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Article (Accepted version)  
(Refereed)

**Original citation:**

Chalmers, Damian and trotter, Sarah (2016) *Fundamental rights and legal wrongs: the two sides of the same EU coin*. *European Law Journal*, 22 (1). pp. 9-39. ISSN 1351-5993

DOI: [10.1111/eulj.12168](https://doi.org/10.1111/eulj.12168)

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Available in LSE Research Online: April 2016

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# Fundamental Rights and Legal Wrongs: The Two Sides of the Same EU Coin

by

Damian Chalmers and Sarah Trotter

**Abstract.** *This article argues that the relationship of EU fundamental rights to the rest of EU law can only be understood if the former are seen as an integral part of a general vision of what EU law is about. This vision conceives EU law as concerned to secure the government of a European political economy. In turn, it has come to shape the interpretation and incidence of EU fundamental rights with the latter conceived as a central tool for incorporating the individual into and asserting her place within the government of the European political economy. A paradox has therefore emerged. EU fundamental rights have become ever more pervasive in EU law and it is couched more frequently in their terms, but these same fundamental rights seem ineffectual to deal with the suffering caused by events such as the crisis.*

## Introduction

The onset of the sovereign debt crisis coincided with the formal incorporation of the EU Charter of Fundamental Rights (the Charter) into EU law by the Treaty of Lisbon in December 2009. If the former has dominated the subsequent politics and economics of the European Union, the Charter would seem, on its face, to have had equally profound effects on the legal sphere. Between 1 December 2009 and 31 December 2014 it was cited no less than 353 times by the Court of Justice and has been deployed in many salient cases.<sup>1</sup> Yet, scratch beyond these headlines, and its transformative effects seem limited. It is rarely successfully used as a source of EU legislative review<sup>2</sup> and its influence on EU institutional practice is unclear.<sup>3</sup> Attempts to widen its remit led to an embarrassing retreat in the face of

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<sup>1</sup> Case C-617/10 *Åkerberg Fransson*, EU:C:2013:105; Case C-300/11 *ZZ*, EU:C:2013:363; Joined cases C-584/10 P, C-593/10 P and C-595/10 P *Kadi*, EU:C:2013:518; Case C-293/12 *Digital Rights Ireland*, EU:C:2014:238; Case C-131/12 *Google Spain*, EU:C:2014:317; Case C-528/13 *Léger*, EU:C:2015:288.

<sup>2</sup> Only two Directives have been struck down for violation with the Charter. Case C-236/09 *Test-Achats*, EU:C:2011:100; Case C-293/12 *Digital Rights Ireland*, EU:C:2014:238.

<sup>3</sup> On the (uncertain) material difference made by the Charter, European Commission, *2014 Annual Report on the Application of the EU Charter of Fundamental Rights* (2015, OOPEU, Luxembourg).

opposition from the German Constitutional Court.<sup>4</sup> It is the crisis, however, that has left the Charter most exposed. It has seemed almost an irrelevance with its being left to national constitutional courts using national constitutions to protect fundamental rights.<sup>5</sup> A trite response might be that the Charter and the crisis have occupied different legal worlds. This is a deeply unsatisfactory answer as, with the effects of both being pervasive, one would have expected more than interchange than has been the case. More profoundly, fundamental rights are used to imbue legal orders with a sense of coherence, authority and moral pedigree. All this would be lost if there was an ad hoc approach to which fields of EU activity are governed by fundamental rights.

Our starting point is that EU law has been established as a *legal order*, which carries with it a claim to possess these qualities of coherence, authority and moral pedigree. To meet this claim, a vision of what EU law is about has been established with fundamental rights a constitutive part of it. Interpretation of EU law in the light of this vision allows these claims to be addressed as it relates individual laws to be one another, sets out reasons for obeying EU law and sets out what is good and right about the European Union.

What is contained in this vision? EU law follows a tradition, present since the early Mediaeval period, in which this vision integrates three elements: a collective way of life; a means for ordering this way of life and an ethos for socialising individuals into this way of life and disposing them to follow the system of order in place. The way of life is that of a European political economy comprised of a multiplicity of spheres of activity which allow life to be more than merely survival. The method of ordering is a governmental one concerned to nurture these spheres of activity, secure their long-term development and ensure that they are in equilibrium. The ethos is one in which through following EU law individuals can better their lives. Fundamental rights are an integral part of this vision as they incorporate the individual into this order and allowing her position to be asserted

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<sup>4</sup> On the attempt in Case C-617/10 *Åkerberg Fransson*, EU:C:2013:1 to extend the remit of the Charter over national measures see BvR 1215/07 *Counterterrorism Database*, Judgment of 24 April 2014.

<sup>5</sup> Case 2 BvR 1390/12 et al. *ESM Treaty (Temporary Injunctions)*, Judgment of 12 September 2012 (German Constitutional Court); Acórdão 187/2013, *State Budget 2012*, Diário da República, 1.<sup>a</sup> série N.º 78 22 April 2013; Acórdão 413/2014 *State Budget 2014*, Judgment of 30 May 2014 (both Portuguese Constitutional Tribunal); 8 Cte 1906/2014 *Olom EYDAP*, Judgment of 4 June 2014; CTE 2192/2014, *Salaries of Military Personnel*, Judgment of 23 June 2014; 2 BvR 2728/13 *ESM/ECB*, Judgment of 7 February 2014 (both Greek Council of State).

within it by establishing autonomy for her there, setting out dimensions to this autonomy and by securing a value for this autonomy.

EU law relies, consequently, on a representation of EU fundamental rights as an integral part of government of the European political economy. This has shaped their interpretation and remit, often highly problematically. The Charter intensified this process in a number of ways. It integrated them far more tightly into this governmental order so that their claims were increasingly tied to the demands of EU government. Alongside this, it led to their being conceived as about realising collective goods with a corresponding instrumentalisation and relativizing of many entitlements. Finally, it shifted the burden for protecting fundamental rights away from administrative actors onto private actors as the latter have become perceived as increasingly central to government of the European political economy. All these trends raise challenging issues, but, it will be concluded, all direct the Charter away from addressing the suffering provoked by the sovereign debt crisis.

### **I. A European Union *Stabilitas***

Two leitmotifs dominate analysis of EU fundamental rights law. One is cynicism. EU fundamental rights law, on this account, uses the rhetorical appeal of fundamental rights to push forward European integration and extend the reach of Union institutional power. Such an argument is unclear why fundamental rights would be invoked when they generate political costs or whether this insincerity applies to other areas of EU law. The other meme is legal splicing. A series of discrete doctrines govern methods of interpreting the Charter, the standard of protection secured by it, its relationship to other instruments and its scope of review. These are spliced together to form EU fundamental rights law. Such splicing is thin on how different aspects of EU fundamental rights law relate to each other or to EU law as a whole. Without this, however, fundamental rights do not have the coherence to set out an imaginary of what is good and right, something central both to their moral status and their iconographic appeal.

Both approaches conceive EU fundamental rights as standing apart from other EU law. Yet the Treaties state that EU fundamental rights are both an integral part of EU law<sup>6</sup> and the central values on which the Union is founded.<sup>7</sup> This claim to separateness is misconceived for other reasons. Even those proclaiming the moral qualities of fundamental rights acknowledge that their value and distinctiveness from other moral claims lie in their reliance on the wider legal order for their implementation and bite.<sup>8</sup> This relationship is not simply institutional. If fundamental rights are used to symbolise, justify and vision a legal order<sup>9</sup> that legal order acts as the relay through which their meaning and implications are elaborated. EU fundamental rights, for example, governing immigration, data protection or broadcasting might have to be translated into the language of immigration, broadcasting or data protection law, and set out in terms allowing for the continued operation of activities in these fields. It is, consequently, possible to talk of a regulatory relationship in which fundamental rights rely on the wider legal order for their execution and jurisdiction. There is also an epistemic relationship in which fundamental rights and the wider legal order supply meaning and understanding to one another. There is a normative relationship whereby each serves to justify the other.

This relationship cannot simply be between individual EU fundamental rights provisions and other EU laws. This would simply produce a multiplicity of legal dots with no indication of how these relate to each other and what they come together to mean and do more generally. Nor can it provide any reason for subjects obeying the law other than a case-by-case basis on the merits of each case. In other words, it can neither explain the coherence of EU law, what it represents or its authority. This failure would seem particularly acute in an account with fundamental rights at its heart as, if the latter do not act to imbue a legal order with a richer sense of coherence, signification and authority, it is not clear what they do.

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<sup>6</sup> Case 11/70 *Internationale Handelsgesellschaft*, EU:C:1970:114.

<sup>7</sup> Article 2 TEU.

<sup>8</sup> J. Habermas, 'Kant's Idea of Perpetual Peace: At Two Hundred Years' Historical Remove' 165, 189-193 in C. Cronin & P. DeGreiff (eds) *Inclusion of the Other: Studies in Political Theory* (1998, MIT Press, Cambridge).

<sup>9</sup> Eg. J. Habermas, *The Postnational Constellation* (2001, Polity) Chapter 4; J-P. Müller, 'A European Constitutional Patriotism? The Case Restated' (2008) 14 *ELJ* 542.

A relationship must be identified between EU fundamental rights and EU law as a whole. This relationship cannot be simply a formal one as legal texts alone cannot explain how EU law is used, and, therefore, what it does and the patterns of meaning, symbolism and representation which emerge from that. Nor can they explain questions of coherence or authority as how a text is related to another text or the reasons for obeying it cannot be found simply in the language of the text. Resort has often been had to some moral foundation to relate this altogether. This can either take the form of some rule-based system of ethics or of a more diffuse ethical awareness.<sup>10</sup> The difficulties with such an approach are two-fold. First, it is de-institutionalised. Any relationship has to be, above all, an institutional account. It has to emerge out of the interpretations of institutional actors, be these courts, legislatures or administrators, who relate EU fundamental laws to a wider view of the EU legal order. Such accounts do not do this. They are, thus, not only unconvincing as depictions of EU law but also normatively problematic. Any such external view relies on the imposition of a particular order on what is taking place, and this imposition is unproblematised and authoritarian. In this case, these accounts put forward this injunction as a *European* one. It is never explained why this is or should be so with the consequence that they become first and foremost attempts at system-building. The second problem with these accounts is that they are underspecified. Law is a regulatory tool and creates a vision of the world. To secure this role for EU law, any relationship has to set out how it relates individuals to each other, to things, to the institutions and social processes that make up their lives, to particular places, and to wider belief-systems. These accounts do not really do this.

The relationship has to emerge, therefore, out of an institutional account of what EU law and EU fundamental rights are about when the latter are interpreted. These will not be found explicitly in one or two individual judgments as these alone will not be able to set out a sufficiently general panorama nor will they be able to set out the assumptions of what EU law is about which guide their interpretation. Instead, it is to be found in these collective assumptions and background understandings which are used to make sense of both EU law and EU fundamental rights, and which locate these in ‘... a wider grasp of our whole

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<sup>10</sup> On this see, respectively, P. Eleftheriadis, ‘The Moral Distinctiveness of the European Union’ (2011) 9 I-CON 69; K. Jaklic, *Constitutional Pluralism in the EU* (2014, OUP, Oxford) 278 et seq.

predicament, how we stand to each other, how we got to where we are, how we relate to other groups, etc.’<sup>11</sup>

Such assumptions rest on inherited shared templates. Those identified with the State make little sense as the Union has inherited no notion of nationhood or the organological features which structure modern Statehood.<sup>12</sup> The Union is rather a socio-political order which places the individual qua actor and qua collective idea at its heart. It is a social order insofar as EU law seeks to recreate and represent complex patterns of interaction. It is a political order insofar as this is done through elaborate institutional machinery. Individual actors are seen as central participants in both of these orders, but there is also a collective vision of the institution insofar as legal importance is attached to features which are seen as generally attaching to individuals.

The European tradition for such a style of order is long-established. It goes back, at least, to the vow of *stabilitas in loci* of the Rule of St. Benedict in the sixth century.<sup>13</sup> This vow, at its most extreme, involved the lifelong commitment of the monk to remain within the monastery and abide by its way of life. It centred human identities around the identity of a place,<sup>14</sup> leading to a sacralisation of the place so that its boundaries were not just seen as physical ones but as enclosing a collective way of being.<sup>15</sup> This way of being set out a definition of stability as the incorporation of the individual into a collective body. This incorporation involved total immersion within the way of life of the monastery, its routines, roles, timetables and activities, and a commitment to the rules securing that way of life.<sup>16</sup> Finally, incorporation involved commitment to the ethos of the *stabilitas*. The *stabilitas* was

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<sup>11</sup> C. Taylor, *Modern Social Imaginaries* (2004, Duke University Press, Durham & London) 123.

<sup>12</sup> On the role of the body metaphor in structuring social and political relations within the State see S. Beckwith, *Christ's Body: Identity, Culture and Society in Late Medieval Writings* (1993, Routledge); A. Carevaro, *Stately Bodies* (2002, University of Michigan Press, Ann Arbor) Chapters 1-3. Within EU law see D. Chalmers, 'European Restatements of Sovereignty' in R. Rawlings et al (eds) *Sovereignty and the law* (2013, OUP, Oxford)

<sup>13</sup> C. Lawrence, *Medieval Monasticism: Forms of religious life in Western Europe in the Middle Ages* (1984, Longman, London) Chapter 2.

<sup>14</sup> C. Butler, *Benedictine Monachism: Studies in Benedictine Life and Rule* (2005, Wipf, Eugene Oregon) 403-404.

<sup>15</sup> H. Fichtenau, *Living in the Tenth Century: Mentalities and Social Orders* (1991, University of Chicago Press, transl. P. Geary, Chicago), 292.

<sup>16</sup> E. Zerubavel, 'The Benedictine Ethic and the Modern Spirit of Scheduling: on Schedules and Social Organization' (1980) 50 *Sociological Inquiry* 157.

characterised by an idea of the monk's individuality, but this individuality was presumed to be marked by a particular disposition towards the monastery as representing a particular way of life and a commitment to subsume that individuality within it.

The notion of *stabilitas* within EU law is neither associated with a confined place such as the monastery nor a vow of commitment. Beyond that, however, the institutional assumptions used to make sense of EU law and EU fundamental rights follows the architecture set out by it quite closely. This involves, first, the identification and valuation of a place, in this case the European Union, with a particular way of life. This way of life comprises a detailed social order which has its own routines, ways of ordering the day, and relating individuals to others and to things. Secondly, collective processes are established for governing this order, securing its continuity and keeping it in equilibrium. Thirdly, an ethos seeks to mark out members as distinctive and to socialise them in both their relations with this way of life and those with its system of government. Finally, the individual is marked as a central element of this way of life. His participation marks it out as a lived order and serves to give it a material reality. However, it is also built around a collective idea of the individual and self-cultivation.

To consider the form taken by the EU *stabilitas* in more detail, this essay will divide it into two. In the first part, it will combine analysis of the first three elements: its way of life, mode of ordering and ethos. Fundamental rights go to incorporation and assertion of the individual within this socio-political order. This will require more time and thus will be addressed in its own section.

## **II. The Union as a Socio-Political Order**

### *(i) The European Political Economy as a European Way of Life*

The European Union is clearly marked out in territorial terms, but what way of life is associated with this territory which distinguishes it as special. It will be argued that in EU



law it is that of a pre-existing European political economy.<sup>17</sup> This political economy is framed as a series of spheres of activity which exist independently and prior to EU law. These spheres of activity include the family, the workplace, the university, the marketplace, science, the welfare State, the World Wide Web, and the neighbourhood. These spheres of activity and institutions are seen as both having an *a priori* value and as being sources of value within EU law. The reason is that they elevate life beyond the biological level to something comprising numerous *ways* of life, and, with it, multiple activities, relations, roles and identities. Consequently, they are never accorded an instrumental value in EU law, and are rather seen as ends in themselves because they give rise to multiple forms of life.

The recognition of the life-giving qualities of these spheres of activity is reflected in EU law by its not seeking to constitute new spheres of activity. It does not establish new EU property rights or contractual forms.<sup>18</sup> To be sure, EU law might limit what is possible within these spheres of activity (e.g. discrimination within the workplace), regulate their invocation, or set conditions for their recognition in particular contexts (e.g. what constitutes a family or employment relationship to be protected by EU law). In this way, it can govern them significantly. However, its failure to constitute or terminate them is important as it results in these spheres of activity being seen as having their own operational logic, vernacular and norms: be these industrial standards, good commercial or employment practice, IT or scientific norms. As these spheres of activity give rise to law, these norms are seen as having a value of their own which must be deferred to.<sup>19</sup>

These spheres of activity are also framed as pre-existing national law. Even something as constitutive of the national political community as nationality is not termed as something created and constituted by national law but as something whose loss and acquisition is conditioned by the latter.<sup>20</sup> The agency for acquiring or losing it is vested in individual and collective activities which take place separately from national law. These pre-existing

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<sup>17</sup> It is possibly more precise to call it a European Union political economy both because it is a shorthand and because it is identified in EU law with its European vocation.

<sup>18</sup> Article 118 TFEU allows for the creation of uniform intellectual property rights within the context of the internal market. Wider systems of property ownership are not to be prejudiced by EU law, Article 345 TFEU.

<sup>19</sup> On scientific norms see Case T-13/99 *Pfizer Animal Health*, EU:T:2002:209

<sup>20</sup> Case C-135/09 *Rottmann*, EU:C:2010:104, para 39.

qualities allow these spheres of activity to be regarded as phenomena which have certain common traits across the Union.

This pan-Union frame grants EU law a power of arrangement over the European political economy. This arrangement is not a neutral one. These spheres of activity are arranged so that they are related to each other as part of a European public economy, which has coherence and equilibrium through that lens. The system has to be stable and make sense at a macro-level, but it also has to ensure that individual processes both contribute to this general equilibrium and make sense, from this perspective in their own right. Secondly, if the tradition of public economy values these spheres of activity for their own sake, it accords public significance to them insofar as they contribute to the material necessities of life.<sup>21</sup> EU policies are, thus, not ends in themselves but have to work towards developing both these activities and the necessities of life produced by them. The single market is 'to work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.'<sup>22</sup> Economic and Monetary Union's sustaining principles are 'stable prices, sound public finances and monetary conditions and a sustainable balance of payments.'<sup>23</sup> The central ambition of the area of freedom, security and justice is a high level of security.<sup>24</sup> Finally, political economy has a particular view of relating the economy to surrounding processes. The market exchange relationship is seen as a social activity to be placed alongside other social activities and as something with a discrete value of its own.<sup>25</sup> Commercial activities are thus framed as economic freedoms which are fundamental to the well-being of those exercising them and to the wider Union project itself.<sup>26</sup>

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<sup>21</sup> H. Arendt, *The Human Condition* (1970, University of Chicago Press, Chicago) 28.

<sup>22</sup> Article 3(3) TEU

<sup>23</sup> Article 119(3) TFEU.

<sup>24</sup> Article 67(3) TFEU.

<sup>25</sup> On this process within the Union see J. Caporaso & S. Tarrow, 'Polanyi in Brussels: Supranational Institutions and the Transnational Embedding of Markets' (2009) 63 *IO* 593; C. Joerges & J. Falke (eds) *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (2011, Hart, Oxford).

<sup>26</sup> There is a requirement, therefore, that Member States not unjustifiably impede the 'effective exercise' of these. Case C-298/14 *Brouillard*, EU:C:2015:652, para 53.

(ii) *Governmental Ordering*

The EU mode of ordering this political economy is governmental. The reason is that governmental ordering is providential in nature. It requires, in the first place, that spheres of activity are nurtured in a prudential manner.<sup>27</sup> The regulatory qualities of the Union involve it not merely sustaining markets and managing their externalities and failures, but also expanding this regulatory ethos to other fields of activity, such as public finances or the area of freedom, security and justice, where it has not been historically deployed.<sup>28</sup> A further dimension of providential intervention is a concern with foresight. Risk management is, thus, a leitmotif of EU law, with its assumptions that adverse future events can, to some extent, be anticipated and their incidence and effects minimised.<sup>29</sup> Finally, providential ordering is concerned with a politics of recognition. The presence of interests and actors contributing to these activities is not merely to be acknowledged but valued and protected so as to bring a certain harmony to these activities.

Sustaining these spheres of activity also acts as the justification for administrative intervention (the most common understanding of government) and shapes how Union policies are developed. This intervention can be direct, whereby EU law commands that certain things be done, or indirect, whereby systems of self-regulation or co-regulation are authorised or recognised to secure collective goals.<sup>30</sup> In all instances, governmental ordering is about guiding and improving the operation of these spheres of activity rather than reformulating or reconstituting them. Very few EU laws are couched, therefore, in highly general terms. Instead, interventions are discrete and managerial, concerned with rectifying and regulating only particular aspects of an activity.<sup>31</sup>

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<sup>27</sup> On this tradition see G. Agamben, *The Kingdom and the Glory* (2012, Stanford University Press, Stanford) 109-143.

<sup>28</sup> D. Chalmers, 'The European Redistributive State: For a New EU Public Law of Conflicts' (2012) 16 *ELJ* 667; C. Kaunert S. Léonard & J. Occhipinti 'Agency Governance in the European Union's Area of Freedom, Security and Justice' (2013) 14 *Perspectives on European Politics and Society* 273.

<sup>29</sup> M. Everson & E. Vos (eds) *Uncertain Risks Regulated* (2012, Routledge, Abingdon).

<sup>30</sup> On these see P. Verbruggen, 'Does Co-Regulation Strengthen EU Legitimacy?' (2009) 15 *ELJ* 425.

<sup>31</sup> A good example is Directive 2004/48/EC on the enforcement of intellectual property rights, OJ 2004, L 157/45. This Directive governs only those aspects of intellectual property 'inherent in the enforcement and infringement of those rights by requiring effective legal remedies designed to prevent, terminate or rectify any infringement', Case C-435/12 *ACI Adam BV*, EU:C:2014:254.

(iii) *An Ethos of Self Betterment*

The ethos of this socio-political order is that of self-betterment. To justify any measure, the Union must show that it can realise the objectives of the latter better than any other legal order. This is both a formal requirement of EU law<sup>32</sup> and a wider dynamic in which EU law competes with other legal orders and forms of regulation to persuade political stakeholders that it offers advantages over these.<sup>33</sup> 'Better', furthermore, is not simply a question of scale. As a Qualified Majority or more of States have to be persuaded that EU law will offer them benefits not present on their own territory, 'better' invariably is a claim to a more effective, efficient and civil form of regulation.

The Union has relatively few administrative or financial resources of its own to secure these objectives. It has, therefore, to rely on the resources of its subjects and to harness these by acting on their actions. In other words, it depends for its goals on changes in their behaviour to secure ambitious collective goals: an ethos of collective or individual self-betterment. This can be achieved in a number of ways. It can be through acquiring capabilities which were not previously possessed, most obviously by aligning their processes with the latest technological developments.<sup>34</sup> It can be through establishing new forms of relationship whereby they harness their resources.<sup>35</sup> However, the most direct form is through requiring them to act more virtuously, be it through higher ecological standards, better consumer protection, stronger commitments towards equality, or tighter commitments towards universal service provision.<sup>36</sup> To be sure, this ethos is highly malleable and can be strongly contested in individual cases. At its core, however, is the imposition of responsibilities, often stringent ones, on private parties to contribute towards ambitious collective goals.

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<sup>32</sup> The principle only regulates competition between EU and national law-making, Article 5(3) TEU.

<sup>33</sup> D. Chalmers & M. Chaves, 'EU law-making and the state of European democratic agency' in S. Hobolt & O. Cramme (ed) *Democratic Politics in a European Union under Stress* (2014, OUP, Oxford).

<sup>34</sup> One example is the requirement to use 'best available techniques' in EU environment law. These are provided by reference documents which can be found at <http://eippcb.jrc.ec.europa.eu/reference/>. Another is the substance information exchange forums which required companies to exchange data on chemicals about to be registered to rationalise studies into these chemicals' ecological and health effects, Regulation 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) establishing a European Chemicals Agency, OJ 2006, L 396/1, article 29.

<sup>35</sup> Eg the European reference network in the field of health care, Directive 2011/24/EU on the application of patients' rights in cross-border healthcare, OJ 2011, L 88/45, article 12

<sup>36</sup> On the operation of this across the Commission 2008 Work programme see D. Chalmers, "Gauging the Cumbersomeness of EU Law" (2009) 62 *Current Legal Problems* 405.

It is important to note that there is no general right to self-betterment within EU law. There is no right to education, wealth, marriage or a job which can be asserted in all settings. As with the monastic *stabilitas*, it is an ethos that only applies within a particular place to socialise individuals and to mark out what is distinctive and special about this place. It is, thus, a second order principle which only exists within the context provided for it. In the instance of the European Union, this is the Union political economy. However, the remit of the ethos is more confined than that. As mentioned, it relates the individual to, amongst other things, the system managing that order. In this instance, that is the government of the European political economy. If this limits the remit of the ethos, it also shapes its meaning. Self-betterment becomes a governmental activity. It is only recognised insofar as it contributes to collective goods and spheres of activity valued by the European Union. There might be other activities, such as the pursuit of happiness or solitude, that might make individuals better people but they are simply not recognised by EU law as they do not contribute to this government. It is simply agnostic about them.

This ethos appears to sit uncomfortably with the idea of fundamental rights, which are often thought to be there to be exercised for whatever purpose desired. If this relationship is explored in more detail later,<sup>37</sup> a couple of observations are appropriate at this point. These governmental qualities explain why some fundamental rights are submerged into Action Programmes.<sup>38</sup> It also explains why the scope of some fundamental rights is limited when these are not perceived as advancing self-betterment. When rights appeared to be *prima facie* available to non-working single mothers to benefits or irregular migrants who have fathered EU children to remain, entitlements were denied to protect public finances or the well-being of a democratic society.<sup>39</sup> By contrast, such arguments were not so well received where pensioners or asylum seekers who have tried to improve their lot by working lawfully sought equivalent claims even though, legally, the cases looked almost identical.<sup>40</sup>

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<sup>37</sup> See pp ...

<sup>38</sup> eg European Commission, 'Towards a Single Market Act', COM (2010) 608, Proposal No. 30; European Commission, 'Strategy for equality between women and men 2010-2015', COM (2010) 491.

<sup>39</sup> See respectively Case C-333/13 *Dano*, EU:C:2014:2358 and Case C-256/11 *Dereci* EU:C:2011:734. In the latter, the matter was referred back to the national court to see whether deportation violated Article 8 ECHR. The Court of Justice would have known this was unlikely to be the case, 50435/99 *Rodriguez da Silva & Hoogkamer v the Netherlands* [2006] ECHR 86.

<sup>40</sup> Respectively, Case C-140/12 *Brey*, EU: C:2013:565 and Case C-34/09 *Zambrano*, EU:C:2011:124.

### III. The Three Autonomies

If *stabilitas* relies on the incorporation of the individual into a wider socio-political order, individual rights set out the individual as enjoying a discrete presence within this order, an agency of her own and recognition as an object of value. Fundamental rights express different dimensions to this presence, agency and value, and position these as central to the constitution and workings of this order. However alone, they can neither guide their own interpretation nor can they fully explain how the individual is to be related to this the wider socio-political order or how individuality is asserted against it. This is done, instead, through the notion of individual autonomy. Autonomy originated in Ancient Greece as meaning making one's own laws. It, therefore, comprises an individual presence which can *assert* itself and be asserted against others. Autonomy also involved a notion of the self and a quality of law-making which was derived from and could only be understood from the environment of which it formed part.<sup>41</sup> The side of autonomy goes, therefore, to how the individual is *incorporated* within this wider order from which she is seen to come. The balance between assertion and incorporation is, as we shall see, a shifting one. Furthermore, the demands placed on it have led to different understandings of autonomy over time. EU fundamental rights law relies on three conceptions of individual autonomy: *autonomy as individual control*, *relational autonomy* and *individual flourishing*. Although one or other may attach more easily to particular fundamental rights provisions, any particular right can be interpreted in the light of any of them and for different conceptions can be present within a single judgment. The reason is that these different conceptions of autonomy incorporate the individual into the other elements of the Union's socio-political order and assert a valued presence, agency and recognition within each of these. Autonomy as individual control is concerned to grant the individual sufficient presence and security within the wider European political economy. Relational autonomy is concerned to ensure that, in the ordering of the spheres of activity central to this political economy, those relationships central to individual well-being are protected and sufficient respect accorded to those within those relations. Individual flourishing is concerned to ensure that the ethos of self-

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<sup>41</sup> J. Cooper, 'Stoic Autonomy' in E. Frankel Paul et al (eds) *Autonomy* (2003, CUP, Cambridge).

betterment goes to a wider development of the self than simply realising Union collective goals.

It is now time to consider each in more detail.

*(i) Autonomy as individual control*

Individual autonomy as individual control sees autonomy as the possession and exercise of rational agency and protection of this agency from encroachment by others.<sup>42</sup> Such autonomy is constituted by law – in this instance EU law – as law provides the conditions which inform and protect its agency. This vision of autonomy is described most emblematically by Article 52(1) of the Charter which secures legal protection only for the rights set out in the Charter, and then states that such rights may only be limited by law where necessary to meet objectives of general interest recognised by the Union or to protect the rights and freedoms of others.<sup>43</sup> It only protects individuals, therefore, insofar as they are granted a legal presence by EU law. This entails not only that they must be recognised by it but also that the activities compromising their autonomy must be regulated by it. If either is not the case, EU law will simply hold that the matter is beyond its remit.<sup>44</sup> If this is to secure its institutional modesty, it also renders the individual, from the EU legal perspective, *homo sacer*: a person stripped of the protection of EU law and vulnerable to anything.

This autonomy comprises, first, an entitlement not to be submerged by other actors or processes governed by EU law. This includes the right to a formal identity which can be unambiguously ascertained.<sup>45</sup> This formal identity allows the holder to be granted rights by EU law and to have these protected by the law<sup>46</sup> and by the courts,<sup>47</sup> and political recognition of this form of identity in the form of the right to vote and stand for office.<sup>48</sup> It also grants her the right to be treated equally to others in the same position both

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<sup>42</sup> I. Kant, *Groundwork of the Metaphysics of Morals* (1997, transl. M Gregor, CUP, Cambridge) paras 4.428-4.453.

<sup>43</sup> Article 52(1) EUCFR.

<sup>44</sup> Case C-617/10 *Åkerberg Fransson*, EU:C:2013:105, para 19; Case C-117/14 *Poclava*, EU:C:2015:60, paras 28-29.

<sup>45</sup> Case C-101/13 *U*, EU:C:2014:2249, paras 48-49.

<sup>46</sup> Joined Cases C-92/09 & C-93/09 *Volker und Markus Schecke and Eifert*, EU:C:2010:662, para 50.

<sup>47</sup> Joined Cases C-428/06 to C-434/06 *UGT-Rioja and Others*, EU:C:2008:488, para 80.

<sup>48</sup> Case C-650/13 *Delvigne*, EU:C:2015:648.

substantively<sup>49</sup> and procedurally.<sup>50</sup> All this does not comprise the right to a more substantive identity which might reflect prior beliefs or dispositions,<sup>51</sup> but merely to be ascribed an identity on the same basis as others.<sup>52</sup> It is a thinner construct, therefore, than respect for singularity, which would involve regard and value to be had to the individuality and vulnerability of others<sup>53</sup> or individual self-ownership which would grant an individual full and exclusive rights of control and use over herself and her powers.<sup>54</sup>

It grants, secondly, corporeal autonomy.<sup>55</sup> The individual's body is neither to be subject to procedures without her prior informed consent<sup>56</sup> nor be subjected to inhuman and degrading treatment.<sup>57</sup> Detention is also only to take place where the conduct of the accused warrants it and only if it is carried out with due diligence.<sup>58</sup>

Thirdly, the public/private distinction in autonomy as self-control affords individuals a private capacity which shields them off from and cannot be integrated into wider processes. the protection of which is conceived of as important for facilitating personal development.<sup>59</sup> Individuals neither have to disclose information about themselves unnecessarily<sup>60</sup> nor may others do this in an unwarranted fashion.<sup>61</sup> They have a right to private property and to protection of its substance.<sup>62</sup> Finally, respect is to be had for the individual's home.<sup>63</sup> However, this public/private distinction is very fluid. Highly intrusive information about a

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<sup>49</sup> Case C-425/14 *Impresa Edilux and SICEF*, Judgment of 22 October 2015, para 21.

<sup>50</sup> Case C-169/14 *Morcillo and García*, EU:C:2014:2099, paras 48-49.

<sup>51</sup> Case C-208/09 *Sayn-Wittgenstein*, EU:C:2010:806, para 95; Case C-391/09 *Runevič-Vardyn and Wardyn*, EU:C:2011:291, para 66.

<sup>52</sup> Case C-148/02 *Garcia Avello*, EU:C:2003:539, paras 37-38.

<sup>53</sup> J. Kristeva, 'Europhilia, Europhoria' (1998) 3 *Constellations* 321, 329.

<sup>54</sup> G. Cohen, *Self-Ownership, Freedom and Equality* (1995, CUP, Cambridge) 12.

<sup>55</sup> To be sure, most of the rights in Title I of the Charter can fall under this heading.

<sup>56</sup> Case C-377/98 *Netherlands v Parliament and Council*, EU: C:2001:329.

<sup>57</sup> Case C-411/10 *N.S.*, EU: C:2011:865; Case C-562/13 *Abdida*, EU:C:2014:2453.

<sup>58</sup> Case C-237/15 PPU *Lanigan*, EU:C:2015:474, paras 55-57.

<sup>59</sup> C. Fischer, 'Toward the Structure of Privacy: Implications for Psychological Assessment' in A. Giorgi et al. (eds) *Duquesne Studies in Phenomenological Psychology: Volume I* (1971, Duquesne University Press, Pittsburgh).

<sup>60</sup> Case 29/69 *Stauder*, EU:C:1969:57.

<sup>61</sup> Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* [2003] ECR I-4989; Case C-131/12 *Google Spain*, EU:C:2014:317, paras 80-81; Case C-362/14 *Schrems*, EU:C:2015:650, para 94.

<sup>62</sup> Case C-44/79 *Hauer*, EU: C: 1979: 290, para 23; Joined Cases C-20/00 and C-64/00 *Booker Aquaculture & Hydro Seafood*, EU:C:2003:397, paras 68 et seq.

<sup>63</sup> Case C-212/13 *Ryneš*, EU:C:2014:2428; Case C-34/13 *Kušinová*, EU:C:2014:2189, paras 62-65.



person's identity might still be held for a public purposes<sup>64</sup> and the substance of any property right can be eviscerated if compensation is paid.<sup>65</sup>

The final dimension is a conception of the individual as a rational agent who must be allowed to use this rationality to plan her life and defend her legal position. There are general requirements of legal certainty and legal transparency.<sup>66</sup> However, it extends beyond these requirements to impose duties of accountability and due process on decision-makers. There is, therefore, a duty for decision-makers to state the reasons for their decisions,<sup>67</sup> the right to fair legal process in all judicial proceedings,<sup>68</sup> and to good administration, which includes the right for an individual to be heard before any individual measure is taken which would adversely affect her.<sup>69</sup>

*Ryneš* is an example of this form of autonomy.<sup>70</sup> The case concerned a householder whose property was subject to regular attacks and who installed video surveillance equipment to film the entrance to his property and the public highway outside to gather evidence. When it filmed two alleged perpetrators, these argued that the recording involved the processing of data, and therefore, under EU legislation, could not be used without their consent. There was an exception to this requirement of consent where the data was processed by a natural person in the course of a purely personal or household activity. Both parties argued that the EU legislation should be interpreted in the light of Article 7 of the Charter protecting the right to respect for private life. Two competing interpretations of this provision emerged. It was argued the creation of data about individuals without their knowledge or agreement could compromise their identities as it could lead to misrepresentation and vulnerability to external control. Against this, it was argued that the provision went to the possession of a private space, the home, which was secure and not violated. Both cases could be made

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<sup>64</sup> Case C-291/12 *Schwarz*, EU:C:2013:670; Joined Cases C-446/12 to C-449/12 *Willems and Kooistra*, EU:C:2015:238.

<sup>65</sup> Albeit this is not invariably required, Case C-56/13 *Érsekcsanádi Mezőgazdasági*, EU:C:2014:352, para 48.

<sup>66</sup> Case C-276/14 *Wrocław*, EU:C:2015:635, para 45.

<sup>67</sup> Case C-32/95 P *Commission v Lisrestal and Others*, EU:C:1996:402, para 21; case C-417/11P *Council v Bamba*, EU:C:2012:718, para 60.

<sup>68</sup> Case C-300/11 ZZ, EU:C:2013:363.

<sup>69</sup> Case C-166/13 *Mukarubega*, EU:C:2014:2336, paras 43-45.

<sup>70</sup> Case C-212/13 *Ryneš*, EU:C:2014:2428.

through assertion of the right to respect for privacy, and it, alone, did not resolve the tensions.

The matter was decided through resort to autonomy as individual control. The first issue was whether the alleged perpetrators had a legal presence in EU law. The Court decided that they did by stating that the EU legislation governed any activities which constituted data processing. This included data which allowed a person to be identified and was automatically processed, as with the case here, with its storage and collection. The filming, therefore, generated a legal presence which granted entitlements under EU fundamental rights law for both parties. The Court noted the filming was directed outwards from the private setting and partially covered 'a public space.' In principle, this was something whose use required the perpetrator's consent. The public/private distinction comes to the fore with the idea that individuals have a freedom to use public spaces without their online identity being compromised or rendered vulnerable. However, the Court then balanced this by stating that EU law allowed protection of the legitimate interests pertaining to the private life of the data controller, such as protection of property, health, and life of his family and himself. The right to protect a private space from violation and to control over that space trumped the protection of online identities.

(ii) *Relational autonomy*

Relational autonomy serves to ensure that governmental activity protect those relations within the European political economy which are seen as integral to individual and collective well-being and to ensure that the individual is accorded adequate recognition and security within these relationships. *Detiček* is an example of this form of autonomy.<sup>71</sup> Under EU legislation, custody conflicts over a child are to be decided by the court in the State where the child is habitually resident, albeit that courts of other States can take protective provisional measures. In this instance, a Slovenian mother absconded to Slovenia with her daughter the day after an Italian court, where the couple had lived, awarded custody to the Italian father and required that she be placed in an Italian children's home. A Slovenian

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<sup>71</sup> Case C-403/09PPU *Detiček*, EU:C:2009:810, para 56.

district court placed the daughter in the custody of the mother on the grounds that she was now settled in Slovenia, wished to stay with her mother and it would be detrimental for her to be placed in a children's home. On referral, the Court of Justice centred its reasoning on Article 24(3) EUCFR which grants the child a fundamental right to maintain on a regular basis a personal relationship and direct contact with both parents unless this is contrary to another interest of the child. It argued that this test merged into what was in the best interests of the child. In this case, the mother had made this impossible by absconding to Slovenia. This presumption was not an absolute one, however, as account also had to be taken account of the actual child and her social environment, something it was assumed that the Italian court had done here.

The reasoning was anchored around two foundations. One was that regular relations with both parents created well-being for the child, but did not subsume this well-being, so other factors could be brought in to rebut this presumption. The other was that the status of the child had to be recognised and cherished within the context of these relations. The child's well-being was both an outcome of these relations and something to be asserted within and against these relations. In this, reliance was had to highly stylised representations of both the relations and the subject. It was unclear how much contact with either parent the daughter would have as a result of being in a home. Little regard was paid to this but rather to the technical possibility for both parents to live close to the home and regularly see their daughter. Equally, recognition of the child did not involve recognition of the stated wishes but rather of an idea of what was in her best interests.

That being so, in which relations is relational autonomy fostered and protected? They are those pivotal to the European political economy. Relational autonomy can be traced back to *International Handelsgesellschaft* in which fundamental rights were asserted to protect the position of a trader within a commercial contract.<sup>72</sup> Since then, fundamental rights have been deployed to protect parties within a series of contractual relationships: commercial,<sup>73</sup> employment<sup>74</sup> and consumer.<sup>75</sup> Alongside, they have been deployed within other relations

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<sup>72</sup> Case 11/70 *Internationale Handelsgesellschaft*, EU:C:1970:114, paras 14-20.

<sup>73</sup> *Ibid.*

<sup>74</sup> Case 149/77 *Defrenne v Sabena*, EU:C:1978:130, paras 26 and 27; Case C-13/94 *P v S*, EU:C:1996:170, para 19.

integral to the Union market economy, most notably the social partners,<sup>76</sup> and professional<sup>77</sup> and trade union relations.<sup>78</sup> Relational autonomy also serves to protect relations between public authorities and the public but only where the former govern the European political economy by acting in a providential manner to secure the operation of its spheres of activity, most typically as regulators. In such instances, it protects not only the regulated party<sup>79</sup> but the sphere of activity more generally so it will also seek to secure the position of third parties who benefit from the public good at risk.<sup>80</sup> By contrast, the protection offered by relational autonomy is not present in other forms of relationship between the State and its subjects: be these fiscal, welfare or penal ones. There is protection of fundamental rights but the only autonomy protected is that of individual -control so the rights protected go to non-disclosure,<sup>81</sup> safeguarding of the body,<sup>82</sup> or protection of property rights.<sup>83</sup>

The last protection relationship is that of the family.<sup>84</sup> On its face, this might seem odd to as the family is an intimate relationship which is neither concerned to secure profit nor political in nature. However, the genealogy of political economy emerged out of extending the metaphor of management of the household, *oikonomia*, to collective management of the welfare of the territory.<sup>85</sup> If family acted as the central inspiration for modern political economy, it is unsurprising that similar styles of reasoning are applied to it. EU fundamental rights law exercises a providential role concerned to regulate rather than constitute family relationships so it has not engaged with questions which go to definitions of the family such

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<sup>75</sup> Case C-244/06 *Dynamic Medien*, EU:C:2008:85; Case C-544/10 *Deutsches Weintor*, EU:C:2012:526; Case C-83/14 *CHEZ Razpredelenie Bulgaria*, EU:C:2015:480.

<sup>76</sup> Case C-172/11 *Erny*, EU:C:2014:157.

<sup>77</sup> Case C-305/05 *Ordre des Barreaux francophones and germanophone and Others*, EU:C:2007:383.

<sup>78</sup> Case C-341/05 *Laval un Partneri*, EU:C:2007:809.

<sup>79</sup> Joined Cases C-244/10 and C-245/10 *Mesopotamia Broadcast & Roy*, EU:C:2011:607; Case C-195/12 *IBV & Cie*, EU:C:2013:598.

<sup>80</sup> Case C-260/11 *Edwards and Pallikaropoulos*, EU:C:2013:221, para 33; Case C-71/14 *East Sussex Council*, EU:C:2015:656, para 52.

<sup>81</sup> Case 29/69 *Stauder* EU:C:1969:57.

<sup>82</sup> Case C-562/13 *Akdida*, EU:C:2014:2453.

<sup>83</sup> Case C-617/10 *Fransson*, EU:C:2013:105.

<sup>84</sup> Case C-109/01 *Akrich*, EU:C:2003:491, para 58; Case C-578/08 *Chakroun*, EU:C:2010:117, para 63; Case C-451/11 *Dülger*, EU:C:2012:504, para 53.

<sup>85</sup> C. Natali, 'Oikonomia in Hellenistic political thought' 95, 97-99 in A. Laks & M. Schofield (eds) *Hellenistic Social and Political Philosophy: Proceedings of the Sixth Symposium Hellenisticum* (1995, CUP, Cambridge).

as same sex relationships, the place of foster children, or the threshold for marriage, but rather adopts received notions of family relations and parties' positions within them.<sup>86</sup>

These relations must be seen as part of the European political economy rather than domestic or wider global processes. This will be so where EU law imposes obligations on one party which allow another party to enter a relationship with it or to assert a claim within an existing relationship. This might be where EU law allows an EU citizen to trade in another Member State, and, in that case, have legal entitlements against the national authorities of the latter or where a female employee can make a claim under anti-discrimination law against her employer. To be sure, there is circularity in the European political economy being whatever EU law sets it out to be. However, it must be remembered that the European political economy is a representation by EU law of what the EU is about. If it is represented as something pre-existing through which EU law is interpreted, it is nevertheless still set out by EU law. There is, to be sure, also selectiveness in this. EU law does not, for example, recognise the possibility to transact freely between EU and non EU States. Consequently, contracts with operators outside the Union will only generate these styles of commitment where the EU legislature has decided to allow such contracts to be made.<sup>87</sup> Likewise, family relations are only recognised insofar as there is either movement within the Union or movement into the Union from third States recognised as imposing obligations on States, and thereby generating entitlements under EU secondary legislation.<sup>88</sup>

The other central question about relational autonomy is the degree of protection offered by it. It provides a more multifaceted recognition of individual qualities, wants and vulnerabilities than autonomy as individual control. As it goes to the possibility for the individual to enjoy a particular relationship or her treatment by or within it, concern is always with two things: the identity granted to her by that relationship (ie a worker, child, parent, broadcaster, consumer) and the identity asserted by her which transcends that relationship (ie gender, sexual orientation, traits, physical and emotional needs). This is

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<sup>86</sup> In *McB*, for example, the possibility for unmarried fathers to have custody over children in the case of separation was refused on the grounds that national law did not allow for it. Case C-400/10 PPU *McB*, EU:C:2010:582, paras 62-63.

<sup>87</sup> Case 112/80 *Dürbeck*, EU:C:1981:94, para 44.

<sup>88</sup> There is one exception where an EU citizen would be forced to leave the territory of the Union. This is a citizenship right, however. Case C-40/11 *Iida*, EU:C:2012:691, paras 68-71.

illustrated by *Chatzi*. A Greek public servant had given birth to twins and her request for two periods of parental leave was rejected. She argued, first, that parental leave was conferred on the child and that the refusal of a second period of leave violated Article 24 of the Charter on the rights of the child, as it stopped each having its own parental leave at the time of the birth. The Court rejected this, ruling that the Directive on parental leave granted parents leave in their capacity as workers. It noted this was confirmed by parental leave being a social right under Article 33(2) of the Charter under the ‘Solidarity’ heading. The rights were thus granted to the parent, and not merely this, but to the *parent qua worker*, a relationship constituted by the employment relationship. The Court then considered whether a working parent with twins was being treated equally under Article 20 of the Charter if she were granted the same amount of parental leave as that of an individual child. At that moment, it shifted the identity to *parent qua parent*, an identity transcending the employment relationship.<sup>89</sup> It noted that bringing up twins entailed greater effort and was not comparable to care of a single child. Special account should be taken of their needs either through the grant of leave that was longer than the minimum or through increased material assistance such as childcare or financial aid.

EU law has recognised a significant number of identities which transcend the relationship in question: be it those on whose grounds discrimination is prohibited;<sup>90</sup> particular needs such as the right to a home;<sup>91</sup> the role of carers<sup>92</sup> or environmental stakeholders.<sup>93</sup> There will inevitably be tensions whether sufficient identities are recognised<sup>94</sup> and why some are recognised at the expense of others. In *Chatzi*, therefore, the judgment was framed in terms of the rights of the parent with little attention paid to the autonomous rights of the child.<sup>95</sup> In addition, these transcendental identities must be made compatible with the relational identities which entrench relationships central to the European political economy. This leads, in the first place, to certain possibilities never being conceived as these would obviate

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<sup>89</sup> C-149/10 *Chatzi*, EU:C:2010:534.

<sup>90</sup> Article 21 EUCFR.

<sup>91</sup> Case C-34/13 *Kušionová*, EU:C:2014:2189, para 64.

<sup>92</sup> Case C-303/06 *Coleman*, EU:C:2008:415.

<sup>93</sup> Case C-260/11 *Edwards and Pallikaropoulos*, EU:C:2013:221.

<sup>94</sup> There was much public debate about whether the obese should be protected from discrimination, Case C-354/13 *FOA*, EU:C:2014:2463.

<sup>95</sup> These were, in fact, dismissed with the Court stating that they gave no absolute right to parental leave.

the presence or need for a relational identity. The worker's desire to control her own work is, for example, simply not available as a fundamental right in modern employment processes.<sup>96</sup> In the second place, transcendental identities are curtailed wherever it might obstruct the relational identities' more general contribution to the European political economy. In *Experian*, the Court held that employers who made lower pension contributions for younger employees did not violate the prohibition on age discrimination in article 21 of the Charter as this both allowed employers to focus their contributions on employees more at risk of death and illness and employees starting their pensions later to have still a decent pot.<sup>97</sup> A view was taken, therefore, that employers and employees should contribute more through the employment relationship to the costs of old age and its risks. To secure this, employers were allowed to pay younger employees less, notwithstanding that these might already be earning less and this will inevitably impinge on their eventual pensions. Invariably, this curtailed interpretation of individual identities stunts the entitlements necessary for self-realisation and generates a sense of a limited recognition of the identity in question.

### *(iii) Autonomy as individual flourishing*

The third vision of autonomy is that of individual flourishing. This has EU law setting out structures which are to enable individuals to fulfil their potential, and it is a vision predicated on a narrative which emphasises self-realisation and, accordingly, the pursuit of individual potentiality. In this narrative, potentiality represents a latent capacity, with the direction and focus being towards realisation through this capacity. In reflection of these qualities, the concept of potentiality is to be found tightly intertwined into theories of the human condition and the self which emphasise continuity of life (self-realisation being a process which is conceived of as obtaining throughout life) and authenticity. The language is that of becoming, and advancing.

Individual flourishing thus presupposes both the presence of the capacity – the potential – within each individual, and the desire, or the drive, on the part of the individual, to fulfil

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<sup>96</sup> A. Honneth, *The I in We* (2014, Polity, Oxford) 61.

<sup>97</sup> Case C-476/11 *Experian*, EU:C:2013:590.

that potential. EU law, in setting out structures and conditions which are intended to be amenable to this, seeks to nurture individual potentiality. In so doing, it is cast as enabling individuals to realise a particular modern vision of identity. Brooks has noted how law was central to institutionalising individual identities. As legal regulation of social life advanced, it set out increasing numbers of external markers classifying individuals as having similar properties. The question 'What am I?' (a worker, consumer, property owner, professional, degree holder) became increasingly both a legal one and a multifaceted one. Alongside this, identity was about creating an internal world, the psychological one, which was non-legal and highly individuated. The question 'Who am I?' was an introspective one to be cultivated through reflection and education.<sup>98</sup> Individual flourishing sees both the acquisition of valued external markers and the development of a sense of Self along the model set out above as central to identity-formation and personal development, and that, therefore, EU fundamental rights law is to nurture both.

Individual flourishing tempers the more instrumental qualities of the ethos of self-betterment which would, otherwise, have individual worth tied to the size of her contribution to the realisation of collective goods. It was developed first, therefore, in the world of work. In *Defrenne (No3)* the Court famously stated that elimination of discrimination based on sex constituted a fundamental right.<sup>99</sup> If this was a claim about meritocracy, it also went to how workers were to be viewed. They could not be reduced to their use value to employers but had a gendered identity which was to be respected through both external recognition and the provision of space for the individual to develop this identity.

Individual flourishing is cultivated in three ways by EU fundamental rights law: the recognition and grant of certain statuses, participation in the creation of collective goods, and contribution to the public sphere.

The first is the relationship between flourishing and a certain status. In some instances, the option of having these statuses is seen as necessary to allow individual flourishing.

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<sup>98</sup> P. Brooks, *Enigmas of Identity* (2011, Princeton University Press, Princeton NJ) chapter 1.

<sup>99</sup> Case 149/77 *Defrenne*, EU:C:1978:130, para 27.



Examples include marriage and the right to found a family;<sup>100</sup> education;<sup>101</sup> to work or pursue an occupation<sup>102</sup> or business.<sup>103</sup> If relational autonomy serves to protect individuals within such relationships, individual flourishing allows individuals to enter them. In other instances, the status is seen as endangering the individual's possibility to flourish. EU fundamental rights law acts protectively here. Children have, thus, a right to such care and protection as is necessary for their well-being;<sup>104</sup> the elderly to dignity and independence and participation in cultural and social life;<sup>105</sup> the disabled a right to integration in the community;<sup>106</sup> young people not to be exploited in the workplace;<sup>107</sup> and a host of particularly vulnerable groups entitlement to social assistance and social security.<sup>108</sup> Status can also be seen as simultaneously necessary to secure well-being and as evidence of vulnerability. Working mothers are seen as securing their wellbeing through family and work but the demands of the former can make them vulnerable to discrimination so a number of maternity rights are offered.<sup>109</sup>

This mode carries also a more ambivalent quality. In some instances, the nature of the status itself has proven to be heavily contingent on the presence of some underpinning stylised conceptualisation. Thus in *C.D.* and *Z*, in which two women, as commissioning mothers, had babies by surrogacy, and sought maternity leave, it was emphasised by the Court of Justice that the conceptualisation of motherhood in EU law, for the purposes of maternity leave, is that of the *gestational* mother.<sup>110</sup> Maternity leave here was thus contingent on pregnancy and birth;<sup>111</sup> it was accordingly about the flourishing of *the gestational mother qua worker* only, and was consequently denied to the commissioning mothers.

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<sup>100</sup> Article 9 EUCFR.

<sup>101</sup> Article 14(1) EUCFR.

<sup>102</sup> Article 15(1) EUCFR.

<sup>103</sup> Article 16(1) EUCFR.

<sup>104</sup> Article 24(1) EUCFR.

<sup>105</sup> Article 25 EUCFR.

<sup>106</sup> Article 26 EUCFR.

<sup>107</sup> Article 32 EUCFR.

<sup>108</sup> Article 34(1) EUCFR.

<sup>109</sup> Article 33(2) EUCFR.

<sup>110</sup> Case C-363/12 *Z*, EU:C:2014:159; Case C-167/12 *C.D.*, EU:C:2014:169.

<sup>111</sup> See especially *C-167/12 C.D.*, EU:C:2014:169, paras 34-43.

The second mode of cultivating individual flourishing is through individuals participating in the creation of some collective good, the most highly ranking of which is that of the protection of human health and life.<sup>112</sup> Individual and collective goods elide into one another here. High levels of consumer and environment protection or public health require individuals to behave as wary consumers, green citizens or to manage their individual health. There is a thin line between the construction of conditions conducive for individual flourishing and asserting individual responsibility for this. In *Deutsches Weintor*, the local supervisory authority brought an action against a German winegrowing cooperative for marketing some of its members' wines as 'easily digestible' on the grounds that this was a prohibited health claim under EU legislation.<sup>113</sup> The Court interpreted the legislation in the light of, *inter alia*, Article 35(2) of the Charter which requires a high level of human health protection to be ensured in defining and implementing EU policies. It noted that whilst the wine might facilitate digestion, as a health claim it was incomplete as it was silent about other less healthy dimensions to the wine, notably those dangers inherent in the consumption of alcohol. The protection of public health justified a prohibition of the claim.

The Court conceived public health as a collective good which was to be protected from misleading claims by those marketing the goods. However, it also conceived of the individual as taking care of her own health. The central instrument for realising public health in this instance was, thus, the label, which relied on the idea of a health conscious and informed consumer who will not only read it, but also understand it and take measures to protect her health accordingly. If this allows her to flourish by leading a healthy lifestyle in line with her choices, it imposes a whole series of responsibilities to realise this.

The third mode of flourishing is contribution to the public sphere. In this, EU fundamental rights law links fundamental rights with EU citizenship, giving rise to a civic humanist conception of flourishing in which active citizenship and self-realisation are intertwined. Rights for EU citizens to vote and stand in European Parliament and municipal elections are both EU citizenship<sup>114</sup> and EU Charter rights.<sup>115</sup> However, within the Charter they form part

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<sup>112</sup> Case C-367/12 *Susanne Sokoll-Seebacher*, EU:C:2014:68, para 26.

<sup>113</sup> Case C-544/10 *Deutsches Weintor*, EU:C:2012:526.

<sup>114</sup> Article 22 TFEU.

<sup>115</sup> Articles 39 and 40 EUCFR.

of involvement within the public sphere which also includes entitlements for EU and non EU citizens alike to freedom of expression and assembly,<sup>116</sup> and to hold EU institutions to account.<sup>117</sup> A distinctive feature of participation in the public sphere is that the individual must reveal or have revealed her participation in the sphere to others: be this through an act of expression, voting or meeting others.<sup>118</sup> This act of revelation allows an individual to be identified not as a worker, consumer, service provider, and so on, but merely as a participant within a 'community of equals': be it one in which she can vote and stand for election as an EU citizen or contribute to public debate and hold EU Institutions to account, otherwise. If it sets out a measure of equality not found elsewhere, it also allows the differences and deep feelings of each individual to be revealed.<sup>119</sup> These allow her to express herself, vote, and so on differently from others but for this nevertheless to be respected. This recognition of equality and difference is central to the flourishing of modern political identities with the voicing of individual identities allowing collective ones to be determined and established.<sup>120</sup>

Whatever mode is taken, a limiting feature of individual flourishing is that, as a corollary of the ethos of self-betterment, it is a *second order* principle. It is only presented where the individual has already been granted a presence by EU law. She is carrying out activities regulated by it which generates certain entitlements for her under EU law. This constrains its remit and shapes its meaning. An example of the tensions surrounding this is *Fenoll*.<sup>121</sup> 'Centres d'aide par le travail' (CAT) were French rehabilitation centres for people with significant mental disabilities. They offered occupational activities, medico-social support, educational assistance, as well as living arrangements. Individuals were also paid a

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<sup>116</sup> Articles 11 and 12 EUCFR.

<sup>117</sup> Articles 41-44 EUCFR.

<sup>118</sup> Arendt, therefore, famously talks of the polis as a space of appearances, H. Arendt, *The Human Condition* (1958, University of Chicago Press, Chicago) 198-199. Cavarero also has talked about it as a place where one is revealed by others but challenges whether it is a place where one's own story can be fully told, A. Cavarero, *Relating Narratives: Storytelling and Selfhood* (2014, Routledge, London) Chapter 3.

<sup>119</sup> D. Winnicott, 'Some Thoughts on the Meaning of the Word 'Democracy'' in D. Winnicott, *Home is Where We Start From: Essays by a Psychoanalyst* (1986, Pelican Books, London) 241-42.

<sup>120</sup> The Court of Justice has, thus, recognised that freedom of expression is both central to democracy (collective identity and will formation) and pluralism (the recognition of singularity as being of equal political worth), Case C-163/10 *Patriciello*, EU:C:2011:543, para 31.

<sup>121</sup> Case C-316/13 *Fenoll*, EU:C:2015:200.

guaranteed income for work done independently of the hours worked at the CAT. The case went to whether those admitted were entitled to payment in lieu of annual leave. They would be granted this if their activities were found to make them workers under EU law.<sup>122</sup> The right to annual leave contributes to individual flourishing as, according to the Court, it secures rest, leisure and relaxation, all necessary for well-being and self-development.<sup>123</sup> The curiosity of attaching the need for these to work became obvious when the Court tried to distinguish this case from others where it had ruled individuals in rehabilitation centres (in that case for drug addiction and alcoholism) were not workers because the activities were rehabilitative. In this instance, it argued that the activities were work as they had a certain economic value unlike the other activities.<sup>124</sup> Economic value would seem an odd basis to determine whether rest and relaxation was needed. Rehabilitative activities can be just as demanding as so-called economic ones. The judgment was equally contrived when looked at through the lens of the employment relationship. The relationship was for those not ready for the broader work place, and was structured to allow them as much space as necessary to recover. The idea of annual leave as a *juste retour* for labour provided over the year made little sense within such a context particularly as the relationship was structured to secure sufficient rest over its entire period.

#### **IV. The European Union Charter of Fundamental Rights and the Reincorporation of the Individual into a Reformulated European *Stabilitas***

These three autonomies incorporated the individual into the way of life represented by EU law, the European political economy, and allowed her to assert her place within this way of life and be seen as a central part of it. The Charter reshaped these processes of incorporation and assertion in three significant ways. It, first, increasingly required the European political economy to be seen in terms of the rights expressed by the Charter. However, this came at the price of increasingly shaping these rights in line with the demands of the European

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<sup>122</sup> The relevant Charter provision is Article 31 which provides for four weeks annual paid leave.

<sup>123</sup> Joined cases C-350/06 and C-520/06 *Schutz-Hoff & Stringer*, EU:C:2009:18, para 25. See also Case C-214/10 *KHS*, EU:C:2011:761, para 23.

<sup>124</sup> The other case was Case C-456/02 *Trojani*, EU:C:2004:488. Actually, economic value was provided by members of the centre in that case in the cleaning and contribution to the running of the centre which would otherwise have to be paid.

political economy as it was set out by EU legislation. Secondly, it increasingly saw fundamental rights not as standards of morally correct behaviour but as goods to be realised. This led to a much more instrumental approach to individual rights. Thirdly, a governmental style of interpretation was developed to make this vision coherent. EU fundamental rights were integrated within a much more tightly drawn vision of what the European political economy was about and represented. This vision incorporated the individual more deeply into the processes of the European political economy making it harder for her to assert her position *against* these processes. However, it also led to new possibilities for her to assert her position *within* these processes. Private actors were now acknowledged as central to the government of this political economy as it was their actions which put it into play. The Charter was increasingly allowed to be asserted against these, albeit always within the confines of its being through the interpretation of EU legislation.

This will now be explained in more detail.

(i) *A European Anthropology of the Human Condition Organised as Legal Policy*

The Charter created a more congested space for fundamental rights by recognising many more rights than previously without the terrain of EU law being expanded correspondingly.<sup>125</sup> The consequent crowding resulted in the increased invocation of fundamental rights already mentioned. In turn, this generated a stronger sense of value salience within EU law. Fundamental rights were more obviously at the forefront of EU law with many pieces of EU legislation now viewed through their optic. In the *Deutsches Weintor* judgment mentioned earlier, there was, for example, reference not only to article 35, the provision on public health, but also those on freedom to choose an occupation and freedom to trade.<sup>126</sup> It is doubtful that a case on EU legislation governing misleading trade descriptions would previously have been couched in these terms. This value salience was symbolically important as it allowed EU law to depict a Union anthropology of the human condition in which the European political economy is increasingly set out as what it is to

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<sup>125</sup> The scope and detail of the Charter is well set out in S. Peers, T. Hervey, J. Kenner & A. Ward, *The EU Charter of Fundamental Rights: A Commentary* (2014, Hart, Oxford).

<sup>126</sup> *Supra* n 113.

lead a good individual and collective life. A case about health claims about German wine now becomes which is necessary for both the individual to lead a healthy life and for public health to be protected, on the one hand, and the limits of free enterprise, on the other.

This value salience was accompanied by a greater sense of value pluralism. A more diverse array of fundamental rights was explicitly recognised with different provisions more frequently coming into contact with each other in individual cases.<sup>127</sup> Value pluralism militated for a stronger incorporation of individual autonomy within the wider Union *stabilitas* with the latter being more strongly determined by the demands of the former. For value pluralism places demands of reconciliation between values in order to secure coherence for the order as a whole, provide reasons for choosing one over the other and to generate some sense of why, combined, these values set out an authoritative statement of the good life.<sup>128</sup>

This tighter incorporation of the individual into the government of the European political economy was evidenced most strongly in fundamental rights being increasingly used to interpret EU laws alongside their traditional role of reviewing EU measures. Time and again, reference was had to a Charter provision to justify why a particular interpretation of a provision of EU law should be taken.<sup>129</sup> In this, the teleologies of fundamental rights became submerged within wider EU legal policy. In many instances, this was done explicitly where EU legislation was characterised as an expression of a fundamental right so that the meaning of the latter became revealed through the content of the former.<sup>130</sup> In other instances, and more commonly, the relationship is reversed and EU legislation is interpreted in the light of a fundamental right. However, the content of that right has still to be couched in the

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<sup>127</sup> Examples just in 2015 include Case C-362/14 *Schrems*, EU:C:2015:650; Case C-580/13 *Coty Germany*, EU:C:2015:485; Case C-583/13 P *Deutsche Bahn*, EU:C:2015:404; Case C-528/13 *Léger*, EU:C:2015:288.

<sup>128</sup> R. Chang, 'Value Pluralism' in J. Wright (ed) *International Encyclopaedia of the Behavioral and Social Sciences* (2015, 2<sup>nd</sup> Edition, Elsevier, Oxford).

<sup>129</sup> In the three months of activity between 1 June and 30 September 2015, these included C-237/15 PPU *Lanigan*, EU:C:2015:474; Case C-184/14 A, EU:C:2015:479; Case C-105/14 *Taricco and Others*, EU:C:2015:555; Case C-98/14 *Berlington Hungary and Others*, EU:C:2015:386; Case C-83/14 *CHEZ Razpredelenie Bulgaria*, EU:C:2015:480; Case C-4/14 *Bohez*, EU:C:2015:563; Case C-580/13 *Coty Germany*, EU:C:2015:485; Case C-519/13 *Alpha Bank Cyprus*, EU:C:2015:603; Case C-170/13 *Huawei Technologies*, EU:C:2015:477 (the Court is in recess in August).

<sup>130</sup> Eg Case C-543/09 *Deutsche Telekom*, EU:C:2011:279; Joined Cases C-244/10 & 245/10 *Mesopotamia Broadcast & Roj TV*, EU:C:2011:607; Case C-416/13 *Vital Pérez*, EU:C:2014:2371; Case C-219/14 *Greenfield*, EU:C:2015:745.

language of the legislation in question: be this the right to human dignity being framed in the language of legislation on the patenting of biotechnology so that it goes to what human organisms can be owned<sup>131</sup> or the right to private life in the light of data protection measures so that its content circulates around such things as the safeguards to be put in place for individual data to be transferred to non EU authorities.<sup>132</sup>

(ii) *From Individual Fundamental Rights to Collective Goods*

The second dynamic was a consequence of the *types* of right now deemed worthy of protection. Most of the rights traditionally protected by EU law expressed an idea of moral correctness (ie freedom from torture, respect for private and family life, freedom of expression, the right to trade or own property). The Charter included a significant number of rights of a different quality. These expressed a desired state of affairs which should be strived towards. They were more closely identified with the realisation of some collective good, whereas the former were more strongly associated with principles of individual behaviour. If, once again, this broadening of the range of fundamental rights was an attempt to identify much more strongly with a more sweeping vision of a good life, it also entailed the emasculation of individual singularity and vulnerability by the demands of these collective goods.

In some instances, these fundamental rights are, therefore, cast simply as collective goods with no reference to individual entitlements (eg the provisions on freedom of the arts and sciences; cultural, religious and linguistic diversity; environmental protection and consumer protection).<sup>133</sup> In others, there is provision for individual access whilst acknowledgement that the right is about protecting a collective good (eg public health; services of general economic interest).<sup>134</sup> The most formal recognition of this shift was in *AMS* where the Court stated that certain provisions were only judicially cognisable insofar as they were given

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<sup>131</sup> Case C-364/13 *International Stem Corporation*, EU:C:2014: 2451; Case C-34/10 *Brüstle*, EU:C:2011:669.

<sup>132</sup> Case C-362/14 *Schrems*, EU:C:2015:650.

<sup>133</sup> Articles 13, 22, 37 and 38 EUCFR.

<sup>134</sup> Articles 35 and 36 EUCFR.

specific expression by national or EU law.<sup>135</sup> These rights were, in other words, collective goods which could only be examined through the lens of the practical steps taken to realise them rather than through what might be granted individuals directly.

This has been accompanied by a more pervasive shift to the perception of fundamental rights as being more broadly about the realisation of collective goods.<sup>136</sup> This was particularly striking in relation to the prohibition on torture, inhuman or degrading treatment set out in article 4 of the Charter: a right which, intuitively, one would assume should be least viewed in this way.

In *NS*, the Court had to consider whether asylum seekers should be sent back to the Member State responsible for considering their claim where there was a risk that they might be subjected to inhuman or degrading treatment.<sup>137</sup> The central good in question, for the Court, was the common European asylum system and it interpreted the duty of States to respect fundamental rights in the light of this. It stated that the system was based on mutual trust and a presumption of compliance with fundamental rights obligations by Member States. Any violation of an individual's fundamental right would, thus, be insufficient to prohibit return, presumably as checking whether this was the case would undermine the mutual trust and presumptions of the common European asylum system and this was to be granted a greater worth than individual violations. Instead, the threshold for non-return would be that of systemic violations in the receiving State, which were there. The individual, thus, almost completely disappears from this account as a collective good is to be followed except where there is a failure on a collective scale. In *M'Bodj* the Court went further and stated that collective goods could be used to determine whether a situation could be reviewed against the prohibition on torture.<sup>138</sup> The case concerned a Mauritanian denied asylum in Belgium but who had been granted leave to remain, and suffered from a serious potentially life-

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<sup>135</sup> Case C-176/12 *AMS*, EU:C:2014: 2, paras 44-45. This is also provided for in Article 52(5) EUCFR.

<sup>136</sup> This is, of course, necessarily present in Commission policy-making on fundamental rights as it seeks to incorporate fundamental rights within policies and develop policies out of them. On this generally see European Commission, *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union*, COM (2010) 573, 3-4. More particularly, European Commission, *An EU Agenda for the Rights of the Child*, COM (2011) 60.

<sup>137</sup> Joined Cases C-411/10 and C-493/10 *N.S.*, EU:C:2011:865. Similar reasoning is present in Case C-4/11 *Puid*, EU:C:2013:740.

<sup>138</sup> Case C-542/13 *M'Bodj*, EU:C:2014:2452.



threatening illness. There were no facilities to treat him in Mauritania. The relevant EU legislation on international protection required Member States to offer protection and health care to those whom there were substantial grounds to believe would suffer inhuman and degrading treatment in their State of origin. The European Court of Human Rights had indicated that in exceptional circumstances return to States with no facilities could constitute inhuman and degrading treatment.<sup>139</sup> The Court of Justice both rejected this and failed to interpret the EU legislation in the light of Article 4 of the Charter. Instead, it reasoned that the purpose of humanitarian protection was not to grant health care to those living in States with insufficient medical facilities. It stated, therefore, that inhuman and degrading treatment in for the purposes of the legislation only occurred if the person were intentionally deprived of healthcare in the State of origin. As this was not the case here, M'Bodj could be denied health care. On its own terms, this criterion made little sense as inhuman and degrading treatment goes to the suffering of the victim rather the motivation of the perpetrator. Instead, the central dynamic behind the reasoning is the safeguarding of EU medical resources. These were only required to be offered, therefore, where the ill health of the party could be attributed to the actions of another party rather than the actions of the ill person or the performance of their body.<sup>140</sup>

(iii) *Governmental interpretation of Fundamental Rights*

The third dynamic went to the style of interpretation of the Charter. From the Treaty of Lisbon onwards, fundamental rights were almost always interpreted through the lens of the Charter provisions.<sup>141</sup> This was a synthetic process as these interpretations had to incorporate earlier traditions of fundamental rights in EU law, the ECHR, national constitutional traditions and international human rights treaties.<sup>142</sup> Interpretation was thus demanding and the challenge was further exacerbated by a series of contradictory

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<sup>139</sup> *N v the United Kingdom*, no. 26565/05, § 42, ECHR 2008

<sup>140</sup> This interpretation was reaffirmed by a judgment the same day in which the Court stated that it could constitute inhuman and degrading treatment to return a non-EU citizen to their State of origin in such circumstances. States are prohibited from returning somebody to a State of origin with insufficient facilities in certain cases where they are in very ill-health but have to provide no care of their own, Case C-562/13 *Abdida*, EU:C:2014:2453.

<sup>141</sup> This is indeed required, Case C-70/10 *Scarlet Extended*, EU:C:2011:255, Opinion of Advocate General Cruz Villalón, para. 30. There are some general principles of law, notably protection of legitimate expectations which are not incorporated within it, Case C-183/14 *Salomie*, EU:C:2015:454.

<sup>142</sup> On this debate see R. Schütze, 'Three "Bills of Rights" for the European Union' (2011) 30 *YBEL* 131.

instructions on how to interpret the Charter - be this in line with other EU law provisions, the ECHR, national constitutions or Explanations of the Secretariat.<sup>143</sup>

To be coherent and authoritative, an interpretation had to be a rigorous interpretation of the formal text, consistent with earlier case law and other provisions of the Charter whilst simultaneously making sense of these other human rights laws, their relationship to each other and to EU law. This exacting task required its *own modus operandi*. As a result, if there was some reference to the modes of interpretation mentioned in the Charter, it was more common to be no reference at all. Instead, the Court developed a new interpretive logic of its own, a governmental logic, to make sense of this new terrain.<sup>144</sup>

First, an increasingly detailed vision of what the European political economy was about was used to structure the interpretation of EU fundamental rights. Rights were interpreted not simply in the light of EU legislation but also in the light of the image of what this legislation was perceived to be about. EU fundamental rights, thereby, acquired a hybrid meaning in which the Charter provision and the legislative provision were drawn together by an interpretation of what way of life these combined to represent, namely that of the European political economy. An example is *Mesopotamia* which concerned German restrictions on broadcasts by a company sympathetic to the PKK, a Kurdish group designated as terrorist by the United Nations but nevertheless enjoying support amongst many Kurds.<sup>145</sup> The judgment went to the place of political expression and controls on hate speech within the European Union. The Court duly interpreted the Charter provision on freedom of expression through the lens of EU broadcasting legislation which required Member States to ensure that broadcasts did not contain any incitement to hatred on grounds of, inter alia, nationality. It ruled that incitement would cover any broadcast intended to direct specific behaviour and generate a feeling of animosity or rejection towards a group of persons. This is a wider definition of hate speech than that found anywhere in North America or Western

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<sup>143</sup> See respectively Articles 52(2)-(4) and (7) EUCFR.

<sup>144</sup> This is indeed alluded to by Advocate General Bot who refers to individual Charter provisions having a different 'substance and identity' from their ECHR counterparts, Case C-69/10 *Diouf*, EU:C:2011:524, para 39.

<sup>145</sup> Joined Cases C-244/10 & C-245/10 *Mesopotamia Broadcast*, EU:C:2011:607.

Europe.<sup>146</sup> The reasoning has some coherence if it is borne in mind that this was a case about broadcasting regulation. The Court was concerned to create a sphere of activity for transnational broadcasts in which operators knew where they stood. This vision of a transnational market in broadcasting shaped both the interpretation of the Directive and that of freedom of expression. The vision was not just about a broadcasting market but also what it was about and what it stood for. The wide definition of incitement sets out a strong exercise of civic responsibility on broadcasters to uphold the quality of the public sphere no doubt because of the opportunities available to them to shape it.

This line of reasoning has strong totalising qualities. There is little space for individuality to be asserted within it and indeed the presence of the individual is sometimes immersed within wider processes. In *Mesopotamia*, for example, there was no mention of what an individual right to freedom of expression might comprise.

This deeper incorporation of the individual within the European political economy led to a reshaping of how her place was to be asserted within it. The most direct line of the Court, building on Article 52(1) EUCFR was to state that any limitation on a right must protect the essence of a fundamental right.<sup>147</sup> It suggests fundamental rights be granted a divisible meaning in which they contain a protected core and then, beyond this, make claims to be weighed against other claims. An example is *Sky Österreich*.<sup>148</sup> *Sky Österreich* held the broadcasting rights for Europa League football in Austria. It allowed highlights of these games to be done for news reports by other broadcasters who had to pay €700 per minute for this. This was found to contradict an EU Directive which allowed Sky only charge for the additional costs in making these reports. Sky argued that this infringed its right to conduct a business, and indeed similar requirements had been found to violate both the German and Austrian constitutions. On this point, the Court stated that the EU legislation did not affect the core content of the freedom to conduct a business. It did not prevent Sky from carrying

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<sup>146</sup> E. Bleich, *The Freedom to Be Racist? How the United States and Europe Struggle to Preserve Freedom and Combat Racism* (2011, OUP, Oxford).

<sup>147</sup> It may well also have parallel similar reasoning with the ECHR. Recent examples include Appl. No. 66048/09 *Koni v Cyprus*, 27 October 2015, para 49; Appl. No. 7984/06 *Saghatelyan v Armenia*, 20 October 2015, paras 45-51; Appl. No. 46815/09 *Reisner v Turkey*, 21 July 2015, paras 56-60.

<sup>148</sup> Case C-283/11 *Sky Österreich*, EU:C:2013:28

out business activities or from making use of these rights by broadcasting the games themselves or selling the rights to do that to another operator.<sup>149</sup>

This reasoning has, however, been sparsely and selectively deployed. There are instances when the Court has been invited to use it but has based its reasoning on completely different grounds.<sup>150</sup> There is only one instance where it was deployed to guide EU legislation.<sup>151</sup> In all other instances, it has simply been held that the essence of the right is not compromised by the EU or national measure. The most dramatic instance was *Delvigne* where a French restriction on the right to vote of those convicted of a serious criminal offence was challenged on the grounds that it violated the right to vote in European Parliament elections set out in Article 39(2) of the Charter. The Court stated that this did not call into question of the essence of the right to vote as it only had 'the effect of excluding certain persons, under specific conditions and on account of their conduct.'<sup>152</sup> A position was struck, therefore, on the right to vote as a collective state. It is difficult to see how holding this to be generally intact did not fully deny the rights of *these individuals* as the vote was withdrawn from them.

Thirdly, institutional responsibilities were recast so that the central actors responsible for the governing the European political economy were bound by EU fundamental rights. This has followed two tracks with regard to review and to interpretation respectively.

Review goes to preventing an EU or national institutions from violating fundamental rights. If the argument of this piece is correct and EU fundamental rights laws contribute to sustaining the European political economy, it would fall that measures would only be taken to review institutional action where it disrupts this political economy. Historically, EU law has been somewhat obscure on this, holding actions of the EU Institutions and national measures fall within the scope of EU law to be reviewed.<sup>153</sup> This has changed in recent years with a much more finessed test emerging with regard to when national measures can be reviewed. The Court has held that these can be reviewed against EU fundamental rights

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<sup>149</sup> Case C-400/10PPU *McB*, EU:C:2014:586; Case C-291/12 *Schwarz*, EU:C:2013:670; Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland*, EU:C:2014:238; Case C-219/14 PPU *Spasic*, EU:C:2014:586; Case C-528/13 *Léger*, EU:C:2015:288.

<sup>150</sup> Case C-101/12 *Schaible*, EU:C:2013:661; Case C-399/11 *Melloni*, EU:C:2013:107.

<sup>151</sup> Case C-400/10PPU *McB*, EU:C:2014:586.

<sup>152</sup> Case C-650/13 *Delvigne*, EU:C:2015:648, para 48.

<sup>153</sup> Case C-260/89 *ERT*, EU:C:1991:254.

when the measure is covered by EU law. This will be so in three circumstances: the national measure was intended to implement a provision of EU law, it pursues objectives which are the same as EU law, and there are specific rules of EU law capable of affecting it.<sup>154</sup> The first of these, implementing specific EU laws, goes to measures required by EU law to secure or regulate the European political economy whilst the second goes to national measures which parallel and have the same objectives as EU law, which is to secure and regulate the European political economy in the same manner as it. The third goes to a duty on the part of national law not to disrupt the European political economy. Many national measures could have adverse effects on the European political economy but the Court indicates, however, that there must be a tight connection between the national measure and EU law before it will be considered sufficiently disruptive to be governed by EU fundamental rights. It must be governed by specific EU laws which, and this is implicit, render any disruption to EU objectives discrete, evident and legally identifiable.

This governmental logic is even starker in relation to the interpretation of EU legislation. A feature of government is that it relies on private actors to realise public objectives through inducing them to behave in particular ways. The ambition of many governmental objectives (ie realising a single market) entails that these are the central relays for government. A measure of a functioning market, therefore, is the number of private transactions taking place. Private actors are thus important governmental actors. This being so, if fundamental rights serves to orient the European political economy as a vision of the human condition, EU fundamental rights obligations have to be imposed on private actors to transform this into a material reality. In this, these act as regulatory principles indicating both the parameters of acceptable activity and why one of activity should be chosen rather than another. This has, indeed, happened. As the centre of gravity of EU fundamental rights moved towards guiding the interpretation of EU legislation, it has become very difficult to argue that private actors are not bound by EU fundamental rights law. Many of the cases in which legislative content had been heavily informed by EU fundamental rights provisions have been private disputes. Indeed, it is this ability to penetrate these private disputes which has allowed the three autonomies – individual control, relational autonomy and individual

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<sup>154</sup> Case C-40/11 *Iida* EU:C:2012:691; Case C-206/13 *Siragusa*, EU:C:2014:126; Case C-87/12 *Ymeraga and Others*, EU:C:2013:291; Case C-98/13 *Julian Hernández*, EU:C:2014:2055.

flourishing – to inform the operation of the spheres of activity that make up the European political economy.

Private actors have thus now become central subjects of EU fundamental rights law. This has led to a paradox. If the governmental style of interpretation that has developed in recent years had led to an immersion of the individual within the processes of the European political economy with the consequence that it has often been very difficult for her to assert her autonomy against public institutions, it has asserted a stronger place for her vis-à-vis other actors. The spheres of activity of the European political economy have, by dint of EU fundamental rights being applied to them, become spheres for exercising and securing individual autonomy in relation to other parties within these spheres of activity. One sees this, therefore, in many of the more well-known judgments of the Court. The right to be forgotten, the right for equal terms over car insurance, stronger protections against age discrimination, stronger assertion of children's interests in custody disputes or the assertion of rights of ownership over certain forms of stem cell research all involved claims against and disputes with other private parties.

## **V. EU Fundamental Rights and the Crisis**

There is much to be uneasy about in this. Interpretations of fundamental rights emphasising human singularity, vulnerability and solidarity are lost in this process. There is no problematisation of the structures making up the European political economy, the asymmetries generated by these or the wider injustices beyond that. This is unsurprising if EU fundamental rights are remembered to be a constitutive part of a legal order that has never really done these things. It is against this backdrop that we now turn to see their role within the sovereign debt crisis. To do this, we will return to the three forms of individual autonomy described as these set out how the EU legal order relates the individual to the crisis.

### *(i) Individual Control*

The central instance in which autonomy as individual control arose was the *Pringle* judgment.<sup>155</sup> Pringle, an Irish MP, challenged the compatibility of the European Stability Mechanism (ESM), the process through which conditional financial support was offered to euro area States whose public finances had run into significant difficulties, with EU law. The terms of support were determined by a Board of Governors comprising the euro area finance ministers and negotiated and overseen by the Commission, ECB and IMF.<sup>156</sup> One of its features was that the Board of Governors was to decide on any dispute surrounding the interpretation or application of the treaty with the only judicial control being the possibility for a State to challenge this before the Court of Justice.<sup>157</sup> Pringle argued that this compromised the possibility, under Article 47 of the Charter, for everybody to have access to an effective remedy before a tribunal where their EU law rights were violated. Such an argument interprets this right through the conception of autonomy as individual control in which the individual as a rational agent must, to have control over her own agency, be allowed to exercise this rationality to defend her legal position by arguing it before a court.<sup>158</sup> The Court was terse in its dismissal of the presence of such a right. It noted that the Charter, by virtue of Article 51(1), only bound Member States when these were implementing EU law. In this instance, Member States were not implementing EU law as the ESM was something agreed by the Member States outside the competences of the Treaties.

Even on its own formal terms, this reasoning is unconvincing on two grounds. First, a number of EU Institutions – the ECB, the Commission and the Court - were central to the operation of the ESM. Under Article 51, the Charter applies to these independently of whether they are implementing EU law. Insofar as the ESM sought to take these beyond the reach of the Charter, there were real questions about its illegality that were unaddressed. The second reason is that the Member States amended the Treaties, namely Article 136 TFEU, to allow the ESM Treaty to be signed. If the ESM was beyond the reach of the EU Treaties, this begged the question as to why they did this unless the Court was suggesting that there was a collective misunderstanding by all of them as to the scope of EU law.

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<sup>155</sup> Case C-370/12 *Pringle*, EU:C:2012:756.

<sup>156</sup> Article 13 ESM. The treaty can be found at <http://www.esm.europa.eu/about/legal-documents/ESM%20Treaty.htm>

<sup>157</sup> *Ibid.* articles 37(2) and (3).

<sup>158</sup> See pp ...

Regard has to be had less to the formal reasoning and more to the contours of the European political economy to identify what was going on. It was mentioned earlier that for individual autonomy as control to be protected by EU fundamental rights, individuals must be accorded an EU legal presence within the European political economy. This presence involves both recognition of them and regulation of the activities compromising their autonomy by EU law (in this case regulation by EU law of the Memoranda of Understanding (MoU) setting out the conditions for ESM). The central question is therefore why such a legal presence was not granted in this instance and Pringle considered not to be governed by EU law, particularly as the technical arguments against this were so weak.<sup>159</sup> The argument has to make sense in terms of what the Court sees EU law is above so that it can claim that it has provide a coherent and authoritative account of the limits of Union competencies.

The answer can be found in the particular vision adopted of the European political economy. If the central fare of the MoU - welfare cuts, control of public finances, tax rises, privatisations and the search for macroeconomic equilibrium – are what many political economists consider to be their bread and butter, the Court framed it rather differently. The European political economy is framed, it will be remembered, as a Union arrangement of a variety of spheres of activities that make up life. It relies on a number of bases, however, which are central to allowing these spheres of activity to operate. In some instances, these are listed, as with Article 119(3) TFEU which sets out stable prices, sound public finances and monetary conditions and a sustainable balance of payments. However, in all cases these bases act as the foundation for the European political economy rather than being part of it. They are, thus, beyond EU law but, as Article 119(3) TFEU makes clear, both Union and Member States activities must comply with them.

This reasoning has its genesis in *Brunner* where the German Constitutional Court stated that although the transfer of monetary policy to the European Central Bank contravened the democratic principle in the German Basic Law by removing a key political area from parliamentary accountability it was still lawful because it was more likely to secure a sound

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<sup>159</sup> Tellingly, the German Constitutional Court has seen the ESM as legally indistinguishable from the EU Treaties for the purposes of how it will engage in its review. 2 BvR 1390/12 *European Stability Mechanism (Temporary Injunction)*, Judgment of 12 September 2012, para 209



currency which would provide 'a generally sound economic basis for the state's budgetary policies and for private planning and transactions in the exercise of rights of economic freedom'.<sup>160</sup> The notion of a sound currency became something which enabled a political economy to take place and something which justified limits on the usual disciplines of democratic constitutionalism. Analogous reasoning has since been followed by the Court of Justice. In *Pringle*, it stated that the prohibition financial bail-outs between States set out in Article 125(1) TFEU must be read in the light of the commitment of the Treaty to secure sound public finances.<sup>161</sup> It was to be construed subject to it, albeit that this notion is only mentioned in Articles 119(3) TFEU, and this could thus justify financial support which helped restored a State to the path of sound public finances. Equally, in *Gauweiler*, the clear prohibition on monetary financing of national authorities by the ECB in Article 123 TFEU was to be subject to this same goal of contributing to sound public finances so that provision of finance to Member States was to be construed as lawful if it contributed to that.<sup>162</sup>

This foundational world in which authorities can do what it takes to secure sound currencies and public finances, price stability, balanced budgets, avoid an imbalanced economy and secure sustainable balance of payments is one in which the individual is not accorded a presence by EU law. There is no place for her there. This is all the more troubling for, as the crisis, has shown it is a world beset by authoritarianism, excesses of institutional power and the infliction of much human suffering.

(ii) *Relational Autonomy*

If many measures adopted in the name of restoring normality during the crisis were seen as prior to and a precondition for the operation of EU law, they could still generate ripple effects with legal consequences for relations governed by EU law. For example, insolvencies and redundancies occurring as a result of a crisis still have to comply with EU insolvency and redundancy law;<sup>163</sup> new privatised arrangements and rescue packages with EU

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<sup>160</sup> *Brunner v TEU* [1994] 1 CMLR 57, para 96.

<sup>161</sup> Case C-370/12 *Pringle*, EU:C:2012:756, paras 133-137.

<sup>162</sup> Case C-62/14 *Gauweiler*, EU:C:2015:400, paras 98-100.

<sup>163</sup> Eg Case C-309/12 *Viana Novo*, EU:C:2013:774.

competition law;<sup>164</sup> or new tax and welfare arrangements not discriminate against other EU citizens. To be sure, EU law does not identify such legal disputes as associated with the crisis, but it is here that its effects on relational autonomy are most directly addressed.

In Spain, financial distress amongst many house owners escalated as a result of the crisis and it is estimated that between 2008 and 2013 4.2% of all mortgages in Spain were foreclosed.<sup>165</sup> *Sánchez Morcillo* dealt with one of these cases.<sup>166</sup> It concerned a 2013 law which improved the position of the creditor vis-à-vis the debtor by allowing the former to appeal any decision by a court on enforcement of the mortgage but not the latter. The court of first instance was, moreover, not required to consider whether the mortgage arrangement was unfair, unless asked, and the debtor was given only fifteen days to raise any such issues. It was argued that such an arrangement violated a provision in the Unfair Contract Terms Directive which required Member States to prevent the continued use of unfair terms in consumer contracts when this was examined in the light of Article 47 of the Charter on effective judicial protection as it prevented an equally balanced analysis of whether the mortgage terms were fair or not. The judgment went to relational autonomy in that it went to an existing relationship, a consumer contract for a home, central to wellbeing and the acknowledgment of this by the Court suggested that this weighed with it, whether each party was sufficiently respected within it. Invoking Article 47, the Court noted that although the right to effective judicial protection granted no right to an appeal for the debtor, the lack of security about whether the fairness of the mortgage would be considered at first instance by a Spanish court exacerbated by the lack of equality of arms entailed that Spain was not doing what was necessary to prevent unfair consumer terms as required by the Directive.

This judgment is an isolated example and could be met by the Spanish law simply removing the right of appeal from both parties. So why is there so limited reference to the Charter? As indicated, there are many relations affected by the crisis where Charter rights might be an issue. Furthermore, insofar as increased Charter responsibilities have been imposed on

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<sup>164</sup> Eg Case C-667/13 *Banco Privado Português and Massa Insolvente do Banco Privado Português*, EU:C:2015:151; Joined Cases C-352/14 & C-353/14 *Iglesias Gutiérrez and Rion Bea* EU:C:2015:691.

<sup>165</sup> G. Fuentes et al, 'From Housing Bubble to Repossession: Spain Compared to Other West European Countries.' (2013) 28 *Housing Studies* 1197.

<sup>166</sup> Case C-169/12 *Sánchez Morcillo*, EU:C:2014:2099.

private actors, one would expect these to arise in this context as commitments to other actors in actors' relations with them.

The reason goes to the slanted allocation of value provided by relational autonomy in EU law. Relational autonomy occurs, it will be remembered, within the context of EU legal ordering of valued spheres of activity. EU law will govern employment, commercial, consumer relations and so on with a view to nurturing them. Within this context the relational autonomy offered by EU fundamental rights may secure a more multifaceted recognition for parties within these spheres of activity and protection of the existing relations constitutive of these spheres of activity. However, this is necessarily structured by the spheres of activity within which it takes place.

Actors are only recognised, first, in terms of their *contribution* to these spheres of activity. The most famous case in EU law, *Van Gend en Loos*, is an example. Individual rights were granted in EU law for the first time, but, if one looks a little closer, they are very confined. They are only granted to individuals to transact transnationally without paying customs duties.<sup>167</sup> This affects the quality of right granted. In *Sánchez Morcillo*, the mortgagee was only recognised as a party to a consumer contract which was contributing to a market in mortgages with a notionally high level of consumer protection. To be sure EU fundamental rights might provide a richer account of what this involved, but it was his position as a transactor which was to be protected as it was this which tied him to the sphere of activity. It was not his relationship to other things, such as ownership of the home. The judgment was not framed, therefore, in terms of what it could do to protect that through protection of his right to property. Nor was it framed in terms of his other relationships to his other people. It was, thus, irrelevant whether enforcement would have a particularly negative effect on family life. To many, this would seem a peculiar way of valuing the process.

Binding fundamental rights to spheres of activity in this way clearly forecloses the application of many. There is, however, a further reason why relational autonomy has been so redundant in the face of the crisis. It grants rights to individuals who contribute to European political economy's spheres of activity, many of which are market activities. A

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<sup>167</sup> Case 26/62 *Van Gend en Loos*, EU:C:1963:1. On this see D. Chalmers & L. Barroso, 'What *Van Gend en Loos* Stands for' (2014) 12 *I-CON* 105.

depressing feature of the crisis is that it has prevented many, indeed the most desperate, from contributing in these terms to these activities. Vulnerable and marginalised, there are fewer possibilities to work, purchase or consume. Family life has equally been disrupted. These people, in short, have been pushed outside the European political economy, and EU fundamental rights, correspondingly, does nothing to help to them.

(iii) *Individual Flourishing*

There is least to be said about individual flourishing. As mentioned earlier, it has second-order qualities. It is only triggered in instances where activities are regulated by EU law and generate entitlements for the person claiming it. This has resulted in its presenting a dichotomous face during the crisis.

There are those relationships regulated by EU law where the actor is seen as contributing to a valued sphere of activity of the European political economy. EU law grants her entitlements and, in such instances, individual flourishing continues to be cultivated around these. Furthermore, a wide view is taken of when an individual is making a contribution. Cases on the granting of annual leave have taken a broad view of when individuals are working and the quantity of that work to determine their entitlement to leave.<sup>168</sup> Non EU nationals lawfully working in the European Union have had requirements that they have sufficient resources to support their families whittled down to enable their families and children to live with them.<sup>169</sup> However, a challenge of the crisis is that those most vulnerable and subject to suffering are not deemed as contributing to these spheres of activity. They fall outside this zone and, thus, are not offered entitlements.

These perceived non-contributors are doubly unprotected. They are, first, not offered any rights seen as enabling individual flourishing by the Charter. It accords them no possibility to get an education, a trade, annual leave, support for parenting, or protection of family life. Secondly, EU institutional practice beyond the Court has had almost no regard to the value of individual flourishing in addressing the crisis. There is almost no mention of granting

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<sup>168</sup>Case C-78/11 *ANGED*, EU:C:2012:372; Case C-316/13 *Fenoll*, EU:C:2015:200; Case C-219/14 *Greenfield*, EU:C:2015:745.

<sup>169</sup> Joined Cases C-356/11 & C-357/11 *O & S*, EU:C:2012:776.

individuals the status, participation in the realisation of collective goods and opportunities within the public sphere that are deemed necessary to realise successful modern identities.<sup>170</sup> This is simply seen as something individuals must recover however they can. This abandonment by EU fundamental rights has set out a meme that those outside the European political economy do not deserve to participate in the goods of modern life.

## **Conclusion**

If truth be told, the European Union has taken fundamental rights very seriously, and that is part of the challenge. They are constructed as a central part of the order it sets out, and, as a consequence,, their qualities are a reflection of this order. It is the nature of this order which some find problematic in their aspirations for EU fundamental rights. In this regard, this order contains no vision of a political community of free and equals who secure freedom and equality by virtue simply of coming together under common laws. Constitutional rights have, historically, been an expression of this vision established to confront not only legislative and administrative transgressions which violate but also to act as a counterweight to other visions of political community which measure individuals' worth by what they do or what they are. The European Union does not possess this vision. It has, thus, put in a place a substitute vision: that of the European political economy. Its fundamental rights, as a reflection of this, can be more managerial, partial and sympathetic to modern market excesses than national counterparts and less attentive to the singularity, vulnerability and potential of human existence. They can also be more attuned to its complexities and the stresses and demands posed for individuals by these market processes. As a consequence, it is unsurprising that there has often been innovation. This is not an argument for disposing with EU fundamental rights but for lowering the ambitions expected of them and seeing them as part of a wider EU legal context which will inevitably contain much to criticise and much to offer.

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<sup>170</sup> The only vague wave to this is acknowledgement that EU governance of the prevention and correction of macroeconomic imbalances must not prejudice the right to collective action or to negotiate and conclude collective agreements. Regulation 1176/2011 on the prevention and correction of macroeconomic imbalances, OJ 2011, L 306/25, Article 1(3).

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