed confirms that the Charter was intended to have a function of collective identity building within a changing framework of deeper political integration.

While the Charter only acquired binding legal force as part of the Lisbon Treaty, the idea of the EU as 'far more than a market', but rather as 'a unique design based on common values' had been made clear already by the 1996 Intergovernmental Conference.[19] The Charter was drafted soon afterwards, at the Cologne European Council in 1999, taking over the recommendations put forth in an influential report by Professor Simitis, which had expressed the worry that it was no longer sufficient for EU fundamental rights to mirror the ECHR but that, rather, a European bill of rights reflecting the 'Union experience' was required.[20] Its symbolism as a platform for a minimum common constitutional identity is, in turn, key in understanding the Charter's role in the EU project as an instrument that is more about legitimacy and identification than it is about new human rights standards.[21] While the Charter's substantive provisions were not drastically altered since its non-binding declaration in the Treaty of Nice, it was only under the negotiations

[16] In this article, I use the term 'public law' to denote the law applicable to the process of governing: M Loughlin, *The Idea of Public Law* (OUP 2003) 5-7; M Loughlin, *The Foundations of Public Law* (OUP 2010) 108.

[17] G Souillac, 'From Global Norms to Local Change: Theoretical Perspectives on the Promotion of Human Rights in Societies in Transition' in SA Horowitz and A Schnabel (eds), *Human Rights and Societies in Transition: Causes, Consequences, Responses* (United Nations University Press 2004) 77, 79.

[18] Ibid, 81, 93; J Habermas, 'Remarks on legitimation through human rights' in J Habermas, *The Postnational Constellation* (M Pensky tr, Polity Press 2001) 117.

[19] A Strategy for Europe', Final Report of the Reflection Group on the 1996 Intergovernmental Conference, SN 520/95, 5 December 1995, iii; PP Craig, 'Democracy and Rule-making within the EC: An Empircal and Normative Assessment' (1997) 3:2 *ELJ* 105, 113.

[20] European Commission Expert Group on Fundamental Rights, *Affirming Fundamental Rights in the European Union: Time to Act* (Office for Official Publications of the European Communities 1999) 10.

[21] J Baquero Cruz, 'What's Left of the Charter? Reflections on Law and Political Mythology' (2008) 15:1 *Maastricht Journal* 65, 65-66.

concerning the Constitutional Treaty that it would acquire its current preamble, a more defined scope of application and, crucially, a binding legal status. As De Burca and Aschenbrenner note, '[t]he decision to confer legal status on the Charter is thus necessarily linked with the discussion on a constitution for Europe and especially with the political debate on the future shape of the EU.'[22]

In other words, even if its content is not new as such, the Charter selects, collects and narrates fundamental rights in a novel manner from the perspective of EU law. As Paul Craig has put it, 'the very fact of putting those pre-existing provisions in a thing called a Charter of Fundamental Rights'[23] was a constitutionally significant exercise. The designation of a group of rights as 'fundamental' was intended to give these rights independent interpretative value vis-à-vis Member State and international standards, not necessarily by antagonising them, but by setting out the arrangements considered the best possible based on the political morality of the European Union, rather than being reducible to external standards alone.[24] Furthermore, the Charter is addressed to EU citizens as a public characterised by a commitment to an underlying set of common values and, most importantly, one that puts that commitment into effect by exercising authorship.[25] Unlike the preambles of the TEU and TFEU, which refer only to the heads of state, the Charter's Preamble retains the formulation used in the Constitutional Treaty. It proclaims that 'the peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common

---

[22] G De Burca and B Aschenbrenner, 'The Development Of European Constitutionalism And The Role Of The EU Charter Of Fundamental Rights' (2003) 9 *Columbia Journal of European Law* 355, 364–65.

[23] See PP Craig, European Scrutiny Committee, 'Oral evidence: The Application of the EU Charter of Fundamental Rights in the UK, HC 979, 22 Jan 2014 (published 3 Feb 2014), <http://data.parliament.uk/writtenevidence/WrittenEvidence.svc/EvidenceHtml/5574>, accessed 9/2/2018.

[24] European Commission Directorate-General for Employment, Industrial Relations, and Social Affairs, 'Affirming Fundamental Rights in the European Union: Time to Act' (1999) Report of the Expert Group on Fundamental Rights, <http://bookshop.europa.eu/en/affirming-fundamental-rights-in-the-european union-pbCE2199181/downloads/CE-21-99-181-EN-C/CE2199181ENC_001.pdf;pgid=y8dIS7GUWMdSR0EAlMEUUsWb00008BR_Mmdd;sid=q4ng-7rouAbg__TN3ld-XNjN5ur-ib07rVo=?FileName=CE2199181ENC_001.pdf&SKU=CE2199181ENC_PDF&CatalogueNumber=CE-21-99-181-EN-C> accessed 15 May 2016, 10.

[25] On the significance of the idea of authorship in a democratic constitution, see J Habermas, *Between Facts and Norms*: *Contributions to a Discourse Theory of Law and Democracy* (Polity Press 1996) 143; H Arendt, *On Revolution* (Penguin 1990) 145. See also: UK Preuss, 'Constitutional Power-Making for the New Polity: Some Deliberations on the Relations Between the Constituent Power and the Constitution' (1992-1993) 14 *Cardozo Law Review* 639.

values.'[26] That is a remarkable statement. It situates the person 'at the heart' of the Union's activities[27] and suggests that the language of fundamental rights is a code to which European institutions, the Member States and, crucially, their peoples, commit. It can thus best be understood as an attempt to distil – or even to construct – a collective 'we' to which EU citizens from different states would relate, adding structure to novel concepts at the time, such as EU citizenship, and aspirations, such as federalisation.[28]

In turn, the application of the Charter can be distinguished, at least at the level of justification, from the application of rights within EU law to date, which mostly attached these claims to the exercise of market freedoms, even though in some cases very loosely,[29] or to compliance with global and European human rights standards. The story the Charter tells runs in parallel with the economic freedoms: it is not primarily concerned with 'conventional' questions of EU law, such as free trade or competition. Rather, it defines how the EU should operate at the most basic level as a Union which, albeit not brought together in federal terms, has undeniably political aspirations of both an institutional character (e.g. a parliamentary body) and of a substantive character (e.g. through competences in fields such as citizenship, monetary, and social policy). Indeed, what sets the Charter apart from other sources of fundamental rights protection, such as the general principles of EU law and respect for the ECHR, is that it has a political dimension, as its interpretation does not only concern the individuals affected by a breach of a fundamental right, but also the way in which the EU as a broader political community has chosen to organise itself.[30] The significance of the status that the provisions in question acquire through the Charter consists, precisely, in their function of setting up the basic parameters of the Union's public order.

---

[26] Charter Preamble, recital 1.
[27] Ibid.
[28] See P Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 *Common Market Law Review* 945.
[29] Most illustratively, Case C-413/99, *Baumbast and R v Secretary of State for the Home Department* (2002) ECR I-7091; Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* [2004] ECR I-09925; Case C-34/09 *Zambrano v Office national de l'emploi* [2011] I-01177.
[30] R Alexy, 'Individual Rights and Collective Goods', in C S Nino (ed), Rights (NYU Press, 1992) 163, 164–165. See also PW Kahn, 'Community in Contemporary Constitutional Theory' (1989) 99 *Yale Law Journal* 1, 20-28; B Ackerman, 'The Storrs Lectures: Discovering the Constitution' (1984) 93 *Yale Law Journal* 1013, 1040-1043.

However, the Charter's constitutional symbolism currently lacks articulation in the Court's rulings. On the one hand, the Court has made plain its intention to give effect to specific provisions of the Charter, such as non-discrimination, in order to effectuate changes in EU law and policy.[31] There is also little to be questioned insofar as the Court's willingness to strike down EU legislation based on human rights issues is concerned;[32] or in the setting of requirements for Member States to comply with Charter provisions over the years.[33] On the other hand, though, as section III demonstrates, a closer look at the development of the Court's reasoning in fundamental rights case law confirms, as interviews at the Court of Justice had indeed suggested,[34] uncertainty about the Charter's overall significance as a means of constitutionalisation, and an unwillingness to distinguish it from the existing case law based on the general principles of EU law. Yet, as the latter had emerged predominantly in response to conflicts with national constitutional courts, it lacked overall conceptual coherence by reference to the values underpinning the protection of fundamental rights in EU law.[35] As such, it is limited in representing the Charter, if this instrument is understood, in light of its drafting context and Preamble, as an attempt to create a stronger linkage between the fundamental rights protected in EU law and the Union's emerging public sphere.[36]

III. The Charter as missed opportunity for constitutionalisation: reasoning about fundamental rights in the Court's case law

The constitutional fabric of the Charter can be contrasted to the broader construction of EU law as a hybrid structure possessing a mix of public and private law features. In the market-building process, the completion of which was a pre-requisite of further integration, the constitutionalisation of the economic freedoms by the Court of Justice

[31] Barnard (n 7) 4.
[32] Ibid; Joined Cases C-92/09 and C-93/09, *Schecke and Eifert v Land Hessen* [2010] ECR I-11063; Case C-236/09, *Association belge des Consommateurs Test-Achats ASBL v Conseil des ministres* [2011] ECR I-00773.
[33] Barnard (n 7) 5-6.
[34] Morano-Foadi and Andreadakis (n 13).
[35] A Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (2009) 23:1 *OJLS* 549, 567.
[36] On the inherent nature of this relationship, see J Habermas, 'On the Internal Relation between the Rule of Law and Democracy' in J Habermas, *The Inclusion of the Other: Studies in Political Theory* (Polity Press 1999) 258-262; JS Dryzek, *Deliberative Democracy and Beyond. Liberals, Critics, Contestations* (OUP 2000) 48.

transformed private law into constitutional law.[37] As exemplified in the *Van Gend en Loos* ruling, the Court's case law rested predominantly upon an understanding of rights as individual interests in the application of EU law.[38] The private enforcement of rights served as an avenue for integration which, historically, contributed to settling organisational questions that eventually developed into Charter rights. For example, most notably in the field of fundamental rights, in *Defrenne II* the Court had held that, in addition to ensuring that undertakings operating in Member States which had implemented the right to equal pay do not suffer a 'competitive disadvantage' within the single market,[39] this right also

> forms part of the social objectives of the community, which is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek the constant improvement of the living and working conditions of its peoples, as is emphasised by the Preamble to the Treaty […]. This double aim, which is at once economic and social, shows that the principle of equal pay forms part of the foundations of the Community.[40]

In the 1976 context, the effect of the *Defrenne* ruling was not simply to include women in a marketplace in which they were disadvantaged. At the same time, in recognising their right to be paid equally with men for their work, it enabled women meaningfully to participate in the market as an institution with substantial political influence, and thus more fully to take part in public life. The Court thereby recognised that the single market had social dimensions, and that its purpose was not *just* to ensure economic integration as an end in itself but, rather, a form of integration that resulted in the improvement of living and working conditions in the EU. In this sense, it substantively engaged with the public law dimensions of the European Union at the time, even if these could only have come about, in light of the limited nature of the Treaties, through the discourse surrounding the free market. Still, rather than attributing the decision to the higher significance of non-discrimination as a

[37] C Joerges, 'The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective' (1997) 3:4 *European Law Journal* 378, 383.
[38] JHH Weiler, 'The Individual as Subject and Object and the Dilemma of European Legitimacy' (2014) 12:1 *ICON* 94, 103.
[39] Case 43/75, *Defrenne v Sabena* [1976] ECR 455, para 9.
[40] Ibid, paras 10-12.

foundational goal of the EU project, as the Advocate General had suggested,[41] the Court spoke only of the 'interest' of private parties in having Treaty rules observed under the umbrella of the Union's 'double aim', which was 'at once economic and social'.[42] It thus failed explicitly to identify priorities amongst considerations that are constitutionally relevant in the Union and introduced a problematic conception of balancing between fundamental rights and market freedoms.

This approach found new expressions in the case law over the years. For example, in referring to *Defrenne* in *Viking* three decades later, the Court used this ruling in a manner that marginalised its dynamic construction of rights in a changed European constitutional framework. The Court referred to *Defrenne* in a formalistic way, as a justification of the restriction of a fundamental social right in order to affirm market freedoms enshrined in the Treaty.[43] Yet, it did not consider how the *Defrenne* ruling could be translated into the post-Maastricht constitutional framework of the Union, which had become far more complex through the introduction of political symbols, such as a supranational citizenship and the Charter, albeit at the time non-binding.[44] Instead, the 'double aim,' to which the Court had referred in justifying the imposition of an obligation to observe a fundamental right in *Defrenne*[45] was used as a justification for directly balancing the duty to observe a market freedom against the fundamental right to strike, without an assessment of how the market freedom on the one hand and the fundamental right on the other could fulfil their respective organisational functions within the very different social context of the early '00s. Thus, while in *Defrenne* the emphasis on the duality of the Union's goals meant going beyond merely economic integration in the single market and acknowledging the emergence of a broader public order, the use of the same phrase in *Viking* had the opposite effect, when assessed against the political aspirations set in motion by the Maastricht treaty.

---

[41] Opinion of Advocate General Trabucchi, delivered on 10 March 1976, in Case 43/75, *Defrenne v Sabena* [1976] ECR 455, 490. See also E Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75:1 *AJIL* 1, 20.
[42] *Defrenne* (n 39) para 31.
[43] Case C-438/05, *The International Transport Workers' Federation & The Finnish Seamen's Union v Viking Line. ABP & Oü Viking Line Eesti* [2007] ECR I-10779, paras 58-59.
[44] Most notably, see Article 8 of the Maastricht Treaty on European Union [1992] OJ C191/01.
[45] *Defrenne* (n 39) paras 10-12.

Such an analysis has persisted in post-2009 jurisprudence, which is characterised by avoidance of more detailed constitutional reasoning[46] and reliance on the idea of balancing for interpreting the Charter. For instance, in *Alemo-Herron*, the Court was faced with a case concerning, on the one hand, the freedom to conduct a business enshrined in Article 16 of the Charter[47] and, on the other hand, the interests of employees in the context of the transfer of the undertaking in question from the public sector to the private sector, negotiated through collective bargaining. The Court sought to reach a 'fair balance'[48] between these sides, ultimately finding that the employees' interests in collective action prejudiced 'the very essence' of the freedom to conduct a business.[49]

In this context, however, the resort to balancing resulted in a deep failure to interpret and, if required, to adjust the rights in question based on the set of values represented by the Charter's provisions.[50] The freedom to conduct a business is usually thought to protect the right to engage in business activity, rather than securing a right to run one's business free from regulatory constraints or from the implications of employee protection.[51] The Court's broad interpretation of Article 16 suggested a preference for a specific conception of that provision, the grounds for which were not explored in the ruling. Moreover, regardless of whether one accepts the salience of such a conception of Article 16 or not, the Court did not acknowledge a constitutional obligation to assess, similarly, the implications of that interpretation for the right to collective bargaining, which is also protected in the Charter, under Article 28 thereof, rather than being an abstract interest. This provision was not mentioned in the ruling.

---

[46] See L Pech, 'Between Judicial Minimalism and Avoidance: The Court of Justice's Sidestepping of Fundamental Constitutional Issues in *Römer* and *Dominguez*' (2012) 49:6 *CML Rev* 1841.

[47] Article 16 EUCFR. Notably, the freedom to conduct a business before incorporation in the Charter was a general principle of EU law, unlike social rights, such as the right to be informed and consulted within the undertaking: Opinion of Advocate General Kokott delivered on 31 May 2016 in Case C-157/15, *Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV*, EU:C:2016:382, para 134; see also Case 4/73, *Nold* v *Commission*, EU:C:1974:51, paras 13-14; Case 44/79, *Hauer*, EU:C:1979:290, paras 15, 16 and 32; Joined Cases C-453/03, C-11/04, C-12/04 and C-194/04, *ABNA and Others*, EU:C:2005:741, para 87; and Case C-544/10, *Deutsches Weintor*, EU:C:2012:526, para 54.

[48] Case C-426/11, *Alemo-Herron and Others v Parkwood Leisure Ldt*, ECLI:EU:C:2013:521, para 25.

[49] Ibid, para 35.

[50] See T Scanlon, 'Adjusting Rights and Balancing Values' (2004) 72:5 *Fordham L Rev* 1477, 1481.

[51] J Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law (Case C-426/11 *Alemo-Herron v Parkwood Leisure*)' (2013) 42 *Industrial Law Journal* 434; J Prassl, 'Business Freedoms and Employment Rights in the European Union' (2015) 17 *Cambridge Yearbook of European Legal Studies* 189; S Weatherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: On the Improper Veneration of 'Freedom of Contract'' (2014) 10 *European Review of Contract Law* 157.

The problems with this approach from the perspective of fundamental rights protection are plain: firstly, what comes within the ambit of a fundamental right is in itself a searching question that requires argumentative support, which cannot be superseded by balancing.[52] The vagueness with which the Court has dealt with the content of the relevant rights appears to trade 'inclusiveness for superficiality' as, by failing to set the relevant threshold or limit for finding that a fundamental right is engaged, it does not weed out justifications that can prejudice its very purpose.[53] Secondly, even if the Court had acknowledged the constitutional significance of Article 28, and thus engaged with both of the affected rights in fuller terms, its methodology would still risk structurally excluding a large set of Charter provisions from meaningful constitutional review, despite their equal constitutional status. Social rights and, particularly, labour rights, necessarily lose out when subjected to the terminology of balancing, because their effectiveness depends precisely on their potential to suspend an employer's pursuit of economic activities, rather than being balanced with it.[54] The key constitutional question at stake in this case was a potential clash, not of competing interests of private parties, but of the Union's economic and social goals themselves. As such, it necessarily required an assessment of which of those considerations constitutionally rank higher in EU law and how different values should be reconciled in the interpretation of Charter provisions.

Still, it might be argued that *Alemo-Herron*, which is drawn from the contested 'Solidarity' chapter of the Charter, is an uncharacteristic example of the Court's case law. It is therefore important to emphasise the centrality of the reasoning described above to cases spanning across the Charter's different sets of provisions, such as *Google* (balancing the right to private life and an interest of access to information)[55], *Melloni* (balancing the right to an effective remedy and the principle of uniformity)[56], and, perhaps most strikingly, *Achbita*[57] and *Bougnaoui*.[58] The latter two cases, which

[52] S Tsakyrakis, 'Proportionality: An assault on human rights?' (2003) 7:3 *ICON* 468, 479-480.
[53] Ibid, 488.
[54] See also E Frantziou, 'Case C-176/12 *Association de Médiation Sociale*: Some Reflections on the Horizontal Effect of the Charter and the Reach of Fundamental Employment Rights in the European Union' (2014) 10 *EuConst* 332.
[55] The use of balancing discourse in this case is further discussed in E Frantziou, 'Further Developments in the Right to be Forgotten: The European Court of Justice's Judgment in Case C-131/12, *Google Spain, SL, Google Inc v Agencia Espanola de Proteccion de Datos*' (2014) 14:4 *HRLR* 761, 768-770.
[56] See (n 9) above.
[57] Case C-157/15, *Achbita and Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v G4S Secure Solutions*, ECLI:EU:C:2017:203.

concerned the wearing of the Islamic headscarf in the workplace, illustrate the Court's use of such a discourse even in the field that has pride of place in EU fundamental rights law, that of non-discrimination, thus highlighting its unease with assessing the role of rights in the public sphere in cases perceived as overly political.[59]

The main issue in both cases was the employees' choice to start wearing a headscarf at work against the employer's policy and a client's wishes, respectively. Setting out the appropriate limits between respect for the private sphere and the public expression and manifestation of religion and belief (e.g. through dress) was, therefore, crucial. However, in contrast to Advocate General Sharpston's eloquent Opinion in *Bougnaoui*, the Court did not discuss the role of the workplace in public life and the effects of bans on religious attire within it.[60] Rather, by examining the cases solely on the basis of discrimination by private employers against a specific characteristic that these individuals possessed, the Court was able to balance the employers' freedom to conduct a business with the right not to be discriminated against on grounds of religious belief, finding for the applicant in *Bougnaoui*, and not quite so in *Achbita*, where it left the national court to decide whether she had been, in fact, discriminated against.

These cases leave the reader with a sense of surprise that the freedom of religion, protected in Article 10 EUCFR, did not at all feature in the Court's analysis of what should fall within the relevant balance.[61] By focusing on discrimination at work as a private harm, the Court did not capture the broader nature of the protection of religious belief as an element of a democratic society, nor did it assess whether its manifestation in the workplace was an essential component of its effective exercise.[62] Crucially, it also did not articulate in what way the freedom to conduct a business amounted not only to a potential justification of indirect discrimination, but at the same time to a legitimate restriction of Article 10, insofar as that right protects

---

[58] Case C-188/15, *Bougnaoui and ADDH v Micropole SA*, ECLI:EU:C:2017:204

[59] M Hunter-Henin, 'Lessons from the European Court's Hijab rulings', UCL European Institute 6 April 2017, <http://www.ucl.ac.uk/european-institute/analysis/2016-17/religious-discrimination>, accessed 8/01/2018. For a comprehensive analysis of the role of religion in the EU, see R McCrea, *Religion and the Public Order of the European Union* (OUP 2010).

[60] See Opinion of Advocate General Sharpston, delivered on 13 July 2016, in Case C-188/15, *Bougnaoui and ADDH v Micropole SA*, EU:C:2016:553, paras 37, 45, 73-75.

[61] See *Achbita* (n 57), paras 37-38.

[62] S Jolly, 'Achbita & Bougnaoui: A strange kind of equality', Cloisters 15 March 2017, <http://www.cloisters.com/blogs/achbita-bougnaoui-a-strange-kind-of-equality>, accessed 8/01/2018; L Vickers, One Step Forward and Two Steps Back for Religious Diversity in the Workplace' (2017) 8:3 *European Labour Law Journal* 232, 253-255.

religion 'in public or in private', as well as its manifestation through 'observance or practice'.[63] As above, one could argue that the idea of a democratic society in the EU comprises corporate image as an adequate bar on the right to publicly manifest religion. That would almost certainly have been a position attracting critique, as it would have openly conflicted with the human rights jurisprudence to which the Court readily referred.[64] Nonetheless, it would have been a justification for placing a limit to the fundamental right to manifest religion in the specific constitutional context of the European Union, which could have invited rational disagreement, rather than mere uncertainty about the Union's stance towards these questions.[65]

This approach is indicative of a broader problem within EU public law. As Dieter Grimm has noted, the lack of a meaningful relationship between the Court's decisions and the EU public sphere can be attributed to the over-constitutionalisation of EU law, whereby the Treaties at large make up the Union's 'constitutional charter.'[66] This has meant that the assertion of a private interest in the application of the Treaties by 'vigilant' individuals – to paraphrase the famous paragraph of the *Van Gend en Loos* judgment – is automatically translated into a constitutionally worthy cause, without an analysis of the characteristics of constitutional rights as foundational for other aspects of Union law.[67] By conceptualising rights through the vindication of private interests, EU law does not distinguish questions of public concern from technical aspects of the functioning of the Union, or present a vision of the public good that can be separated from the interests of particular actors. As Streeck notes, though, in contrast to bare markets, polities 'rather than simply serving the idiosyncratic wants of individuals […] must subject them to public examination with the objective of aggregating them into a general will, which bundles and supersedes the many individual wills.'[68] In not doing so, EU law fails to move beyond a private-centric, *ad hoc* conception of justice and to acquire – or to acknowledge the

[63] Article 10(1) EUCFR; Z Adams and JO Adenitire, 'Ideological Neutrality in the Workplace' (2018) 81(2) *MLR* 337, 356-359.
[64] *Achbita* (n 57), para 39; *Eweida and others v United Kingdom* (Application nos. 48420/10, 59842/10, 51671/10 and 36516/10), ECtHR 15 Jan 2013, para 94.
[65] M Steijns, 'Achbita and Bougnaoui: raising more questions than answers', Eutopia Law 18 March 2017, <https://eutopialaw.com/2017/03/18/achbita-and-bougnaoui-raising-more-questions-than-answers/>, accessed 8/01/2018.
[66] Case 294/83, *Parti Ecologiste "Les Verts" v Parliament* [1986] ECR 1339, para 23.
[67] Grimm (n 10) 469-471.
[68] W Streeck, 'Citizens as Customers: Considerations on the New Politics of Consumption' (2012) 76 *New Left Review* 27, 42.

value of – legitimation by appeal to political decisions.[69] Rather, in the Court's analysis, both the significance of the constitutionalisation of fundamental rights in the Charter and the broader, common values that underpinned their creation seem to have 'dwindled into the background.'[70]

This is at odds with the collective dimensions inherent in a fundamental rights catalogue as a politically constructional device. The abovementioned cases do not have a merely private or case-specific character. They pertain to a changing constitutional domain in which competing ideologies seek legitimation through rights and where rights often provide the means through which different actors lay down their vision of what the Union is or should become. As Ingram notes, 'far from being the apolitical basis of politics, rights are vehicles of politicisation.'[71] They are used by individual claimants and broader political movements alike, as demonstrated in cases where rights are relied upon to shield an aspect of one's identity (such as their gender or religious belief) from attack in society (for instance, through an employment practice).[72]

While the Court's position need not mean a poor overall human rights record, it is therefore criticisable from a normative standpoint, whereby the legitimacy of the market as a starting point for further EU integration may be challenged.[73] It is also criticisable from a procedural standpoint, as it suggests a lack of fit of the reasons supplied to a changing EU constitutional framework. Both the way in which the Court selects what amounts to a right, rather than an interest, and the balance it reaches between the different individual entitlements to which EU law gives rise marginalise the significance of the constitutional moment as a *legitimate* driver of change and as a step towards more political forms of EU constitutionalism. In turn, in the absence of moral evaluation of the content and reach of the protected rights, the Court naturally

---

[69] Walker (n 11) 129; F De Witte, 'The Architecture of a Social Market Economy' (2015) LSE Law, Society and Economy Working Paper 13/2015, 19-22.
[70] A Albi, 'An Essay on How the Discourse on Sovereignty and the Co-Operativeness of National Courts Has Diverted Attention From the Erosion of Classic Constitutional Rights in the EU' in M Claes and others, *Constitutional Conversations in Europe: Actors, Topics and Procedures* (Intersentia 2012) 41, 43.
[71] JD Ingram, 'What Is a "Right to Have Rights"? Three Images of the Politics of Human Rights' (2008) 102:4 *American Political Science Review* 401, 411.
[72] See further S Benhabib, *The Reluctant Modernism of Hannah Arendt* (Rowman and Littlefield 2003) 232-233.
[73] S Douglas-Scott, 'Pluralism and Injustice in the EU' (2012) 65:1 *Current Legal Problems* 83, 107. For a thoughtful analysis of this position from a sociological perspective, see W Streeck, 'Small-state Nostalgia? The Currency Union, Germany and Europe: A Reply to Jürgen Habermas' (2014) 21:2 *Constellations* 213, 218.

struggles with cases that concern multiple or cross-sectional fundamental rights questions, such as those raised by religious discrimination in the workplace. There, while the concept of a fair balance creates a mirage of precision in the relevant standard of justice, rather than being perceived as an arbitrary standard, it largely overlooks the intricacies of fundamental rights as claims that are not always 'amenable to quantification.'[74] Indeed, the Charter's provisions can be understood as being already reflective of an adequate balance between different interests, reached during its drafting process – a process which had, for instance, resulted in the exclusion of the four original market freedoms from its final text, placing therein only the free movement and residence of persons.[75]

It follows that, when assessed against the Charter framework, the Court's approach suggests not an exercise of restraint, but a form of meta-constitutional review of which aspects of that instrument are suitable or unsuitable to the existing constitutional toolbox, rather than delineating Charter provisions themselves as the bases for judicial review. It appears to be premised on a distinct philosophy, which still sees a functional, incremental form of integration through law as a sufficient and generally effective form of adjudication, capable of delivering justice in the Union even 'without the involvement of politics.'[76] Trying to marry the ambition of authorship in the Charter with the conception of justice stemming from the case law, which is based largely on 'delimiting spheres of individual freedom'[77] can then seem to be an almost impossible task. A shift in judicial reasoning is required in order for the Charter to assume a more meaningful role as a source of common constitutional foundations for the EU polity - a role it was by design intended to play.

IV. Public justification as constitutional discourse about the Charter

What might amount to a more apposite form of fundamental rights reasoning at the EU level? A suitable alternative to the existing discourse can be found, as Douglas-

[74] Tsakyrakis (n 52) 475 ; S Besson, 'Comment Humaniser le Droit Privé sans Commodifier les Droits de l'Homme' in F Werro (ed), *Convention Européenne des Droits de l'Homme et le Droit Privé* (Stämpfli 2006) 30.
[75] Article 45 EUCFR.
[76] De Witte (n 69) 19.
[77] Habermas, Internal Relation (n 36) 260-261.

Scott had highlighted, in the idea of public justification.[78] While primarily associated with political reasoning, public justification is a key function of constitutional adjudication within a discursive democratic framework, particularly where multiple constitutional actors operate, because it highlights the need for adequate and explicit analysis of the aims which are compatible with the recognition of a fundamental right. The entry into force of the Charter justifies a methodological shift in favour of such an approach, because it enables the Court to avoid a discourse of what must be safeguarded *a priori* (as was the case, for example, with the development of the general principles of EU law) and to focus instead on which interpretation most convincingly corresponds to an existing, and politically sanctioned, constitutional right. By emphasising the visible, ascertainable act of formal constitutionalisation, it offers a starting point for building a discourse about how best to organise our common life on the basis of the rules we have thereby set out.[79]

Such an approach places rights within a political, and not a metaphysical, conception of justice.[80] Within a framework where there may be disagreement about what is, ultimately, the common good, public reason must begin 'from some consensus, that is, from premises that we and others publicly recognize as true.'[81] It thus puts an emphasis on the constitutional text and the values that underpin it as a collective project, rather than through an affirmation of absolute primacy. As Rawls himself explained, 'public justification is not simply valid reasoning, but argument addressed to others: it proceeds correctly from premises we accept and think others could reasonably accept to conclusions we think they could also reasonably accept.'[82] We can then come to favour a particular interpretation of a right – or, if we must use the balancing terminology – we might attribute weight to one consideration more than others, because doing so embodies a broader value that the constitutional order

[78] Douglas-Scott (n 1).
[79] See J Rawls, 'The Idea of Public Reason Revisited' (1997) 64:3 *Chicago L Rev* 765, 786.
[80] For clarification, I do hereby espouse Habermas's analysis of the relationship between the good and the right. Arguably, Habermas's view of what constitutes public reason is not as wide as that of Rawls, as he nuances different elements of justification, but the specificities of their disagreement pertain to Habermas's broader political philosophy regarding human rights, which are beyond the scope of this paper. See further, on this point: T Heddrick, *Rawls and Habermas: Reason, Pluralism, and the Claims of Political Philosophy* (Stanford University Press 2010) 17-33.
[81] J Rawls, 'Justice as Fairness: Political, not Metaphysical' (1985) 14:3 *Philosophy and Public Affairs* 223, 229.
[82] Rawls (n 79) 786.

protects,[83] as long as the terms of justification are clearly defined in a manner that can be reasonably accepted by all involved.[84]

In practical terms, this means that the Court should start its analysis from a thorough interpretation of the appropriate content and ambit of the protected rights themselves. In this regard, the use of comparative law could be one of the key justificatory tools at the Court's disposal, as it can reveal strengths and deficiencies of the various interpretations of a right as well as offering grounds for differentiation. At present, while the Court states that it draws inspiration from the constitutional traditions of the Member states in reaching a particular conclusion, it does not engage in a precise analysis of these traditions or refer to the judgments of its national counterparts in its rulings.[85] As Bruno De Witte has suggested, the Court 'could be less vague about the "common constitutional traditions" by venturing, when a case so warrants, into a genuine comparative evaluation of Member State constitutions; this would make a rejection of the arguments taken from the law of just one State more compelling […], particularly in the field of fundamental rights.'[86]

Still, whilst constitutional comparison might be sufficient in cases of overwhelming consensus about the correct interpretation of the Charter, where there is real disagreement about the boundaries of a fundamental right, the Court would have to resort to additional means of justification. In such cases, it could be guided by principled references to the values which led to the protection of a right in the EU in the first place.[87] However, an abstract articulation of values premised upon references to inward-looking general principles, such as the primacy, uniformity, or continuity of EU law, would not be sufficient, as these may not be recognised as inherently virtuous by other constitutional actors.[88] It has been clear for some time, for instance, that conflicts of interpretation will not be resolved by mere appeal to the primacy

[83] See Scanlon (n 50) 1481; See also R Alexy, 'Constitutional Rights, Balancing, and Rationality' (2003) 16:2 *Ratio Juris* 131, 135-139.
[84] A discourse-enhancing proceduralist account of constitutional law of the kind advanced by Jürgen Habermas is capable of accommodating values but remains, at the same time, open to reinterpretation to match changing circumstances: Habermas, Between Facts and Norms (n 25) 384 – indeed, it requires both guarantees regarding procedure (such as legal certainty) as well as legitimacy (which it ascribes to authorship): ibid, 198.
[85] FC Mayer, 'Constitutional Comparativism in Action. The Example of General Principles of EU Law and How They Are Made – A German Perspective' (2013) 11:4 *ICON* 1003, 1008.
[86] B De Witte, 'The Past and Future of the European Court of Justice in the Protection of Human Rights' in P Alston (ed), *The EU and Human Rights* (OUP 1999) 859, 882.
[87] Weiler, Fundamental Boundaries (n 5) 69.
[88] See Albi (n 70). Of course, there will be parity between some general principles of EU law and the constitutional values mentioned in the Charter, such as equality, but that is not *necessarily* the case.

principle, insofar as national constitutional courts do not accept its salience in the fundamental rights context.[89] Rather, complying with the requirements of public reason in this field would entail that the values guiding the interpretation of the Charter's provisions can be seen to correspond to the EU fundamental rights framework in its current form, and that they are 'rooted' in the specific constitutional context that gave rise to the Charter,[90] so that a claim to their political legitimacy can be convincingly sustained vis-à-vis constitutional actors whose interest in EU integration may be ancillary to the protection of fundamental rights.

As already argued by Von Bogdandy and others, such a set of values is listed in Article 2 TEU, and their acceptance can be understood as a condition of freely associative membership of the Union.[91] One might add that the Charter itself offers a concrete vision of how the Union's values could be tailored to its interpretation, through its thematic sets of provisions. Entitled 'dignity'; 'freedom'[92]; 'equality'; 'solidarity'; 'citizens' rights'; and 'justice', these themes appear to describe the key aim or value that should be referred to in interpreting a provision contained in each chapter. That is not to say that the Court might not choose a different set of values, if adequately justified, but that the Charter's text itself can provide the basis for interpretations of rights that are more thoroughly grounded in public (rather than individual) goals, and which can be substantively related to the process of political constitutionalisation during which the Charter was drafted.

What, then, might the interpretation of the cases I have considered above have looked like, if public reason had driven the Court's discourse? Firstly, where a case only concerns the encroachment of a fundamental right upon other *interests* in the application of EU law,[93] reaching a decision would have involved a clearer interpretation of the ambit of that right in the light of the value that defines its key

---

[89] D Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe' (2013) 50:5 *CML Rev* 1267, 1267-8. See also n 6 above.

[90] MW Dowdle and MA Wilkinson, 'On the Limits of Constitutional Liberalism: In Search of a Constitutional Reflexivity' (November 2015), NUS Law Working Paper No. 2015/009, 20-21; See also Neil Walker, 'The Place of European Law' in G De Búrca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (OUP 2012) 57, 65.

[91] A Von Bogdandy and others, 'Reverse *Solange* – Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49:2 *CML Rev* 489.

[92] The title of the chapter is in the plural – 'freedoms' – but, arguably, the provisions enshrined therein can be associated with freedom as a broader value. This is supported by the French version and explanatory rubrics to the Charter, such as <http://www.europarl.europa.eu/charter/default_fr.htm>, accessed 8/01/2018, which mentions *liberté* and *citoyenneté* as guiding principles to the relevant chapters.

[93] An example of such a case is *Melloni* (n 9).

qualities. In other words, the Court would need to explain why the interpretation it offers serves the values, say, of justice or solidarity, as the case may be. Secondly, in cases involving a conflict both of rights and of the underlying values themselves (such as in *Alemo-Herron* or *Bougnaoui* and *Achbita*), an adequate decision would be one that can ostensibly reconcile that clash by safeguarding the core elements of both of the protected rights. In *Alemo-Herron*, for example, public justification as a method of constitutional reasoning would have comprised a positive examination of the meaning, firstly, of the rights at stake. Article 28 on collective bargaining would need to be defined paying due regard to the value of solidarity in an EU-wide context (and constitutional comparison would have been very useful in order to pin this down in a measured way). At the same time, a similarly detailed assessment of Article 16 on the freedom to conduct a business would have been needed, examined in light of the value of freedom. The outcome of the case might have been the same, if the concept of freedom employed in the European Union was deemed to be one that allows broad corporate freedom. In that case, though, safeguards for the core layers of solidarity, as manifested *inter alia* in aspects of collective bargaining, would have needed to be spelt out to prevent the erosion of this provision by implication, in contrast to the actual ruling.

Of course, even if the Court did apply this form of reasoning, finding *the* interpretation that most authentically serves the public good, of which there are bound to be multiple versions,[94] would be likely to continue to give rise to contestation by national courts. My argument is not that interpretations of the Charter offered through public justification would be singular or unchallengeable. The benefit of this approach is that it requires that what claims to be a true interpretation of rights be both capable of justification in terms acceptable to others and procedurally coherent.[95] It means, to put it simply, that the Court's interpretations of the Charter 'earn' their primacy based on a cogent set of relevant considerations, rather than, as Williams had put it, allowing fundamental rights to be driven by the fear of 'consequence'.[96] In this field, public justification might render challenges more constructive by ensuring that

[94] See by analogy A McHard, 'Reconciling Human Rights and Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights'(1999) 62 *Modern Law Review* 671.
[95] J Habermas, *The Theory of Communicative Action, Vol 1 – Reason and the Rationalization of Society* (reprint edn, T McCarthy tr, Polity Press 1984), 11
[96] Williams (n 35) 565.

disagreements are openly explained and responded to, thus giving rise to a relationship between national constitutional courts and the CJEU that moves beyond the parameters of constitutional conflict. After all, fundamental rights have been not only a source of dissonance in the EU legal order, but also one of unity[97] – and the Charter can be seen as the most wide-ranging affirmation of this dimension.

Indeed, insofar as the moral justification offered *for* conflict, from the perspective of national courts, is that the CJEU's reasoning risks insufficiently safeguarding what national constitutions hold dear, there is great value in more reasoning in itself, and of more evaluative reasoning particularly, even from the perspective of maintaining the effectiveness of the EU fundamental rights regime in the longer run.[98] It could resolve preconceptions or misunderstandings about what particular constitutions entail, what level of protection of rights they afford, and why such a standard has been selected.[99] In turn, when the reasons for the interpretations in question are verifiable, judicial debate about their respective merits can only enrich EU constitutional law, different layers of which rest with different constitutional actors.[100] It would create an opportunity for national courts to assume a more active role in the maintenance of fundamental rights in the EU and to claim ownership of the Charter for what may be a majority of cases involving fundamental rights (those where there is parity between the EU interpretation of a right and the national interpretation).[101] It would also enable national courts to assess the logic of EU law in a more confident manner, thus placing them in a better position to fulfil their task of delivering rights within their jurisdiction, in line with the settled case law of the Court of Justice that 'it is for the national courts to provide the legal protection which individuals derive from the rules of EU law and to ensure that those rules are fully effective.'[102] Seen in this way, the Charter might eventually offer the possibility of

[97] Weiler, Fundamental Boundaries (n 5) 51-52.
[98] A Torres Pérez, C*onflicts of Rights in the European Union: A Theory of Supranational Adjudication* (OUP 2009) 178.
[99] Ibid. See also JHH Weiler, 'Epilogue: The Judicial Après Nice' in G De Búrca and JHH Weiler (eds), *The European Court of Justice* (OUP 2002) 222.
[100] J Komárek, 'The Place of Constitutional Courts in the EU' (2013) 9:3 *EuConst* 420, 449-450.
[101] Sarmiento (n 89) 1299-1300.
[102] Opinion of Advocate General Bot, delivered on 25 November 2015, in Case C-441/14, *Dansk Industri (DI) v Estate of Karsten Eigil Rasmussen*, EU:C:2015:77, para 42 ; This approach has been further expressed in some (though not all) of the Court's prior case law. See in particular Joined Cases C□397/01 to C□403/01, *Pfeiffer and Others v Deutsches Rotes Kreuz, Kreisverband Waldshut eV* [2004] ECR I□8835, para 111, and Case C-268/06, *Impact v Minister for Agriculture and Food and Others* [2008] ECR I□2483, para 42.

what Walker has described as the ultimate form of legitimation: that of allowing EU constitutional law to become a forum for the juxtaposition of arguments and for the crystallisation of reasonable, democratic opinion.[103]

V. Conclusion

This article has argued that a different form of constitutional reasoning about the Charter is required in order to represent sufficiently the role that this instrument was set out to play in the EU public sphere. In interpreting the Charter's provisions, it is essential to make links to the goals associated with its drafting in the case law and to do so explicitly, through rational justification of the role of rights in the Union. This approach has not been assumed in the Court's case law so far. Rather than using it as an incentive for public justification of its interpretations of rights, the Court has sought to fit the Charter into an earlier constitutionalisation discourse built upon a collation of individual interests in the application of EU law, but lacking an intelligible conception of the public good.

The article has highlighted the impossibility of accommodating the Charter – as an instrument with a public law character – within such a paradigm of rights protection. While that is particularly evident in respect of provisions related to solidarity, which necessitate a conception of social and redistributive justice,[104] as I have sought to clarify, it would be an error to assume that the Court's methodology poses problems only for the Charter's Solidarity chapter. Rather, it reveals a broader discomfort with acknowledging the symbolic role of a negotiated list of fundamental rights as expressing a polity's constitutional equilibrium, i.e. how much a given set of guarantees matter to the version of 'us' (real or imagined) that is presented therein. In such a context, public justification would shift the judicial exercise from what is a good or appropriate balance of interests on a particular instance – as the case law currently appears to do – to a somewhat more modest, albeit intricate, task: that of accepting the constitutional framework as in itself offering the narrative, with the Court seeking to express it the way that most coherently serves its overarching aims.

[103] Walker (n 11) 129.
[104] De Witte (n 69) 22.

Of course, developing a judicial discourse about fundamental rights is a complicated exercise in transitional constitutional orders, where political goals and institutional roles remain somewhat fluid, and especially where, contrary to the statements made in the Charter's Preamble, the authorship of the constitutional settlement by, or its effective attribution to 'the peoples of Europe' might be empirically challenged.[105] It has indeed been argued that the Charter was used as a shortcut to democracy rather than indicating a substantive concern with political inclusion.[106] Furthermore, it is questionable whether the Charter was in fact capable of delivering outcomes such as heightened legitimacy, constitutional identification, or a sense of post-national belonging. Its drafting process has been criticised precisely for a lack of civic participation and, thus, for a lack of representativeness.[107] It should also be acknowledged that the absence of a coherent constitutional narrative in the Lisbon Treaty may have left the Court, to some extent, understandably hesitant as regards the Charter's legal value, and particularly its relationship to the case law that preceded it, which the Charter's Explanations endorsed in terms of content.[108] In light of all this, one might be left wondering what the Charter's present value is as a means of politicisation at all.[109]

It is true that the arguments I have expressed above would better resonate with a different, more wide-ranging framework for EU constitutional law, and one in which constitutional priorities as well as popular support could be more convincingly located. Tackling the political deficit in the Court's conception of constitutionality nonetheless remains an important task, regardless of whether we fully espouse the Charter's constructional dimensions at present. We can only enter the public sphere through an existing rights paradigm – it is through communication in the public sphere that we re-evaluate it.[110] By using the institutional mechanisms we do have (albeit partial and imperfect) as the basis of a more coherent constitutional exchange about rights, both the existing institutions as well as the Union's broader constitutional direction can be reimagined.[111] As Walker has put it, 'if sufficiently

[105] J Shaw, 'Process, Responsibility and Inclusion in EU Constitutionalism' (2003) 9:1 *ELJ* 45, 58ff.
[106] Baquero Cruz (n 21) 74.
[107] De Burca and Aschenbrenner (n 22) 375–76. Baquero Cruz (n 21) 74.
[108] Explanations Relating to the Charter of Fundamental Rights [2007] (OJ C 303/17) 17.
[109] Baquero Cruz (n 21) 72ff. See also U Haltern, 'Pathos and Patina: The Failure and Promise of Constitutionalism in the European Imagination' (2003) 9:1 *European Law Journal* 14.
[110] J Habermas, Internal Relation (n 36) 263.
[111] J Habermas, 'Democracy in Europe: Why the Development of the EU into a Transnational Democracy Is Necessary and How It Is Possible' (2015) 21 *ELJ* 546, 553.

open in consultation, intensive in consideration, and iterative in response to changing circumstances, a rule-of-law grounded procedural constitutionalism may be seen as the platform not for a post-democratic conception of decision-making but for a post-representative conception of democratic decision-making.'[112]

[112] Walker (n 11) 137.