The Binding Charter Ten Years On: More than a 'Mere Entreaty'?

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I. Introduction

In his seminal Opinion in *Bauer*, the late Advocate General Bot argued that fundamental rights listed in the Charter should have a proper bite – that they are not, as he put it, 'une simple incantation' – or 'a mere entreaty'.[1] This formulation becomes a useful prompt for framing this article, which seeks to cast a retrospective glance at the Charter of Fundamental Rights, as it captures two key changes the binding Charter has effected upon fundamental rights protection in the European Union.[2]

First, this phrase conjures up the irony of the Charter's history, emerging through the Treaty of Nice precisely as a 'simple incantation'. The attribution of 'the same legal status as the Treaties'[3] to this instrument as part of the Lisbon reforms ten years ago followed a nearly decade-long period of initial flirtation with the Charter in its non-binding dimension. Neither the Charter's text nor its overall character as confirmatory of 'existing rights'[4] changed with the attribution of binding effect thereto. And yet, the symbolic effects of formal constitutionalisation are, as the informed reader might already be able to remark, discernible in the way in which the Charter has been used in the case law after 2009. Still, the question of whether fundamental rights are 'more than a mere entreaty' can be approached in another sense, too: whereas the Charter as a constitutional instrument may be well recognised and extensively relied upon, can this be said of all of its provisions? That question was, indeed, at the heart of the Advocate General's reasoning in *Bauer*: he was concerned not with whether the Charter as a whole was effective, but with whether a particular subset of Charter rights – fundamental social rights – could be considered as anything more than a mere entreaty *within* the Charter.

The following discussion of the Charter's first decade as a binding instrument will be guided by this twofold schema. It interrogates, firstly, the Charter's overall effectiveness as a binding instrument. Secondly, it looks more specifically at the effective application of the rights protected therein. In order to carry out this assessment, the first substantive part of the paper lays down and decodes a series of data – some drawn from official documents and some originally collected for present purposes – regarding the use of the Charter in the case law of the Court of Justice to date (Section II). Interpreting this statistical information leads to two initial findings: that whereas the Charter has become an essential port of call for human rights discourse in the EU, there are significant variations in the extent to which it has affected the different sets of provisions enshrined in its seven titles. While, in part, this may be explained by external factors, such as the lack of EU competences or of relevance for the scope of EU law in certain areas of rights protection, it justifies a closer

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[1] Opinion of Advocate General Bot, delivered on 29 May 2018, in Joined Cases C-569/16, *Bauer and Willmeroth*, EU:C:2018:337, para 95, citing R Tinière, 'L'invocabilité des principes de la Charte des droits fondamentaux dans les litiges horizontaux' *Revue des droits et libertés fondamentaux* (2014) Chronicle No 14.

[2] For the purposes of this paper, the terms fundamental and human rights are used interchangeably.

[3] Article 6(1) TEU.

[4] House of Lords EU Select Committee, 'The Treaty of Lisbon: An Impact Assessment' (HL Paper 62, August 2007) paras 5.37–5.41.

look and an attempt to theorise potential difficulties in the adjudication of certain rights or types of rights within the European Union.

That is the purpose of the second substantive section of the paper (Section III), which seeks to contextualise the numerical data so as to offer an overarching interpretation of the two questions set out above. On the one hand, it will be argued, the Charter has succeeded in relatively quickly weaving into EU law a bill of rights – one of the clearest affirmations of an 'ever closer Union' of EU citizens or, differently put, of a legal order that creates 'rights which become part of their legal heritage', to recall the famous paragraph from *Van Gend en Loos*.[5] Yet, on the other hand, despite certain efforts to affirm the constitutional character of all of its provisions,[6] the case law on the Charter arguably continues to embed two of the Union's core limitations in the field of fundamental rights protection, which largely explain the varied treatment of its different titles. The first of these limitations is none other than the Court's construction of rights as prerogatives to be asserted by each interested individual against others – already clear in the above passage from the *Van Gend en Loos* ruling.[7] The second, albeit related, limitation resides in an attempt to translate to the Charter the idea of balancing the Union's 'double aim, at once economic and social'[8] – a notion which can tilt the way in which some of the rights protected particularly in the Freedoms and Solidarity titles operate.

There is no magic potion for these problems in the Union's fundamental rights jurisprudence. Rather, as this paper ultimately argues (Section IV), moving toward a more mature period of rights protection through the Charter requires a conscious break with the aforementioned aspects of the Union's pre-existing conception of fundamental rights, as well as a deeper engagement with the sources of human rights protection on which the Charter itself is based. Such engagement could more explicitly involve the Universal Declaration of Human Rights, the ICCPR, the ICESR, the ESC and, most importantly, the Convention, as well as the theories of interpretation that underpin inter- or post-national human rights. More concretely, three tenets of human rights theory can, in my view, be valuable in developing a coherent, rather than a fragmented, right-by-right or even case-by-case view of the Charter within EU law: the tripartite typology of rights; a more complete principle of attribution that differentiates right-holders from duty-bearers; and the notion of incommensurability of human rights with respect to other interests.

II. Data on the use of the Charter in Court of Justice Case Law

Numerical data does not always offer a reliable measure of the success of a human rights instrument. However, it can be a useful starting point for identifying patterns and possible gaps over a stretch of time. It is in this way that some statistical information relating to the use of the Charter will be used, so as to shed light upon the two different aspects of this enquiry: whether the Charter has structurally changed fundamental rights discourse in the European Union and whether it has changed the treatment in EU law of particular human rights. These issues will be discussed in turn, following a note on the nature and limitations

[5] Case 26/62, *Van Gend en Loos* [1963] ECR 1, 12.
[6] See, notably, the rejection of the idea that the Charter had introduced an opt-out from Solidarity provisions in Joined Cases C-411-10 and C-493-10, *N.S. and M.E.*, EU:C:2011:865, paras 118-120.
[7] See further, on this point, JHH Weiler, 'The Individual as Subject and Object and the Dilemma of European Legitimacy' (2014) 12:1 *ICON* 94.
[8] Case 43/75, *Defrenne* [1976] ECR 455, para 12.

of the data presented herein as well as a detailed disclosure of my methodology during the data collection stage.

A. Qualities and Limitations of the Data Presented

It should be noted at the outset that, as this paper focuses predominantly on the use of the Charter by the Court of Justice, it does not – except tangentially – rely upon data concerning national courts. Equally, as the purpose of the paper is to assess the impact of the application of the Charter on the case law, it excludes judgments by the General Court and the Civil Service Tribunal.[9] It excludes the Opinions of Advocates General insofar as it refers to 'rulings' or 'judgments', but includes them where it refers to 'mentions.'[10]

The data relied upon is drawn from four main sources: the European Commission's Annual Reports on the Application of the Charter (2010-2018);[11] the Fundamental Rights Agency's (hereafter 'FRA') data on the Charter, through its Fundamental Rights Report 2019;[12] original data collected from the Court's case law database through term-specific searches for each Charter provision;[13] and, finally, the FRA's database on right-by-right references to the Charter ('Charterpedia').[14]

The Commission's reports and the Annual Report of the FRA provide statistics on the application of the Charter since 2010, thus highlighting broad patterns and trends regarding its use. However, they are based on sampling and offer neither complete right-by-right data (other than an indication of the most frequently relied upon provisions of the Charter) nor a comparison with the pre-Lisbon Charter.

My own data will be used to fill the gaps left by these official statistics,[15] by indicating broad overall trends about the post-Lisbon Charter and the use of particular provisions and

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[9] My reasoning for this was that including these judgments would carry the risk of skewing results in favour of specific provisions, such as the rights of defence, which would be more likely to be invoked in case law in which the General Court acts as the first instance court, whereas relying solely on the case law of the Court of Justice can offer a more reliable picture of the use of the Charter as a whole.

[10] My reasoning for separating mentions in Opinions from my findings concerning Court of Justice case law was twofold: first, as highlighted in the text, it was intended to help with clarifying the extent to which the Charter has had an impact on the application of fundamental rights through binding rulings, rather than influencing their application, particularly considering the extensive use of the Charter by Advocates General already as a non-binding instrument before the entry into force of the Lisbon Treaty. Secondly, it was intended to ensure consistency with the data of the European Commission at n 11 below, which refer to 'rulings', so that comparisons can be made between these datasets. Nevertheless, I have included Opinions alongside preliminary ruling requests in my discussion of 'mentions' and 'distinct case references'.

[11] European Commission, 'Annual Reports on the Application of the EU Charter of Fundamental Rights 2010-2018', available at https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights/application-charter/annual-reports-application-charter_en, accessed 15 August 2019 (hereafter 'Commission Report [year]').

[12] Fundamental Rights Agency, 'Fundamental Rights Report 2019', available at https://fra.europa.eu/sites/default/files/fra_uploads/fra-2019-fundamental-rights-report-2019_en.pdf , accessed 15 August 2019.

[13] The original data is supplied as an Annex to this issue.

[14] Fundamental Rights Agency, 'Charterpedia' database, available at ttps://fra.europa.eu/en/charterpedia, accessed 15 August 2019.

[15] It should be acknowledged, in this regard, that while care has been taken to collect the same data, as noted earlier, the methodology of the Commission and FRA is not laid down in detail in their respective analyses. This means that different collection methodologies could result in potential reconciliation issues. However, as the data is used only to highlight broad trends, rather than to draw detailed conclusions, I feel that this does not present a significant cause of concern for the purposes of this paper.

sets of provisions. More specifically, I have collected data regarding Court of Justice judgments mentioning each provision of the Charter through manual, term-specific searches on curia.europa.eu. For Articles 1-7 of the Charter, I searched for: "Article [number of the provision] of the Charter'", excluding 'of Fundamental Rights' and including 'Article' to avoid results that refer to paragraphs 1-7 of other provisions. For Articles 8 and following, I searched for: "[number of the provision] of the Charter", excluding 'of Fundamental Rights' and excluding 'Article' to ensure the possibility of a succession of provisions being mentioned, before the one in question. For provisions that have more than one paragraph, I searched for: "[number of the provision] of the Charter" comma "[number of the provision(number of paragraph)] of the Charter".

In terms of the number of cases, I have referred to distinct cases mentioning each provision rather than the overall number of mentions (i.e. cases which mention the provision in more than one document). The cases are, however, replicated when they refer to more than one provision of the Charter.[16]

It must be acknowledged that this dataset carries the potential of error. First, it is likely that it is over-inclusive from a substantive perspective, as it contains mere mentions of Charter provisions, even where these do not play a significant role in the ruling. Secondly, there is a near-certainty of inadvertent under-inclusion, due to cases where 'of the Charter' is not mentioned immediately after the provision (e.g. where the provision is mentioned in the beginning or in the middle of a sequence of provisions of the Charter). Finally, I erred in favour of searching for references to the "Charter" rather than the "Charter of Fundamental Rights", as this emerged as a formulation frequently used in the case law while trialling different terms, whereas the latter search would have excluded important rulings from the search results.[17] However, this has made it impossible fully to exclude from this data possible overlaps with other Charters, namely:

- Approximately 101 cases mentioning the Charter of Fundamental Social Rights of Workers after 2000, of which 45 are judgments.
- Approximately 56 cases mentioning the European Social Charter after 2000, of which 16 are judgments and orders.
- Approximately 33 cases mentioning the UN Charter after 2000, of which 23 are judgments.

While I have sought manually to correct erroneous inclusion of references to these instruments in my results by browsing for content, it is possible that they have not been entirely rectified, particularly in respect of provisions with large numbers of mentions, such as Articles 47 and 21 of the Charter. As such, the data presented below should not be relied upon as confirming absolute numbers of references but, rather, as being only indicative of broad patterns in the Charter's use by the Court of Justice.

My data reflects the case law from 7 December 2000[18] to 30 November 2009 insofar as it concerns pre-Lisbon case law and from 1 December 2009 to 1 August 2019 insofar as it concerns post-Lisbon case law.

[16] My understanding is that this is also the case for the official data of the European Commission and FRA, although this is not explicitly mentioned in their reports.
[17] E.g. Case C- 555/07, *Kücükdeveci* [2010] ECR I-365.
[18] The date of the Charter's proclamation as a non-binding instrument.

Finally, I have relied upon the case law database of the FRA ('Charterpedia') to offer a cross-check on the numerical data highlighted above. The Charterpedia offers qualitatively accurate data per provision, in the sense that it lists under each provision of the Charter cases which have been analysed for content and directly relate to, rather than merely mentioning, the provision in question. However, as is clearly highlighted on the FRA's website, the database is still a work in progress, which is neither complete nor up to date. More precisely, this database does not list all cases that deal with a particular provision, but only the ones deemed to be the most representative, especially for provisions that have been referred to extensively by the Court of Justice. Moreover, for most provisions, the latest cases mentioned date back to 2016, thus excluding important rulings in some fields, such as non-discrimination, working time, and the right to work, where substantive changes have taken place in the case law over the last two years.[19] These issues restrict the potential of this database in showing broader trends and scale. However, the Charterpedia remains useful in highlighting provisions which have not been substantively used by the Court of Justice, as well as in checking for accuracy the findings stemming from the numerical data and, particularly, the originally collected right-by-right statistics.

B. The Overall Impact of Formal Constitutionalisation on References to the Charter

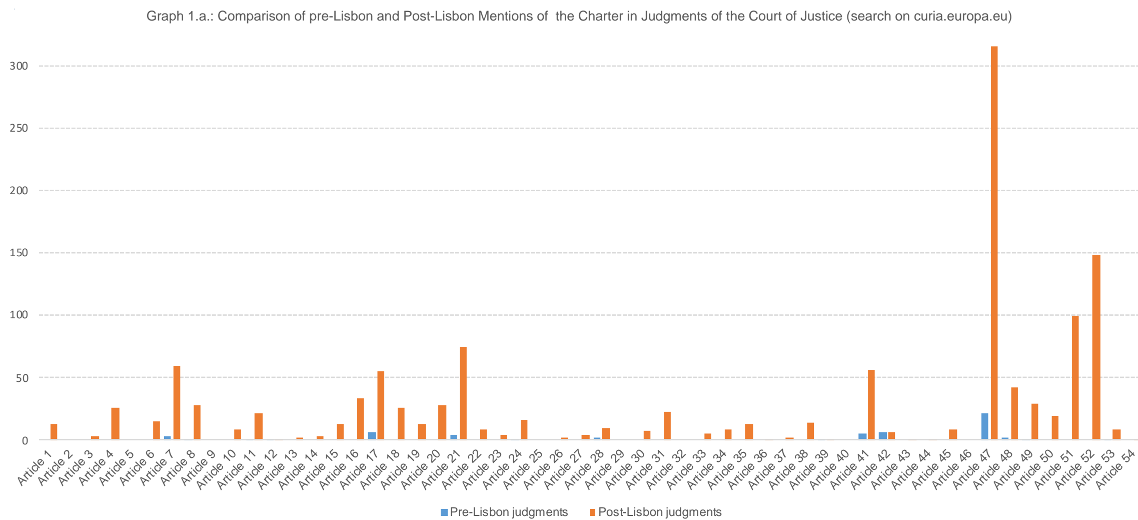
The principal finding that emerges from the data on the application of the Charter indicated above is the extent to which the Charter's annexation to the Lisbon Treaty in 2009 has changed its use in EU fundamental rights discourse by the Court of Justice. As the Commission's most recent report on the application of the Charter highlights, while there have been small drops in the number of overall mentions of the Charter for specific years (2015 and 2017), it is relatively clear that the attribution of binding effect to this instrument has made a discernible difference to its use in the case law within a short span of time.[20] The increase in overall references to the Charter is, indeed, very stark, with the Court of Justice having referred to the Charter in 356 cases in 2018, against only 27 in 2010. Preliminary ruling requests relating to the Charter rose from 19 in 2010 to 84 in 2018.[21] This is also highlighted by graphs 1.a and 1.b below, which represent the relationship between mentions of the Charter in Court of Justice judgments before and after the entry into force of the Lisbon Treaty, showing an increase in mentions of the Charter in final judgments for nearly all rights.

Graph 1.a: Comparison of pre-Lisbon and Post-Lisbon Mentions of the Charter in Judgments of the Court of Justice (Data Source: search on curia.europa.eu)

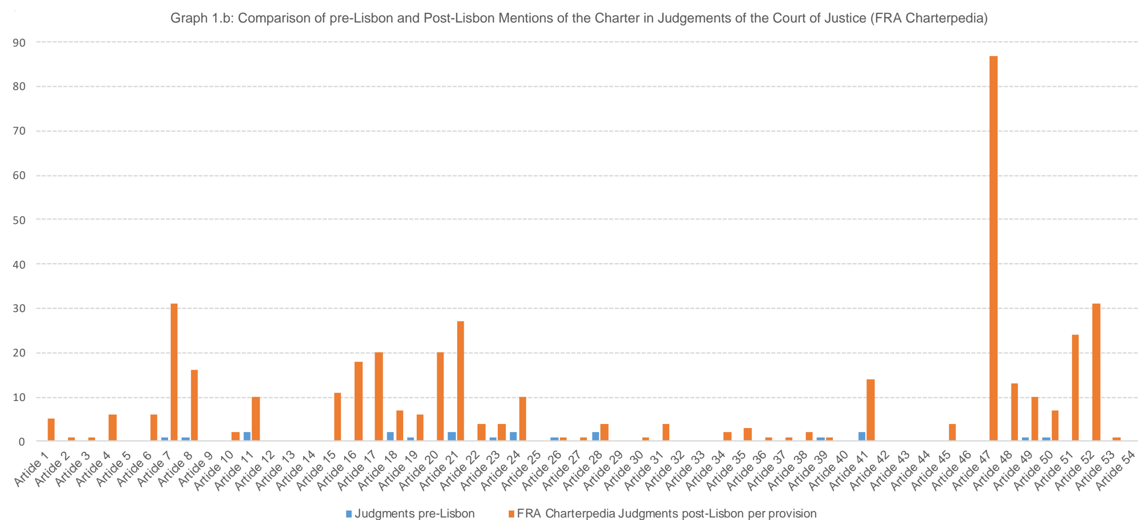
[19] It should also be noted that this database originally included Opinions and General Court and Civil Service Tribunal rulings which, as mentioned above, I have removed from the scope of my data collection. In turn, as the recalculation of the number of rulings mentioning each case without regard to Opinions and lower court rulings was carried out manually, there is a possibility of human error in this calculation.

[20] Commission Report 2018, available at https://ec.europa.eu/info/sites/info/files/2018_annual_report_charter_en_0.pdf, accessed 15 August 2019, 14.

[21] Ibid. This is also confirmed by the 2019 report of the EU Fundamental Rights agency (n 12), 47.



Graph 1.b: Comparison of pre-Lisbon and post-Lisbon Mentions of the Charter in Judgments of the Court of Justice (Data Source: FRA Charterpedia)



It follows from this data that the clearest, albeit perhaps unsurprising, piece of statistical evidence that we have about the Lisbon Charter is that it has been numerically much more impactful on the case law than its earlier, non-binding counterpart. From only a handful of mentions of the non-binding Charter, and even fewer cases that actively grappled with its provisions, as suggested by the FRA data illustrated in graph 1.b., today all but two provisions of the Charter[22] have been mentioned at the Court of Justice level altogether (in an Opinion, reference, judgment or order) and most have also been used in final judgments of the Union's highest court.

Still, while there is no denying that the binding Charter is displaying a much stronger presence in the case law when compared to the its pre-Lisbon iteration, it is worth looking more closely at the breakdown of judgments per provision and the average number of judgments per title, to understand both the extent to which the Court is likely to refer to different provisions of the Charter, as well as the extent to which its position vis-à-vis

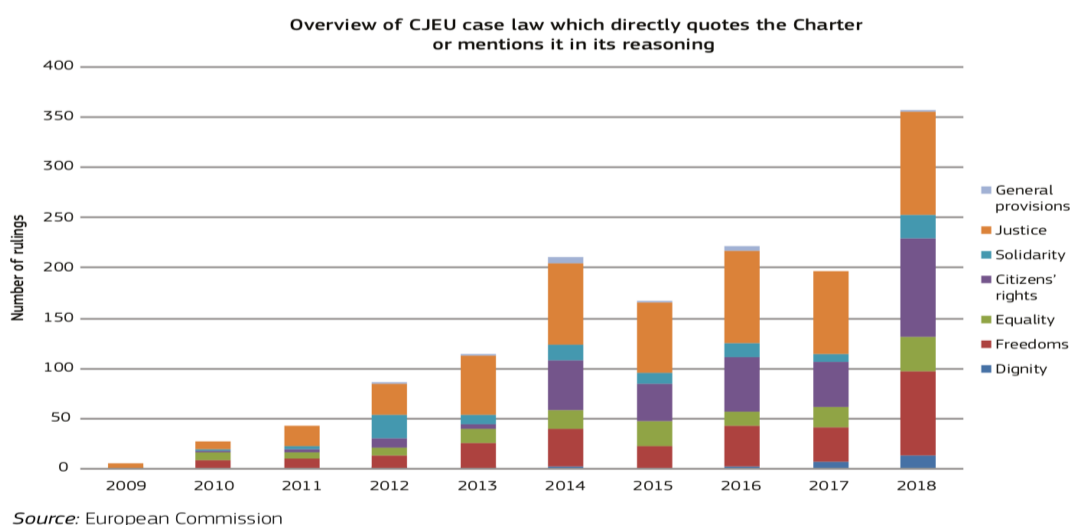
[22] Articles 40 and 46.

particular types of rights (e.g. Citizens' Rights, Solidarity etc.) has been equally encouraging.

C. The data on specific provisions of the Charter

Graphs 1.a and 1.b have already highlighted that there are significant discrepancies in the extent to which certain provisions of the Charter have been referred to in the case law. From these graphs, it appears rather striking that the Solidarity Title (Articles 27-38) has had the lowest concentration of judgments – immediately preceding the Dignity chapter before Lisbon but jumping behind it after Lisbon. The highest concentration of judgments falls in the Justice part of the Charter (Articles 46-50), followed by the Charter's General provisions (Articles 51-54), Freedoms (Articles 6-19), Equality (Articles 20-26), and Citizen's Rights (Articles 39-45). This is confirmed by the year-by-year analysis of the distribution of judgments per Title of the Charter, available in the Commission's 2018 Report on its application.[23]

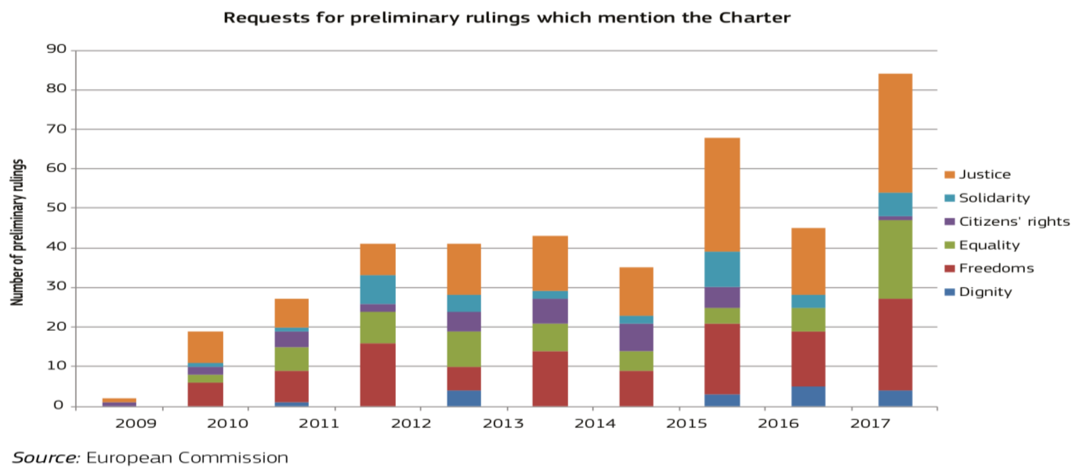
Graph 2.a: Number of Charter Mentions in Judgments per Title (Data Source: European Commission Report 2018, p.14)



What is especially interesting about this data is that it does not strictly correlate to the number of preliminary references per title, as presented in the same document and reproduced below:

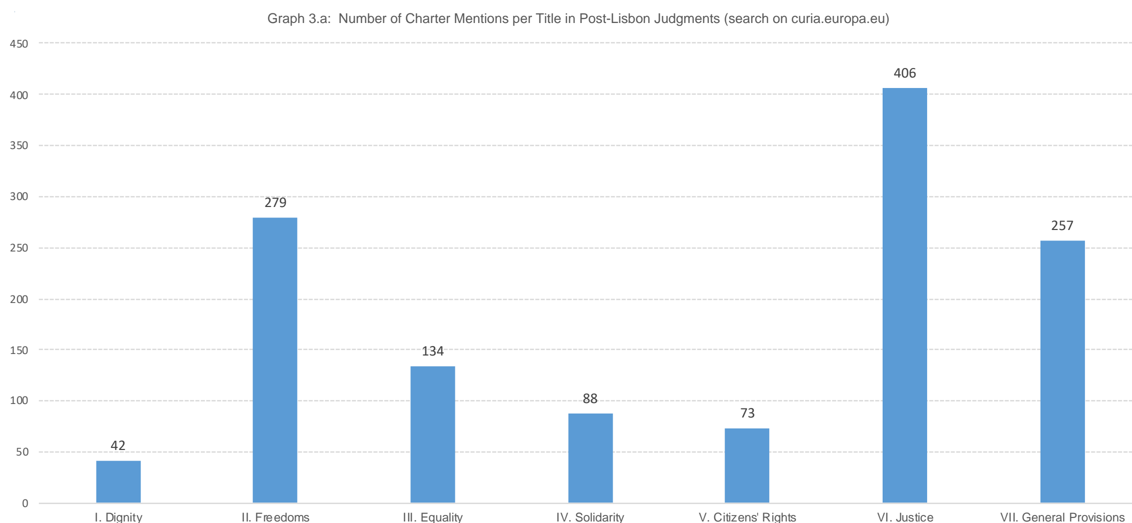
Graph 2.b: Number of Charter Mentions in Preliminary Reference Requests per Title (Data Source: European Commission Report 2018, p.15)

[23] NB: it is unclear to the author why the General Provisions appear so underrepresented as a Title in the Commission's graphs, when the numerical data per provision suggests that they are extensively relied upon.

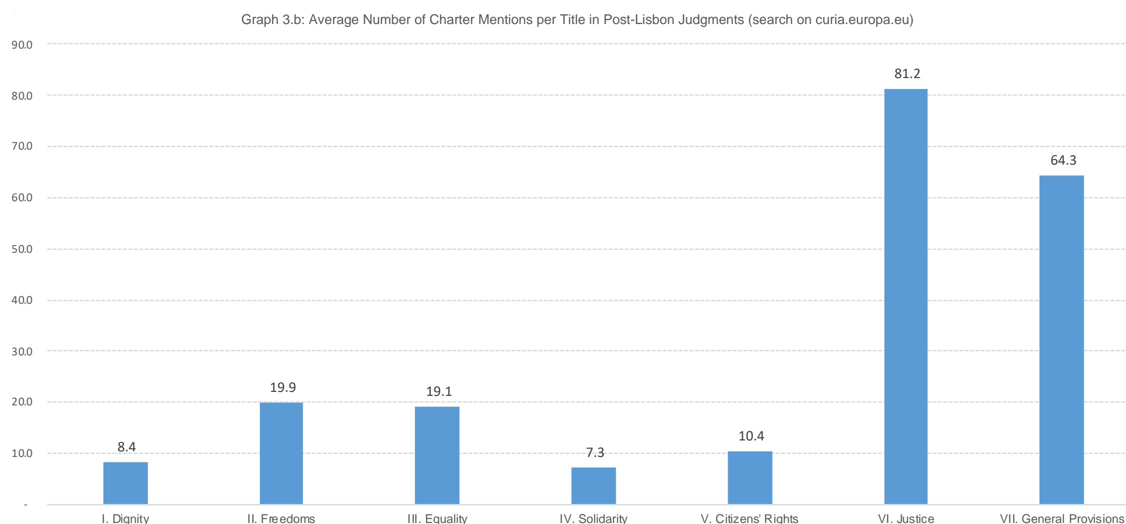


As it is impossible to know when the cases referred to the Court, say, in 2016 or 2017 were decided, it is in turn difficult to make out a correlation between the preliminary ruling requests and the judgments, from this graph alone. What is evident from both of these European Commission graphs is that whilst some titles (such as Justice) feature in a stable manner in both preliminary ruling requests and judgments of the Court, other titles are over- or under- represented compared to the number of requests. For example, the Freedoms and Equality titles appear underrepresented in judgments compared to references, whereas Citizens' Rights are overrepresented, especially after 2014. Nevertheless, the above graphs could be misleading proxies of how likely it is that the provisions of a particular title will be referred, as they do not work based on an average, despite the fact that some titles contain more provisions than others – Equality being, for example, the most compact one. As the aforementioned Report does not indicate the absolute numbers per Title, in graphs 3.a and 3.b, I have sought to replicate such an assessment based on originally collected data, and subsequently computed the average mentions of the Charter per Title based on the number of provisions, with a view to approximating the likelihood of a mention in a judgment more effectively. These graphs confirm unequal mentions of different titles of the Charter in judgments of the Court of Justice, both in absolute terms and on average.

Graph 3.a: Number of Charter Mentions per Title in Post-Lisbon Judgments (Data Source: search on curia.europa.eu)



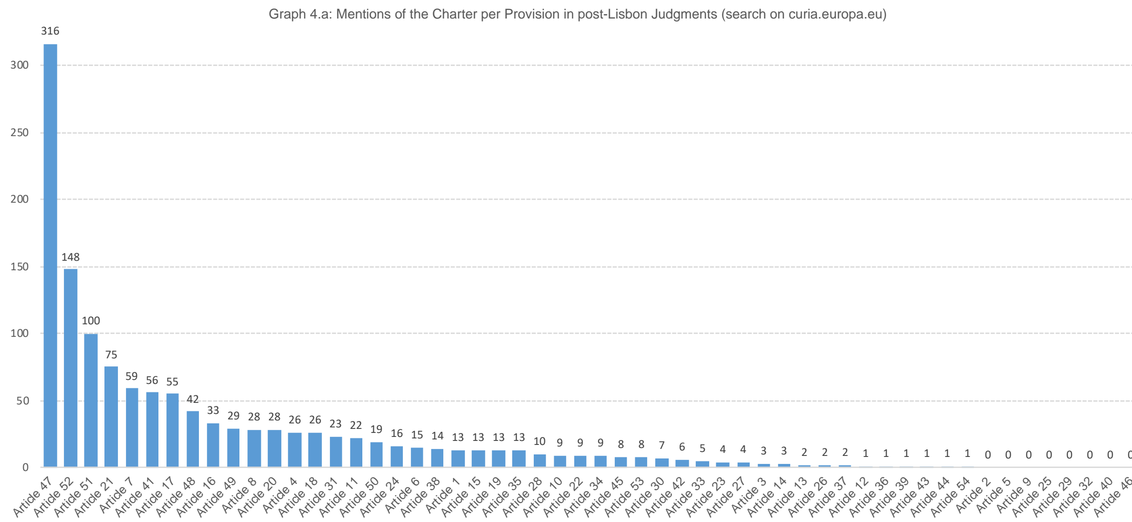
Graph 3.b: Average Number of Charter Mentions per Title in post-Lisbon judgments (Data Source: search on curia.europa.eu)



More specifically, both of the above graphs reveal that the Solidarity Chapter is the least frequently referred to in the Court's judgments. That should not necessarily be taken to mean that the Court has not been eager to refer to this title at all or that this finding is not subject to year-by-year variations. Going back to graphs 2.a and 2.b, for instance, it may be observed that the mentions in rulings and preliminary reference requests concerning Solidarity were nearly equal in 2018, even though the Court had been more reluctant to refer to Solidarity in its rulings (compared to requests) in several previous years, in the same vein as with the Dignity Title.

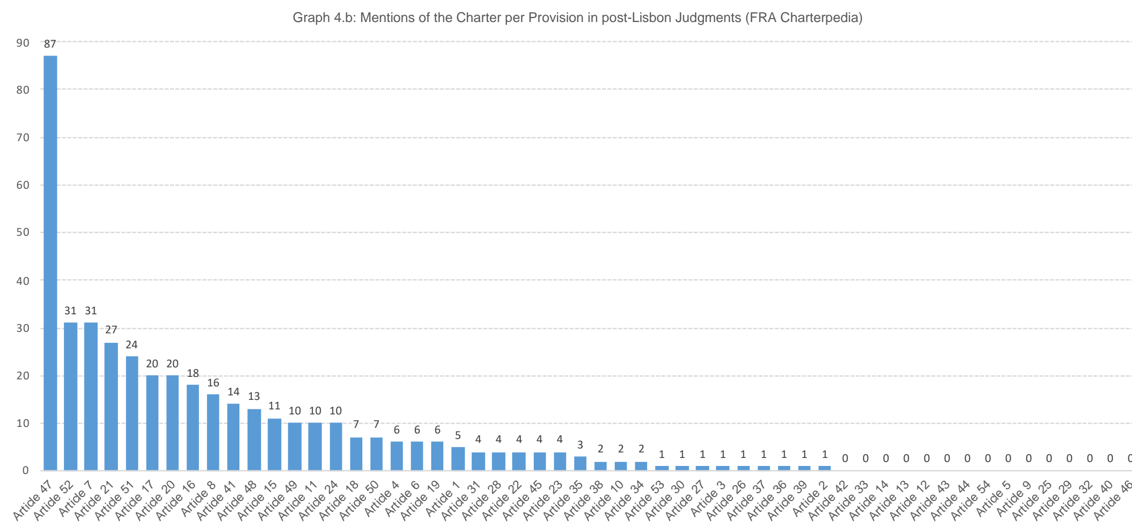
In other words, it must be acknowledged that changes may be taking place in respect of the frequency of references to these titles, which is something worth checking again a few years down the line. However, the exceptionalism of Article 47 and the general provisions remains evident over the last ten years, as does the relatively marginal treatment of the Solidarity, Dignity, and Citizen's Rights Titles, across these different sets of data. Indeed, even more striking than the per-title apportionment of the Charter is the extent to which the case law has been dominated by certain provisions within the former two titles, as highlighted in graphs 4.a and 4.b below.

Graph 4.a: Mentions of the Charter per Provision in post-Lisbon Judgments (Data Source: search on curia.europa.eu)



Interestingly, the FRA's data through the Charterpedia (graph 4.b) generally confirm the major patterns of the distribution stemming from my research (graph 4.a), albeit with some discrepancies right-by-right, which are likely attributable to the non-exhaustive selection of cases presented in that database. This suggests that not only the number of judgments, but also the assessment of these rights by the Court, varies significantly.

Graph 4.b: Mentions of the Charter per Provision in post-Lisbon Judgments (Data Source: FRA Charterpedia)



Both of these graphs show that a particular provision, Article 47, is towering over the adjudication of the Charter – a finding which is also cross-confirmed by nearly all Commission reports on the Charter since 2010.[24] But the extent to which references to

[24] Commission Report 2018 (n 20), p 16. Commission Report 2017, available at https://ec.europa.eu/info/sites/info/files/2017_annual_charter_report_en.pdf, accessed 15 August 2019, 27; Commission Report 2016, available at https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=125796 accessed 15 August 2019, 28; Commission Report 2015, available at

Article 47 outweigh other references is staggering, as graph 4.a illustrates: Article 47 has been mentioned in more than double the number of judgments as the next most-often referred to provision (Article 52 – scope) and more than four times more often than the next most-often referred to substantive provision of the Charter (Article 21 on non-discrimination). Particularly in light of the fact that, unlike the data for other provisions, the prominence of Article 47 is confirmed across all the datasets used, it is worth querying the reasons for its emergence as the protagonist of the Charter and, particularly, whether this right might be assuming an inflated role in EU fundamental rights discourse.[25]

Secondly, the general provisions of the Charter and, more precisely, Articles 51 and 52 thereof (concerning its field of application and scope of the protected rights and principles, respectively), are now assuming a central place in the adjudication of rights in the EU, together far outweighing all substantive provisions of the Charter (other than Article 47). On the one hand, this is of course a positive observation: references to the general provisions, as well as judgments grappling with them, consolidate the Charter's role in the EU legal order and clarify its reach, so that national constitutional actors can play a more independent role in interpreting this instrument. These may also be the provisions where national constitutional courts might feel more inclined to make a reference, not only because the general provisions were the only ones which were changed between the pre- and post-Lisbon Charter, but also because the substantive provisions of the Charter (such as aspects of Equality) have had a much longer pedigree in EU fundamental rights law, with case law on these matters dating back to the early '70s. On the other hand, the extent to which the spread of cases is occupied by Articles 51 and 52 could be read as suggesting a high degree of resistance to the Charter by national courts making the preliminary references in question and an arduous attempt on the part of the Court to define the contours of these provisions. This is largely to be expected in the first decade of the Charter's binding existence. Yet, it would be worth revisiting these statistics on the Charter's next decennial anniversary so as to understand whether and, if so, to what extent, the dust has settled or, indeed, to understand whether these provisions are simply consistently mentioned alongside other Charter rights as part of a developing jargon in the Charter's adjudication (a possibility that I have not looked into in this analysis).

Thirdly, some remarks can be made by looking at the broader distribution of rights. Based on the above data, the ten most frequently used provisions are the following. First, according to the FRA, the provisions in question are: Articles 47 (right to an effective

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https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=125806 accessed 15 August 2019, 28. Commission Report 2014, available at https://archiefotc01.archiefweb.eu/archives/archiefweb/20171122200726/http://ec.europa.eu/justice/fundamental-rights/files/2014_annual_charter_report_en.pdf accessed 15 August 2019, 27; Commission Report 2013, available at https://archiefotc01.archiefweb.eu/archives/archiefweb/20171220210550/http:/ec.europa.eu/justice/fundamental-rights/charter/application/report/2013/index_en.htm accessed 15 August 2019, 25; Commission Report 2012, available at https://archiefotc01.archiefweb.eu/archives/archiefweb/20171122200739/http://ec.europa.eu/justice/fundamental-rights/files/charter_report_2012_en.pdf, accessed 15 August 2019, 14; Commission Report 2011, available at https://archiefotc01.archiefweb.eu/archives/archiefweb/20171122200744/http://ec.europa.eu/justice/fundamental-rights/files/charter_report_en.pdf accessed 15 August 2019, 16; Commission Report 2010, available at: https://archiefotc01.archiefweb.eu/archives/archiefweb/20171123021304/http://ec.europa.eu/justice/fundamental-rights/files/annual_report_2010_en.pdf accessed 15 August 2019, 9.

[25] I go on to conduct this analysis in section III below.

remedy and to a fair trial), 52 (scope and interpretation of rights and principles), 7 (right to private and family life), 21 (non-discrimination), 51 (field of application), 17 (right to property), 20 (equality before the law), 16 (freedom to conduct a business), 8 (protection of personal data), and 41 (Right to good administration). Based on my numerical search on Curia, they emerge as: Articles 47, 52, 51, 21, 7, 41, 17, 48 (Presumption of innocence and right of defence), 16, 49 (Principles of legality and proportionality of criminal offences and penalties). It follows that there are some discrepancies between the two datasets, such that it is difficult to present a verified account of the Court's preponderance to mention specific rights. Some of these discrepancies could, however, be explained by the fact that the FRA data is based on sampling according to significance. Articles 48 and 49, which do not feature quite as prominently in the graph based on FRA data are, indeed, provisions that tend to be raised in conjunction with Article 47 in claims concerning due process. Furthermore, aside from these discrepancies, both datasets clearly show a prevalence of specific freedoms and types of rights in three main areas – a finding also supported by the Commission reports.[26] Alongside the scope and contours of the guaranteed rights, these areas are: judicial protection/effective remedy, non-discrimination, and private life/data protection.

Of course, it is essential to bear in mind that these themes are also, as the Commission has observed, reflected in references to the Charter by national courts.[27] Thus, a parallelism between the type of cases that national courts are interested in and the references to the Charter in judgments of the Court of Justice is to be expected. However, even if it concerns national courts as much as the Court of Justice, and even if only patterns, rather than conclusions, can be drawn from this analysis, identifying those overall patterns in respect of the case law on the Charter remains valuable. It cannot be overlooked, for example, that the ten most referred to provisions of the Charter, with the exception perhaps of process-based rights, are all provisions that could – in rather unfashionable terminology – be considered negative freedoms (such as non-discrimination, undue incursions on the private sphere, on the enjoyment of property, and on business activity). This is important insofar as the Charter remains one of the few binding and, as I have sought to highlight earlier, extensively applied, fundamental rights instruments that include rights thought to have more positive dimensions[28] and, especially, social rights.

D. Interim Conclusion Drawn from the Above Data

The statistical information allows for some – if limited – insights into the Charter's first decade as a binding instrument. First, the Charter has, overall, been overwhelmingly more present in EU law since its entry into binding force than it had been pre-Lisbon. Secondly, there appears to be a marked focus on the right to an effective remedy and associated rights, as well as potential contestation over the Charter's field of application and the scope of the rights and principles protected therein. Finally, it is also clear that the Charter has had less of a focus on positive action and collective rights than it has had on certain personal liberties, such as privacy, the freedom to conduct a business, and the freedom from arbitrary interference with property. In the remainder of this paper, these findings will be used as cues for raising broader, conceptual challenges to the Charter's application. Section III follows the patterns that this numerical analysis has thrown up and attempts to explain them

[26] Commission Report 2018 (n 20) 16.
[27] Ibid, 31.
[28] As I go on to argue below, the negative/positive distinction rests on assumptions that have been disproved over time and should, therefore, be resisted.

through a deeper review of aspects of the Court’s case law and an engagement with their merits, against the broader context of fundamental rights protection that led to the creation of the Charter. Ultimately, it develops a critique of a focus on the general provisions, procedural rights, and negative freedoms, as indicative of judicial resistance to the Charter’s embracement of a more tenacious conception of rights than that developed in the case law that predates it.

III. Continuity and Category Errors in the Application of the Charter Post-Lisbon

If reliance on mere numbers is not enough to assess the effectiveness of the Charter in its ten years as a binding instrument, against what benchmark should the above data be interpreted? What would be a better standard to determine the effectiveness of the Charter, both in respect of its overall impact on fundamental rights and in respect of the impact of its specific provisions?

The Charter’s drafting context can be helpful in this regard. The proclamation of the non-binding Charter in 2000 had sought to further develop the EU’s own understanding of rights, by designating as ‘fundamental’ a group of provisions that reflected the ‘Union experience’.[29] It thus purposefully included both fundamental rights protected in national constitutions and the ECHR and rights more specific to the operation of the Union, such as non-discrimination and the protection of EU citizenship, through political rights and free movement. Indeed, the drafting of the Charter was largely indistinguishable from the Union’s broader constitutional project as it prepared for a Constitutional Treaty,[30] thus acquiring an important symbolic value even as a non-binding instrument: it raised a debate about the direction of the EU beyond its economic roots and towards an expanded identity as a ‘human rights organisation’[31] or, even, as a federal polity.[32] In turn, the binding Charter – albeit only as an Annex to the Treaties, rather than as an integral part thereof, as the Constitution would have had it – continues overtly to support a project of constitutionalisation *qua* democratic self-government. Crucially, it speaks on behalf of ‘the peoples of Europe’, whom it imagines as ‘bound together by a common heritage’ and by ‘shared values.’

For these reasons, the Charter could be thought to address well-known critiques of EU fundamental rights law, such as that the Court was not advancing a serious or cogent vision of rights protection and that it was using fundamental rights as means to its own ends, i.e.

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

[30] See further G De Burca and B Aschenbrenner, ‘The Development Of European Constitutionalism And The Role Of The EU Charter Of Fundamental Rights’ (2003) 9 *Columbia Journal of European Law* 355.

[31] A Von Bogdandy, ‘The European Union as a Human Rights Organisation? Human Rights and the Core of the European Union’ (2000) 37:6 *Common Market Law Review* 1307.

[32] P Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’ (2002) 39 *Common Market Law Review* 945, 990.

in order to strengthen the autonomy, primacy, and effectiveness of EU law.[33] After all, it cannot be forgotten that, whilst the creation of what Mancini called an 'unwritten bill of rights' through the general principles jurisprudence was the Court's most significant contribution to the EU constitutional project, the commitment to rights 'was forced on the Court by the outside'– initially by the German and, later, by other constitutional courts.[34] While the extension of the general principles jurisprudence had already started to soften such criticisms before the entry into force of the Charter, especially through an emphasis on equality,[35] the Charter concretised this shift away from a conception of rights as externally imposed standards. Deriving its legitimacy from a political consultation process and appeals to shared values, it represented a potential for EU fundamental rights to acquire a meaning distinguishable from the 'fear of consequence'[36] that had driven the Court's early case law.[37] Equally, it could be seen as a prompt for redefining EU fundamental rights as goals in their own right, in contrast to the basic structure of judgments such as *Internationale Handelsgesellschaft*, *Nold*, and *Hauer*, in which fundamental rights were conceptualised as in principle limitable by the Union's goal of establishing an internal market, provided that their essence was not compromised.[38]

Looking at the ways in which the post-Lisbon case law has responded to the main criticisms of the Union's system of fundamental rights protection before the Charter's entry into force – namely, as Douglas-Scott reconstructs them, those of 'incoherence, and of manipulation of rights for other purposes'[39] – is, therefore, key to assessing how much its codification changed the application of fundamental rights in practice. For instance, could such critiques explain the statistical information presented earlier, such as the prevalence of Article 47 and the general provisions in mentions of the Charter by the Court of Justice, or the comparative silence on positive rights and the Solidarity Title? As the following subsections highlight, it is arguable that the uneasy development of fundamental rights in EU law can be traced across these patterns, thus indicating a mismatch between the case law on the Charter, on the one hand, and the ennobling words of the Charter's Preamble, on the other.

A. Articles 51 and 52(3) CFR: Affirming the Charter's Constitutional Status

On a superficial level, the changes effectuated by the Charter upon the Court's discourse are certainly remarkable: based on the statistics presented earlier, there are more than two thousand references to provisions of the Charter in final judgments of the Court of Justice in only ten years of binding application. The Charter has thus steadily (and not that slowly)

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[33] See J Coppell and A O'Neill,'The European Court of Justice: Taking Rights Seriously?' (1992) 29 *Common Market Law Review* 669.
[34] GF Mancini, 'The Making of a Constitution for Europe' (1989) 26 *Common Market Law Review* 595, 596.
[35] Joined Cases 117/ 76 and 16/ 77, *Ruckdeschel* [1977] ECR
1753, para 7.
[36] A Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' (2009) 23:1 *OJLS* 549, 565.
[37] See, most notably, Case C-144/04, *Mangold* [2005] ECR I-9981. On why equality, as a relational value, nevertheless does not amount to a positive vision of rights in the Union, see further R Xenidis, 'Transforming EU Equality Law? On Disruptive Narratives and False Dichotomies' (2019) *YEL* 1.
[38] Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR I- 1125; Case 4/ 73, *Nold* [1974] ECR 491; Case 44/ 79, *Hauer* [1979] ECR 3727
[39] S Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11:4 *Human Rights Law Review* 645, 650.

assumed a constitutional place at the apex of the EU hierarchy of norms.[40] But the terse history of fundamental rights in Union law can also be considered a reason for the many references to the scope and field of application of the Charter in the Court's case law. The general provisions are the main vehicles of primacy within the Charter's text and, hence, an important point of contestation between national courts and the Court of Justice.

Aspects of the case law on the general provisions have already become a well-developed area of post-Lisbon jurisprudence. Indeed, while the desirability or activism of its findings in this regard may have been strongly debated internally[41], it is noteworthy that the case law on the Charter's constitutional status, especially as it emerges from the Charter's overall field of application under Article 51 thereof, has acquired a nearly unambiguous meaning. The Court's finding in *Fransson*[42] that, in being addressed to Member States 'when implementing EU law', the Charter is applicable whenever the scope of application of EU law is engaged, has remained valid and has been firmly reiterated by the Court in subsequent case law.[43] The Court has also affirmed the Charter's prominence as the *primary* source of fundamental rights protection in the Union based on Article 52(3)[44] and has, albeit in my view regrettably, consistently replaced the Convention with the Charter (not by dropping standards below the requisite level, but by objecting to accession and not engaging with the Strasbourg Court's case law in its rulings)[45] as well as by emphasising uniformity, rather than best practices in the substantive protection of human rights.[46]

Judged against the critique of incoherence, then, the Court's increasingly unitary treatment of the Charter's overall status as the constitutional source *par excellence* of fundamental rights within the scope of EU law must be noted. Judged against the critique of instrumentalization or manipulation of rights for other purposes, the picture is more mixed: while it is not suggested that the Charter has harmed the protection of fundamental rights in the EU compared to the Convention standard, the resistance to accession and to the use of Strasbourg case law, as well as to UN standards, as highlighted by the *Kadi* litigation,[47] has many lamentable features. Referring to other human rights norms is not just useful for the purpose of making sure that the presumption of compatibility[48] is met. Particularly in the absence of a formal possibility of appeal to the Convention, which prevents effective judicial supervision of human rights issues by a specialised external body,[49] using the Strasbourg Court's interpretative principles on structural/conceptual questions concerning

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[40] Of course, it could be questioned whether, rather than having the 'same legal status as the Treaties' the Charter should, alongside perhaps aspects of the TEU, attain a superior constitutional place. See further on this: D Grimm, 'The Democratic Costs of Constitutionalisation: The European Case' (2015) 21:4 *European Law Journal* 460.

[41] D Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe' (2013) 50:5 *Common Market Law Review* 1267, 1275– 6.

[42] Case C-617/10 *Åkerberg Fransson,* EU:C:2013:105, para 19.

[43] See, e.g., Case C-198/13 *Hernández* EU:C:2014:2055, para 33 and Case C-206/13 *Siragusa*, EU:C:2014:126, para 35 (which clarifies that the scope of the Charter and the scope of general principles is the same).

[44] See, e.g. Case C- 501/ 10, *Kamberaj*, EU:C:2012:233, paras 62- 63 and 80.

[45] *Opinion 2/13 re ECHR Accession* EU:C:2014:2454. For a thoughtful critique, see P Eeckhout, 'Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky?' 2015 (38:4) *Fordham Intl L J* 955.

[46] See, e.g. Case C-399/11, *Melloni,* EU:C:2013:107.

[47] Joined Cases C-402/05P and C-415/05P, *Kadi v Council and Commission* [2008] ECRI-6351.

[48] ECtHR, *Bosphorus v Ireland*, App. No. 45036/98, judgment of 30 June 2005.

[49] Douglas-Scott (n 39) 658-9.

the protection of fundamental rights would have been an important indicator of their accuracy and legitimacy on the merits.

It follows that a strong sense of ownership of fundamental rights can have a darker side: while there is no doubt *more* fundamental rights based reasoning in the Union, even on issues that engender important disagreements amongst the Member States such as gay marriage[50], and thus a greater degree of confidence with affirming human rights,[51] that confidence can at times be read as excessive isolationism from external checks on the correctness of the Court's interpretation of fundamental rights. It can also be seen as highlighting a continuing, excessive reliance on primacy as the key *internal* justificatory mechanism in matters of rights protection.[52] This is, in turn, manifested in significant hesitation with re-adjusting constitutional priorities because of the Charter, which can be seen in the limited impact of Article 52 CFR upon the Court's reasoning in respect of legitimate limitations of rights and the nature of a distinction between rights and principles.

B. Article 52(1) CFR and the Quest for a 'Fair Balance'

As Prechal notes, 'when compared to the pre-Charter era, Article 52(1) CFR structures in a more compelling fashion the review of limitations of fundamental rights'[53] by asking that such review be conducted on the basis of a Convention-inspired test. In line with this provision, limitations to the Charter must be prescribed by law in pursuance of a legitimate aim and subject to the principle of proportionality. This could have been a significant change to the *status quo*, which had manifested a much more flexible, variable notion of proportionality, allowing a variety of interests to be taken into account in analysing the legality of restrictions upon rights and, most notably, the Union's goals in advancing policies relating to the internal market.[54]

Nevertheless, while such a change is obvious in the Charter's text, it is not clearly reflected in the Court's post-Lisbon case law. Whereas the terminology of Article 52(1) is at times used by Advocates General,[55] the analysis of the relationship between fundamental rights and market freedoms, as well as between different types of rights, has not always followed the structure suggested by this provision. Rather, cases that involved multiple right-holders, such as *Alemo-Herron* and *Achbita,* have highlighted the continued relevance of an old formula: that, rather than interpreting the scope of the protected rights, the Court strives to reach a 'fair balance'[56] between them, in order to give effect to a 'double aim, at once

[50] See, e.g. Case C-267/06, *Maruko* [2008] I-01757; LS Rossi, 'How Fundamental are Fundamental Principles? Primacy and Fundamental Rights after Lisbon' (2008) 27:1 *YEL* 65, 83.
[51] Rossi, ibid, 83-87.
[52] Douglas-Scott (n 39) 675-6; R Ziegler, 'Strengthening the Rule of Law, but Fragmenting International Law: The *Kadi* Decision of the ECJ from the Perspective of Human Rights' (2009) 9 *Human Rights Law Review* 288; G De Búrca,'The ECJ and the International Legal Order after *Kadi'*(2009) 51 *Harvard Journal of International Law* 1.
[53] S Prechal, 'The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?' in C Paulussen, T Takacs, V Lazic, and B van Rompuy (eds), *Fundamental Rights in International and European Law* (Springer 2015) 143, 154.
[54] As suggested in cases such as *Nold* (n 38).
[55] See Opinion of AG Bobek in Case C-190/16, *Fries* [2017] EU:C:2017:225, paras 65-78.
[56] Case C-426/11, *Alemo-Herron,* ECLI:EU:C:2013:521, para 25. See also Case C-157/15, *Achbita*, ECLI:EU:C:2017:203; S Jolly, 'Achbita & Bougnaoui: A strange kind of equality', Cloisters 15 March 2017, <http://www.cloisters.com/blogs/achbita-bougnaoui-a-strange-kind-of-equality>, accessed 8/01/2018; L Vickers, One Step Forward and Two Steps Back for Religious Diversity in the Workplace' (2017) 8:3 *European Labour Law Journal* 232, 253-255.

economic and social', in line with its settled case law and, particularly, its ruling in *Defrenne II*.[57] Taken out of its initial context, though, this approach skews interpretations of fundamental rights that lean more strongly towards one or the other realm.

Balancing has been deeply criticised in the fundamental rights context as an inadequate response to the increasing complexity of the values that underpin rights.[58] It is particularly problematic, as Ladeur has pointed out, because in extending the adjudication of rights to include all relevant interests, it corrodes the 'definitional contours'[59] of the rights themselves. Under the Charter, this can be seen most sharply in an especially broad construction of contractual freedom (enshrined in the freedom to conduct a business protected in Article 16 CFR) that has moved away from the normative roots of this freedom as non-interference towards a vision of it as the absence of regulatory restraint.[60]

More generally, the idea of a 'fair balance' is an appealing avenue for courts, especially at the supranational level, because it removes the need for a difficult analysis of what amounts to a widely recognised legitimate aim or sufficient incursion on the rights of others, while maintaining the illusion of objectivity associated with the imagery of a balancing scale.[61] As Ladeur points out, that scale is often not a common one. In theory, '[t]here are obviously easy cases in which such a common "scale" exists: e.g. in cases of conflicts of a public and a private financial interest (the common denominator is money) or the comparison between the importance of a personal injury – this is the realm of proportionality in a traditional sense […]'.[62] In respect of fundamental rights, however, how could there be a balance, say, between 'the freedom of the press and the right to privacy, without a reconstruction of the evolution of the social role of the press, its professional rules and the present function of the rules about protection of privacy?'[63] The 'quasi-rational operation of balancing, understood as the "optimisation" of conflicting civil rights based on the proportionality principle' fails to take into account the situatedness of rights within the specific parameters of a democratic society, thus reduces the normative force that they maintain as its foundations.[64]

It follows that, both due to its questionable conceptual applicability to human rights and the fact that, in contrast to the Convention, Article 52(1) employs limitations in respect of all Charter provisions,[65] the idea of a fair balance could become problematic for the application of the Charter as a whole. But it is worth highlighting that, in the EU context in particular, the idea of balancing that emerges from the case law, rather than a clearer use of the terminology of Article 52(1), is likely to have a more significant impact on the

[57] *Defrenne* (n 8), para 12.
[58] K Ladeur, 'A critique of balancing and the principle of proportionality in constitutional law – a case for 'impersonal rights'?' (2016) 7:2 *Transnational Legal Theory* 228, 244. See also S Tsakyrakis, 'Proportionality: An assault on human rights?' (2003) 7:3 *ICON* 468.
[59] Ladeur, ibid, 232; see further Tsakyrakis, ibid, 479-480.
[60] See further on this: J Prassl, 'Freedom of Contract as a General Principle of EU Law? Transfers of Undertakings and the Protection of Employer Rights in EU Labour Law (Case C-426/11 *Alemo-Herron v Parkwood Leisure*)' (2013) 42 *Industrial Law Journal* 434; J Prassl, 'Business Freedoms and Employment Rights in the European Union' (2015) 17 *Cambridge Yearbook of European Legal Studies* 189; S Weatherill, 'Use and Abuse of the EU's Charter of Fundamental Rights: On the Improper Veneration of 'Freedom of Contract'' (2014) 10 *European Review of Contract Law* 157.
[61] Tsakyrakis (n 58) 475.
[62] Ladeur (n 58), 249.
[63] Ibid.
[64] Ibid.
[65] Prechal (n 53) 156; Douglas-Scott (n 39) 652.

Charter's protections going beyond the ECHR (predominantly, more extensive economic freedoms on enterprise and cross-border movement, as well as social rights). Not only are these rights not subject to a requirement of observance of the ECHR as a minimum requirement. At the same time, the transplantation of the idea of a 'fair balance' to these provisions is especially problematic because it stems from – and entrenches – a different, hybrid constitutional context:[66] one in which market freedoms enjoyed explicit protection in the Union, as against an underdeveloped social dimension.

For this reason, whereas the idea of a fair balance in *Defrenne* – however conceptually problematic – might have had an inclusionary impact on EU law by improving the substantive protection of a fundamental right (equal pay), today it has the opposite effect. It inadvertently works as a stalling mechanism for fundamental rights expressing a range of values beyond economic freedom, as it jumps the step of positively demonstrating that economic freedom is a *legitimate limitation* on the exercise of these rights. Most notably perhaps, an unquestioned balancing act between the economic and the social goals of the Union creates a significant hurdle for certain Charter provisions. As I have argued in more detail elsewhere, some of these rights, such as collective labour rights, necessarily lose out when subjected to the terminology of balancing, because their effectiveness depends precisely on being able to suspend an employer's pursuit of economic activities, rather than being balanced with it.[67] For this reason, foregoing reasoned and detailed analysis of limitations of these rights under the 'prescribed by law' and 'pursuance of a legitimate aim' elements of the Article 52(1) formula can create a structural preference for market-friendly elements of rights protection, without working just as well for others.[68]

This may explain, in part, both the contestability of Article 52 as well as the overall distribution in references to the Charter in the above statistics, which showed a greater emphasis on economic rights, such as the enjoyment of property, the freedom to conduct a business, and the right to work (construed by the Court as a right to engage in economic activity)[69] than mentions of provisions pertaining to Solidarity as well as, albeit perhaps less evidently, civil liberties and the provisions of the Dignity Title. Such a dichotomous view of rights can more broadly be attributed, as this paper goes on to argue, to a failure to understand fundamental rights as interrelated, interdependent, and indivisible, which has both material and structural implications for the role of fundamental rights in the Union. The understanding of labour rights as part of the 'social' and distinct from the 'market', for instance, fails to represent the significant benefits that the enjoyment of labour rights provides to the market, not only in respect of fairness, but also of efficiency[70] and, in turn, the value of personal freedoms, including economic freedom, entail for self-realisation and substantive equality. Finally, this view of rights exacerbates another important drawback

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[66] C Joerges, 'The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective' (1997) 3:4 *European Law Journal* 378, 383.
[67] E Frantziou, 'Constitutional Reasoning in the European Union and the Charter of Fundamental Rights: In Search of Public Justification' (2019) 25:2 *EPL*; see also E Frantziou, 'Case C-176/12 *Association de Médiation Sociale*: Some Reflections on the Horizontal Effect of the Charter and the Reach of Fundamental Employment Rights in the European Union' (2014) 10 *EuConst* 332.
[68] E Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis* (OUP 2019) 124; F De Witte, 'The Architecture of a Social Market Economy' (2015) LSE Law, Society and Economy Working Paper 13/2015, 19.
[69] See further V Mantouvalou and E Frantziou, 'Article 15', forthcoming in S Peers, T Hervey, J Kenner, and A Ward (eds) *The EU Charter of Fundamental Rights: A Commentary* (2nd edn, Hart 2020).
[70] I Lianos, N Countouris, and V De Stefano, 'Re-thinking the competition law/labour law interaction: Promoting a fairer labour market' (2019) 10:3 *ELLJ* 291.

in the Court's treatment of Article 52: an often unclear analysis of the distinction between rights and principles made in Article 52(5) CFR.

C. Solidarity Provisions and the Quest for Indivisibility

The idea that, rather than being in a relationship of subordination to civil and political rights, all rights are interdependent, interrelated, and indivisible,[71] was acknowledged early on in the UN system. For example, the International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the UN General Assembly in 1965, included a prohibition of discrimination in the enjoyment of a range of economic, social and cultural rights.[72] The Universal Declaration itself had included social rights, such as the right to housing and the right to work.[73] Despite this recognition of the status of social rights, however, the idea that such rights required a *different* form of implementation (through the progressive deployment of appropriate State policies)[74] also settled into international human rights law relatively early, splitting it between the ICCPR and ICESCR and, in the European context, between the Convention and European Social Charter. In turn, since at least the 1980s, the differentiated understanding in the implementation of types or 'generations' of rights has been criticised as overly hierarchising and stalling of the development of social and economic rights, rather than contributing to their advancement.[75]

The Charter had promised to change this state of affairs for the better, by moving beyond the entrenchment of social rights in mostly non-justiciable human rights treaties. Its Preamble states: 'Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law.' Of course, it cannot be ignored that the Charter's appeal to indivisibility relates to the values underpinning its different titles and not to the rights contained in those titles themselves. But, even so, the link is not difficult to forge: how can there be dignity in destitution or persistent unemployment? Justice in discrimination? Freedom without democratic processes of participation and non-interference with personal integrity? As Nickel puts it, 'within a system of successfully implemented human rights, many rights support and reinforce other rights. For example, due process rights support […] freedoms by constraining abuses of the criminal law that undermine those freedoms. Due process rights also support equality rights by blocking some manifestations of racism in criminal trials.'[76]

And yet, as Douglas-Scott has noted, while 'the Charter presents human rights as indivisible, several of its provisions limit them in other ways' – most notably, through an 'unfortunate' distinction between rights and principles, provided for in Article 52(5) thereof.[77] As the Explanations to the Charter do not make clear which provisions are 'rights' and which are 'principles', the distinction is unhelpful, particularly because

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[71] 'Indivisibility is a very strong form of interdependence': JW Nickel, 'Rethinking Indivisibility: Towards A Theory of Supporting Relations between Human Rights' (2008) 30 *Human Rights Quarterly* 984, 987.
[72] O De Schutter, 'Economic, Social and Cultural Rights as Human Rights: An Introduction' (2003) CRIDHO-WP-2013/2, 3-4.
[73] Articles 25 and 23 UDHR, respectively.
[74] P Alston and G Quinn, 'The Nature and Scope of State Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 156, 181ff; see also M Cranston, *What Are Human Rights?* (Basic Books 1964) 54.
[75] I Koh, 'Dichotomies, Trichotomies or Waves of Duties?' (2005) 5:1 *Human Rights Law Review* 81, 83.
[76] Nickel (n 71) 984-5.
[77] Douglas-Scott (n 39) 652.

provisions which have a long-standing history as enforceable rights in EU law, such as gender equality, are labelled as 'principles' within the Charter.[78] An understanding of social rights as programmatic or 'aspirational', rather than as creating the same obligations as other rights, thus risked becoming a reality predominantly for the Charter's Solidarity provisions – something that the distinction between rights and principles indeed sought to preserve, according to the UK's representative in the Charter's drafting process.[79] All of this suggests that, already at the time of the Charter's creation, its proclaimed indivisibility was but a 'mirage.'[80]

Ten years after the entry into force of the binding Charter, the question of whether the Charter's provisions have the same legal status remains strikingly pertinent and substantively unanswered. Not only is Article 52 of the Charter the second most referred to provision after Article 47, suggesting a continuing and substantial lack of clarity regarding the scope of the protected rights, insofar as it concerns the Charter's 'principles'. At the same time, both the data drawn from curia.europa.eu and the FRA data per provision have highlighted that the designation of the Charter's provisions as 'principles' has hardly any bearing on the extent to which the Court is prepared to associate them with enforceable rights. For example, aside from Article 23 (the principle of equality between men and women), Article 49 (enshrining the principles of legality and proportionality in criminal sanctions) is one of the most litigated provisions of the Charter, thus resulting – despite the terminology of principles – in justiciable rights. It might then be thought that this is not bad news for the Solidarity Title after all, where most of the Charter's mere 'aspirations'[81] are found. Indeed, perhaps the most positive development that the interpretation of the binding Charter has brought about, from the lens of human rights theory, is that the Court has not read a *formal* distinction into the legal status of any thematic set of provisions.[82] Rather, the Court has, albeit only recently, in *Bauer*, emphatically affirmed the enforceability of some of the social rights protected in the Solidarity Title.[83] It has thus succeeded in retaining the Charter's quality as a binding instrument across its different titles.

Nevertheless, the case law has not been similarly successful in showing a coherent commitment to *all* of the fundamental social rights protected in the Charter as equal subsets of an indivisible and interconnected set of values. On the one hand, that is due to the Court's use of balancing discourse, the problems of which were discussed earlier. On the other, it is attributable to an insufficient explanation of what is meant by the distinction between rights and principles, through the Court's resort to another well-known aspect of early case law: the development of a hierarchy of rights based on their enforceability under the direct effect formula. Whereas the Court has not applied the rights/principles distinction strictly,

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[78] Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303/17, 35.

[79] Lord Goldsmith QC, 'A Charter of Rights, Freedoms and Principles' (2001) 38:5 *Common Market Law Review* 1201, 1212– 13.

[80] J Kenner, 'Economic and Social Rights in the EU Legal Order: The Mirage of Indivisibility' in T Hervey and J Kenner (eds), *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective* (Hart 2003) 1; See further I Koch, 'The Justiciability of Indivisible Rights' (2003) 72:1 *Nordic Journal of International Law* 3; E Wiles, 'Aspirational Principles or Enforceable Rights- The Future for Socio-Economic Rights in National Law' (2006) 22:1 *American University International Law Review* 35–64.

[81] Goldsmith (n 79).

[82] *N.S* (n 6).

[83] Most notably in respect of the application of Article 31 thereof: Joined Cases C-569/16 and C-570/16, *Bauer,* EU:C:2018:871; Case C-684/16, *Max-Planck-Gesellschaft*, EU:C:2018:874; Case C-55/18, *CCOO*, EU:C:2019:402.

it has qualified the status of some provisions primarily within the Solidarity Title, such as Article 27, by referring to a test of invocability. This was the bearing of the much-criticised *Association de Médiation Sociale* ruling, where the Court found that the right to information and consultation within the undertaking enshrined in Article 27 of the Charter did not result in a right that could be invoked 'as such' against Member States or other private actors, unlike, e.g., Article 21 on non-discrimination (and, eventually, Articles 47 on effective judicial protection and Article 31 on fair working conditions).[84]

How can such a re-drawing of the Charter's provisions through rights invocable 'as such' and rights that cannot be so invoked be rationalised? While it is impossible to ignore that the statistics offered in Section II above highlight an overall less prominent role for provisions of the Charter that fall within the Solidarity title, to draw the conclusion that the Court has actively or consciously undermined Solidarity provisions would be inaccurate. Not only are references to the Solidarity Title increasing, but it is also becoming clearer that aspects of that Title create justiciable rights in the same way as non-discrimination, privacy or effective remedies.[85] A more convincing argument might be that it is generally rights with more positive dimensions that run up against the problem of non-justiciability. Indeed, a key reason for differentiating between the implementation of social rights and civil and political rights in other human rights instruments has traditionally been a positive/negative understanding of rights, whereby social rights were predominantly conceived as positive rights, in the sense that they have resource implications.[86] In turn, courts often shy away from expenditure decisions, both due to lack of expertise and, more importantly, because of a broader institutional objection that they are not the right forum to be taking decisions with important policy repercussions, such as the attribution of funds to particular purposes.[87] It may not come as a surprise, therefore, that rights that clearly bear on resources, such as social security and the right to access a free placement service, have never given rise to a ruling at the Court of Justice level. Furthermore, as the *AMS* ruling highlights,[88] the Charter's text itself embraces conditionality of most social rights on national laws and practices, thereby suggesting that interpretations of these rights should be conducted in a spirit of deference to the requirements of national law, which may reflect the varied availability of resources and different levels of welfare protection in the Member States.

The above reasons do not, however, offer an easy or complete fit with the distinction drawn in *AMS,* when it is looked at within the broader case law on the Charter and, particularly, decisions such as *Bauer* and *CCOO*.[89] Amongst the Charter's social rights, the right to information and consultation is a protection that does not require substantial state expenditure, rather than appropriate protective legislative action (in addition to that envisaged by EU law in Directive 2002/14/EC). By the same token, rights such as Article

[84] Case C-176/12, *Association de Médiation Sociale (AMS) v Union Locale des Syndicats CGT Hichem Laboubi Union Départementale CGT des Bouches-du-Rhône Confédération Générale du Travail (CGT)*, EU:C:2014:2, para 49. See, for a closer analysis, E Frantziou, Case C-176/12 '*Association de Médiation Sociale*: Some Reflections on the Horizontal Effect of the Charter and the Reach of Fundamental Employment Rights in the European Union' 10 *EuConst* 332.
[85] See in particular the proliferation of judgments on Article 31 mentioned at n 83 above.
[86] C McCrudden, 'Mainstreaming Human Rights' in T Harvey (ed) *Human Rights in the Community: Rights as Agents for Change* (Hart 2005) 9, 15.
[87] Ibid.
[88] *AMS* (n 84), para 45, where the Court found that 'for this article to be fully effective, it must be given more specific expression in European Union or national law.'
[89] (n 83).

31 and, even, Articles 23 on equal pay and Article 47 on effective judicial protection, which are subject to intense scrutiny and enjoy direct effect in EU law even against private actors, do have immediate resource implications, despite the fact that they do not depend on national laws and practices. Thus, what appears rather more neatly tied to the invocability of Charter provisions 'as such' is not negative status altogether in the sense of rights that are non-resource-intensive or independent of national laws and practices,[90] but a particular *kind* of negative status, associated the well-known direct effect formula: that rights should give rise to clearly ascertainable obligations and that they should not be subject to the need for further implementation beyond any applicable Union law.

Such an EU-specific understanding of the meaningfulness of fundamental rights is supported not only by the case law on the Solidarity chapter, but also by looking at other oft-referred to provisions, which share important elements. Privacy, non-discrimination, and the protection of property and entrepreneurial activity, alongside (perhaps most clearly of all) the right to effective judicial protection, can all be construed as predominantly individualizable protections strongly associated with private enforcement by 'vigilant' right-holders.[91] It is, in turn, unsurprising that these provisions have a relatively easy transposition to the Charter era, insofar as the notion of rights that emerges from the case law remains one of sufficiently clear, precise, and unconditional interests in the enforcement of the Charter.

Thus, albeit not expressing a two-speed theory of progressive realisation for entire titles of the Charter, a linkage of the concept of rights within the Charter with direct effect appears only to maintain a divisible and differentiated understanding of fundamental rights, under another label. This creates three significant problems for the adjudication of fundamental rights: first, insofar as it conceptualises rights as interests to be privately enforced, the Court appears almost entirely to exclude rights which are not invocable as such from meaningful constitutional review, as highlighted by the *AMS* ruling.[92] That is the case despite the fact that the division of the Charter into rights and principles could nevertheless have provided for the protection of principles in certain circumstances. Indeed, it cannot be overlooked that Article 52(5) of the Charter envisages that provisions which express principles 'may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers.'[93] Rather than resulting in a lack of justiciability altogether, therefore, these provisions remain 'judicially cognisable in the interpretation of [EU legislative and executive] acts [and of implementing acts of the Member States] and in the ruling on their legality.'

Secondly, the direct effect conditions present an unlikely – if not artificial – standard for many fundamental rights. Rather than being clear, precise, and unconditional, many fundamental rights, just like general principles before them, operate on a level of

[90] Indeed, the Court has applied extensively other rights which are conditional on national laws and practices, such as Article 16 CFR: see further on this: E Frantziou, '(Most of) the Charter of Fundamental Rights is Horizontally Applicable: ECJ 6 November 2018, Joined Cases C-569/16 and C-570/16, *Bauer et al*' (2019) 15:2 *EuConst* 306, 319-321.
[91] *Van Gend en Loos* (n 5).
[92] Frantziou (n 84) 341.
[93] Article 52(5).

abstraction and generality uncharacteristic of other legal norms.[94] Indeed, referring to pre-existing case law for support of findings of justiciability fails particularly where the Charter breaks new ground, by transposing to the supranational level common constitutional traditions not previously envisaged in the case law and, most clearly, rights that do not offer a precise interest in a tangible or intangible thing, such as arrangements for the improvement of working conditions through collective bargaining or rights to a future benefit (e.g. a healthy environment). In this sense, the 'double asymmetry' identified by Scharpf is clearly manifested in the interpretation of the Charter:[95] on the one hand, EU law now recognises the need for fundamental rights, yet seeks to reconcile them with a partly economic discourse that does not always accord them primacy. On the other hand, it errs in favour of a self-preserving circularity through appeals to its own earlier iterations, rather than acknowledging other sources of legitimacy.

Last but not least, the appeal to direct effect in the assessment of justiciability is problematic insofar as it embeds protective functions not into the substantive provisions of the Charter but into a procedural standard of effective enforcement. The enforcement of human rights is conceptually distinct from their existence as binding norms.[96] As the following subsection highlights, such a misconception could shed light upon the emergence of Article 47 as the undisputed star of the Charter across the different sets of statistics presented earlier.

D. A Right without a Remedy Is No Right at All; or Is It?

Ubi jus ibi remedium. When there is a right, there is a remedy. How could the courts, as Lord Denning had once put it, see an injustice and yet 'stand idly by'?[97]

The purpose of this subsection is not to argue that the right to an effective remedy is materially over-protected in EU law, which continues to present important challenges regarding effective judicial protection in certain fields.[98] And there are no doubt many important, practical reasons why the right to an effective remedy and the rights of defence are so often brought up in proceedings before the Court, compared to other provisions.[99] Nevertheless, this section does suggest that there may be a downside to the prominence of Article 47 CFR in the case law, which was so clearly highlighted in the numerical data as the first port of call in the protection of fundamental rights in the EU. Both a vision of rights as strongly associated with effective enforcement, discussed in subsection C above, and the lack of definition of the content of rights through the use of balancing discourse, discussed

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[94] Opinion of Advocate General Trstenjak, delivered on 30 June 2009, in Case C-101/ 08, *Audiolux* [2009] ECR I- 9823, para 87.

[95] FW Scharpf, 'On the Double Asymmetry of European Integration. Or: Why the EU Cannot Be a Social Market Economy' (2012) Max Planck Institute for the Study of Societies, MPlfG Working Paper 09/ 12, <www.mpifg.de/pu/workpap/ wp09- 12.pdf> accessed 22 September 2018, 33.

[96] J Nickel, *Making Sense of Human Rights* (2nd edn, Blackwell 2007) 33.

[97] *Gouriet v Union of Post Office Workers* [1977] 1 All ER 696, 702.

[98] Most notably, individual standing requirements. See further, on this, e.g., M Safjan and D Düsterhaus, 'A Union of Effective Judicial Protection: Addressing a Multi-level Challenge through the Lens of Article 47 CFREU?' (2014) 33:1 *YEL* 3, 25; See also D Sarmiento, 'National Voice and European Loyalty, Member State Autonomy, European Remedies and Constitutional Pluralism in EU Law' in HW Micklitz and B De Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012), 325–45.

[99] For example, one such reason could be that these rights are often used in competition law cases, which make up for a significant proportion of the Court's rulings, even on appeal.

in subsection B, can be considered as largely coextensive with a resulting emphasis on process-based rights, such as Article 47.

The recognition of the right to an effective remedy in Article 47 enshrines an idea, already expressed several years back, that rights arising from EU law should be effectively protected at the national level, resulting in a set of corresponding obligations on national courts.[100] For this reason, it has been argued that Article 47 sets a standard that is 'composite, coherent, and autonomous,'[101] premised on the idea that the EU gives rise to a 'complete system of legal remedies.'[102] On the one hand, each member State legal system contributes to effective judicial protection in the EU[103] - a continuation of the notion of national procedural autonomy.[104] On the other, national procedures, checked for effectiveness and equivalence by Article 47, 'add flesh to the skeleton of primacy, direct effect and state liability'.[105] Nevertheless, Arnull is right to query whether, in light of the fact that the principle of effective judicial protection had in itself previously enjoyed direct effect, this might cause 'renewed activism on the part of the Court' through the fiat of Article 47, rather than mere checks on effectiveness and equivalence.[106] Indeed, in line with a charge of manipulation of rights for other purposes, the continuing references to Article 47 of the Charter are suspicious when considering how this provision is used in conjunction with other rights. There, questions can be raised about the extent to which the case law accommodates appropriately the needs of the substantive provisions of the Charter as ends in their own right, rather than building them into a separate, general obligation to protect all rights arising from EU law effectively, uniformly and in line with the primacy principle.

One of the most significant recent cases that displays a potential overuse of Article 47 is *Egenberger*, where Article 47 was used in addition to Article 21 in a case concerning discrimination against a non-believer applicant for a job with the Evangelical Church in Germany.[107] It is noteworthy that, in *Egenberger*, the Bundesarbeitsgericht had asked a series of questions about the role of religion within the Framework Equality Directive 2000/78 and, more specifically, about whether subscribing to a particular religion could constitute a genuine occupational requirement.[108] The Court of Justice raised Article 47 of

[100] Case 222/84 *Johnston* [1986] ECR 1651, para 18; see also Case 222/86 *Heylens,* EU:C:1987:442.; and Case 14/83, *Von Colson and Kamann*, ECLI:EU:C:184:153, para 23.
[101] Safjan and Düsterhaus (n 98) 3.
[102] C-50/00P, *Unión de Pequeños Agricultores* [2002] ECR I-6677, para 40; Case C-263/02, *Jégo-Quéré*, EU:**C**:2004:210, para 30.
[103] K Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union' (2007) 44 *Common Market Law Review* 1625, 1625.
[104] Case 33/76, *Rewe-Zentral* [1976] ECR 1989. See further on this, S Prechal, 'National Courts in EU Judicial Structures' (2006) 25:1 *YEL* 429.
[105] A Arnull, 'The Principle of Effective Judicial Protection in EU law: An Unruly Horse?' 36:1 (2011) *EL Rev* 51, 51.
[106] Ibid, 68.
[107] Case C- 414/16, *Egenberger*, EU:C:2018:257. For a more extensive discussion of the issues around direct effect in this case, see: E Frantziou, 'Mangold Recast? The ECJ's Flirtation with *Drittwirkung* in *Egenberger*', European Law Blog 24 April 2018, available at https://europeanlawblog.eu/2018/04/24/mangold-recast-the-ecjs-flirtation-with-drittwirkung-in-egenberger/, accessed 15 August 2019; A Colombi Ciacchi, 'The Direct Horizontal Effect of EU Fundamental Rights: ECJ 17 April 2018, Case C-414/16, *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung e.V.* and ECJ 11 September 2018, Case C-68/17, *IR v JQ*' (2019) 15:2 *EuConst* 294.
[108] *Egenberger*, ibid, para 41.

its own motion (albeit that the provision had been mentioned by Advocate General Tanchev in his Opinion).[109] It found:

> Article 47 of the Charter, which applies to a dispute such as that in the main proceedings, given that the AGG implements Directive 2000/78 in German law for the purposes of Article 51(1) of the Charter and that the dispute concerns a person who was the subject of a difference of treatment on grounds of religion in connection with access to employment, lays down the right of individuals to effective judicial protection of their rights under EU law.[110]

The Court went on to decide that, in circumstances where Article 47 was applicable, the provision was invocable 'as such'[111] and required the availability of full judicial protection and the meaningful observance of both applicable provisions of the Charter – non-discrimination and the right to an effective remedy.[112] Finally, in line with the *Mangold/Küçükdeveci* principle,

> a national court hearing a dispute between two individuals is obliged, where it is not possible for it to interpret the applicable national law in conformity with Article 4(2) of Directive 2000/78, to ensure within its jurisdiction the judicial protection deriving for individuals from Articles 21 and 47 of the Charter and to guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law.[113]

Whether one agrees with the outcome of the case or not, *Egenberger* forms part of a series of rulings over the last couple of years that have made leaps in terms of methodologically clarifying *Mangold*.[114] One can only wonder, though: in an area so directly occupied by Article 21 of the Charter – and indeed by Article 10 thereof (the freedom of thought, conscience, and religion), to which the Court does not refer – what does Article 47 add to the Court's analysis and why was reference to that right essential?[115]

As a matter of human rights law, procedural rights display significant differences to other provisions as they are 'normatively defensible only by reference to a complete elaboration of the substantive rights at stake when [they] are invoked.'[116] Indeed, whilst effective judicial protection is an essential facet of human rights law, as the ECtHR has highlighted, it is a supplementary provision that addresses non-rectification of violations of other rights due to a lack of appropriate and transparent legal processes.[117] In turn, the adjudication of procedural rights engenders important difficulties for courts: used too little, and known

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[109] Opinion of Advocate General Tanchev, delivered on 9 November 2017, in Case C- 414/16, *Egenberger*, EU:C:2017:851, para 54.

[110] *Egenberger* (n 107) para 49 (reference omitted).

[111] Ibid, para 78.

[112] Ibid, paras 59 and 81.

[113] Ibid, para 82. See also *Mangold* (n 37) para 76.

[114] Frantziou (n 107).

[115] It is possible that Article 47 may have horizontal dimensions – see, e.g, *Benkharbouche* [2015] EWCA Civ 3, which concerned a near-legal slavery scenario by a foreign embassy. However, it is not clear why it should have that such a dimension in the *Egenberger* ruling.

[116] L Alexander, 'Are Procedural Rights Derivative Substantive Rights?' (1998) 17 *Law and Philosophy* 19, 19.

[117] *Klass and Others v Germany,* App. No. 5029/71, ECtHR 6 September 1978, para 69; *Kudla v Poland*, App. No. 30210/96, ECtHR 26 October 2000, para 151.

violations of rights can end up under-remedied. Used too much, and remedial issues can end up detracting from the normative questions inherent in the interpretation of substantive rights, such as – but not limited to – the reach of non-discrimination or of unfair employment practices. Such a pitfall is evident in the *Egenberger* ruling. The substantive problem with a rule that discriminates against non-believers is the discrimination against non-believers. It is not, at least in the first instance, the question of effective judicial protection, of which the preliminary reference itself is a generally positive indicator. Of course, once a finding is made in respect of the existence of a breach of a substantive right, such as non-discrimination, one could see the relevance of Article 47, provided the failure to protect the right is compounded by an absence of the possibility of obtaining redress for an established discriminatory practice. However, the existence of a link with EU law through a substantive right is not a sufficient reason to engage Article 47, in the absence of an analysis of the relevant procedures against which effectiveness of remedial measures is judged.

Egenberger is not an isolated ruling. Another example of such a use of Article 47 is *Fuß*, a case where a firefighter was forcibly transferred to an operational role when he requested that his working hours comply with the requirements of the Working Time Directive. There, the Court found a violation of Article 47 of the Charter due to the lack of dissuasive penalties for the employer making the transfer, but not a breach of Article 31 of the Charter, which protects the right to fair and just working conditions. The Court noted that 'fear of such a reprisal measure, where no legal remedy is available against it, might deter workers who considered themselves the victims of a measure taken by their employer from pursuing their claims by judicial process, and would consequently be liable seriously to jeopardise implementation of the aim pursued by the directive.'[118] This is undoubtedly correct, when looking at the effective protection of maximum working hours. If, however, it is not *also* (if not solely) a breach of Article 31 of the Charter, where do the protective functions of this provision (i.e. the obligation adequately to legislate for it) lie?

The cogency of the Court's approach is further undermined by the fact that, whereas Article 47 is built into parts of the case law such as the ones discussed above, this is not always the case. For example, in *Smith*, a case which concerned the implementation of EU law on consumer protection in the field of insurance policies, the Court did not refer to Article 47, as it had done in *Egenberger* or *Fuß*.[119] Rather, in that case, the Court affirmed the non-horizontality of directives and fell back on state liability in damages under the *Francovich* rule.[120] The same was true of *Association de Médiation Sociale*, discussed earlier, where the Court did not accompany its finding that Article 27 of the Charter was not invokable as such with a finding that this right must nevertheless be effectively protected in line with Article 47, rather than with the conditions of state liability under *Francovich*.[121] That is not to say that Article 47 *should* have been used in these cases. However, if it is, as *Egenberger* suggests, relevant in all cases of implementation of EU law in line with the case law on Article 51, finding a coherent way of reconciling these rulings appears especially difficult.

As Safjan and Düsterhaus convincingly argue, Article 47 is being interpreted by the Court as entailing a positive obligation on the part of the Member States to legislate for the

[118] Case C-243/09, *Fuß* [2010] ECR I-9849, para 66.
[119] Case C-122/17, *Smith*, EU:C:2018:631.
[120] Ibid, para 56.
[121] *AMS* (n 84) para 50.

protection of fundamental rights.[122] Factually, this might explain why Article 47 does not feature as prominently in areas involving more nebulous provisions aiming to a 'high level of consumer protection' in Union policies, such as Article 38 CFR, or provisions that refer to national laws and practices, such as Article 27. Conceptually, however, it demonstrates that the significance of Article 47 might entail a broader failure to recognise that protective duties to ensure the application of fundamental rights within the scope of EU law attach to *all* Charter provisions (i.e. even without the need to employ Article 47), as well as to develop a clear system of sanctions for the legislative and remedial failures of the Member States. Indeed, in parallel to Reich's critique of the absence of a meaningful doctrine of civil liability in EU law – what he called the 'paradox of "rights without duties"'[123], one could similarly query EU law's restricted notion of state liability as a public law remedy (one which, in its current iteration, does not always work well for fundamental rights, where the damage suffered is not necessarily pecuniary).[124] Unfortunately, this taints Article 47 with a panacea-like character, which can run against important problems of inflation, as well as raising questions about whether the substantive provisions are, rather ironically, effectively protected. Similarly, the Court's approach towards Article 47 risks insufficiently accommodating the character of the right to an effective remedy itself, as a human right 'deriving from a primary substantive right that has been breached.'[125]

Of course, it should not be ignored that, in contrast with other constructions of procedural rights,[126] the Charter right to an effective remedy is expressly linked to a value enshrined in one of the Charter's titles (Justice) and carries heavy positive dimensions (e.g. legal aid), which indicate that it sets a high threshold, once engaged. It could, therefore, end up exceeding other standards of effective judicial protection such as Articles 6 and 13 of the Convention.[127] While those standards already require, as Gerards and Glas point out, independent, flexible, transparent, and timely procedures, developed based on the principle of legal certainty,[128] they do not include more specific stipulations along the lines of Article 47. Nevertheless, even if the Union standard of Article 47 reaches beyond other comparable provisions, an understanding of the EU's conception of effective judicial protection as something other and different, rather than building upon existing human rights norms, should not be celebrated. There is a difference between saying that lack of procedural fairness can 'modify substance and can render that substance unconstitutional'[129] and inflating the concept of a procedural right to encompass substantive choices pertaining to the application of other rights.

Overall, whereas the fundamental rights protected by EU law must be effectively rendered at national level, the Court's building of Article 47 into the analysis of other provisions suggests the supersession of the core remedial function of EU law (state liability in

[122] Safjan (n 98) 17.
[123] N Reich, 'The Interrelation between Rights and Duties in EU Law: Reflections on the State of Liability Law in the Multilevel Governance System of the Union: Is There a Need for a More Coherent Approach in European Private Law?' (2010) 29:1 *YEL* 112, 113.
[124] Frantziou (n 84) 343.
[125] L Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law' 2003 IRRC 497, 503.
[126] Cf Alexander (n 116) 32ff; see also L Alexander, 'The Relationship Between Procedural Due Process and Substantive Constitutional Rights' (1987) 39 *U Fla L Rev* 323.
[127] Safjan (n 101) 32.
[128] JH Gerards and LR Glas, 'Access to Justice in the European Convention of Human Rights System' (2017) 35(1) *Netherlands Quarterly of Human Rights* 11-30, 19.
[129] Alexander (n 116) 31.

damages) because indirect effect and, failing that, direct effect apply, in both public and private disputes, through the use of Article 47. This is so without appeal to any obvious test as to how and when Article 47 is added to other rights claims within the scope of EU law. Thus, while EU lawyers have rightly criticised the complexity of this field, which could be reduced if Article 47 in fact gave rise to a fully harmonised law of remedies at the EU level,[130] it would be highly problematic if such a development emerged on the back of existing case law. Chantal Mak is thus correct in pointing out that 'clarification is needed' in respect of a number of aspects of the operation of Article 47 and, particularly, of the continued value of pre-existing rules on national procedural autonomy[131] and the relationship between Article 47 with direct and indirect effect and state liability.[132]

E. Interim Conclusion: The Need for a Break from Pre-Lisbon Case Law

The foregoing analysis has shown, firstly, that the Court has succeeded in overcoming certain aspects of the fundamental rights critiques often levied against the Union. In light of the clarity with which general questions concerning the Charter's scope and field of application have been treated, this instrument can be seen as playing a positive role in solidifying the role of fundamental rights in the EU as self-standing constitutional commitments. Yet, at the same time, in interpreting the Charter's distinct provisions, as well as their general limitations, structure, and implications, the Court's insistence upon continuity with the pre-Lisbon case law can be seen as restricting the reflexive development of fundamental rights as constitutional norms in the Union *qua* polity and continues to raise questions about its ability to protect all rights equally. Left unchallenged, the internal logic of this case law is problematic as a basis for further developing the Charter, as it foregoes a difficult but necessary transformation of the transactional forms of corrective justice underlying the Union's initially private law model of integration into a constitutional order premised on a variety of shared values with a public (and not just intersubjective and individualistic) character.[133]

Indeed, critiques such as the instrumentalisation of fundamental rights to achieve the primacy, effectiveness and uniformity of EU law and its marginal positive justification of rights by reference to the values that underpin them, still ring true of judgments relating to the Charter in its binding dimension, confirming what the numerical analysis had already suggested: that, albeit laying constitutionally strong foundations for the Charter in principle, the case law offers a fragmentary treatment of the Charter's substantive provisions. That is so, insofar the structure of fundamental rights that the Court employs today continues to rest upon aspects of early case law not neatly transposable to the field of fundamental rights and, most notably, to the 'vigilance of individuals seeking to assert their rights' and the quest for a balance between the Union's 'double aim, at once economic and social'. An overuse of Article 47 and an underuse of social rights and civil liberties

[130] HW Micklitz, 'The ECJ Between the Individual Citizen and the Member States – A Plea for a Judge-Made European Law on Remedies', in HW Micklitz and B De Witte (n 98) 349, 373.
[131] C Mak, 'Rights and Remedies: Article 47 EUCFR and Effective Judicial Protection in European Private Law Matters' (2012) Centre for the Study of European Contract Law Working Paper Series No. 2012-11, 18.
[132] Ibid and Arnull (n 105) 69.
[133] L Azoulai, 'Sur un sens de la distinction public/ privé dans le droit de l''Union Européenne' in S Robin-Olivier, O Odudu, and L Azoulai (eds), 'The Public/ Private Divide in European Union Law' (2012) CEJEC- WP 2010/ 7, 34. For such an argument see also, more generally, W Streeck, 'Citizens as Customers: Considerations on the New Politics of Consumption' (2012) 76 *New Left Review* 27; A Somek, *Individualism: An Essay on the Authority of the European Union* (OUP 2008).

could, in turn, be attributed to these features of EU rights protection, which naturally include unconditional rights within the invocability formula and strive to offer them effective protection through the procedural means of an effective remedy – yet without exhausting all of the positive/protective aspects that attach to their substantive protection. Similarly, these features can be taken to explain why the Union struggles to find a place for rights that are more vaguely phrased, legislatively more demanding and, crucially, not easily justifiable by reference to the often vacuous 'balance' between the different demands of a social market economy.

A need more clearly to delineate the nature of the obligations protected by the Charter and to identify their addressees thus emerge as the key stumbling blocks of a constitutionally cogent understanding of fundamental rights under the Charter post-Lisbon. They set up a difficult task because they require a break from existing case law that presents the effectiveness of the Union's constitutional machinery as one and the same with its enforcement[134] and a vision of the realisation of rights that is more attuned to their changing constitutional functions within the Union. They entail, in other words, an understanding of rights based not on the need for a 'fair balance' between competing individual interests in market integration, but on a self-standing conception of the common good.[135]

IV. Fundamental Rights under the Charter as Tripartite, Adequately Attributed, and Incommensurable

How, one might ask, could the break with past visions of rights that the above section has called for be shown in rulings relating to the Charter of Fundamental Rights, going forward? And how could legal certainty and coherence – core aspects of the critique of the case law developed earlier – be served, if radical shifts were to take place in the protection of fundamental rights in the EU under the Charter? Provided they are understood as part of a holistic view of rights, rather than through a sectional perspective on rights as autonomous EU constructs, three settled tenets of human rights theory could, in the author's view, assist with bringing about a self-standing fundamental rights jurisprudence for the Charter in the years to come. These are: the tripartite typology of human rights; the delineation of state and non-state duties to protect fundamental rights through the development of a principle of attribution distinct from direct effect; and the incommensurability of fundamental rights with respect to other interests.

A. Tripartite Typology

The quest for a conception of all rights as worthy of protection 'globally in a fair and equal manner, on the same footing, and with the same emphasis', albeit not having materialised at the international level, has been supported by the United Nations for the past twenty-five years.[136] In adopting the Vienna Declaration and Programme of Action on 25 June 1993, the World Conference of Human Rights and, shortly afterwards, the UN General Assembly, clearly asserted that 'human rights are universal, indivisible and interdependent and

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[134] Perhaps most clearly shown in Case 294/83, *Parti Ecologiste "Les Verts"* [1986] ECR 1339, para 23.

[135] For some alternative conceptions, see: S Douglas-Scott, 'Pluralism and Injustice in the EU' (2012) 65:1 *Current Legal Problems* 83; A Williams, *The Ethos of Europe: Values, Law and Justice in the EU* (CUP 2010); F De Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (OUP 2015).

[136] Vienna Declaration, para 5; General Assembly resolution No 48/121 of 20 December 1993, A/RES/48/121.

interrelated.'[137] In turn, the most significant implication of this statement has been the adoption of a singular, tripartite typology of obligations to respect, protect and fulfil all rights, including economic, social and cultural rights:[138]

> Like civil and political rights, economic, social and cultural rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. Failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to respect requires States to refrain from interfering with the enjoyment of economic, social and cultural rights. Thus, the right to housing is violated if the State engages in arbitrary forced evictions. The obligation to protect requires States to prevent violations of such rights by third parties. Thus, the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to fulfil requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation.[139]

This typology, initially coined by Shue,[140] is generally considered an adequate substitution for the positive/negative dichotomy whereby economic, social and cultural rights had been seen as merely programmatic, aspirational and not justiciable.[141] The typology was intended to highlight that all rights have positive and negative dimensions. For example, the state is required to police demonstrators to ensure the right to freedom of association is not hindered by counter-demonstrators.[142] The duty to fulfil requires active steps to promote rights, such as by encouraging diversified ownership of the media.[143] Indeed, it is now clear that 'civil and political rights may also encompass "positive", costly elements, and that these rights are also to some extent subject to progressive realisation.'[144] The procedural rights discussed in section III above, for instance, such as the right to a fair trial and to an effective remedy, are good examples of the former type, insofar as they necessitate the building of appropriate institutions. And economic, social and cultural rights may also have elements 'of a "negative", cost-free character' so that they are capable of immediate, rather than progressive, realisation.[145]

Of course, this is not to say that the tripartite typology is capable in itself of filling in the gaps of what amounts to the core of different fundamental rights. Particularly when it comes to the most contentious part of the typology, that of positive duties to fulfil rights,

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[137] Ibid.

[138] This approach has also been employed by the European Court of Human Rights, albeit in respect of a more limited list of provisions: see further V Mantouvalou, 'Work and Private Life: *Sidabras and Dziautas v Lithuania*' 30(4) *European Law Review* (2005) 573.

[139] Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, later reissued as UN document E/C.12/2000/13, paragraph 6, as quoted in De Schutter (n 72), 6.

[140] H Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton University Press 1996); See also A Eide, 'Realization of Social and Economic Rights and the Minimum Threshold Approach' (1989) 10 *Human Rights Law Journal* 35.

[141] Koh (n 75) 81.

[142] McCrudden (n 86) 13; see also *Plattform 'Ärzte Für Das Leben' v Austria*, App. No. 10126/ 82, ECtHR 21 June 1988.

[143] McCrudden, ibid; see also *Groppera Radio AG v Switzerland*, App. No. 10890/84, ECtHR 28 March 1990.

[144] Koh (n 75) 84.

[145] Ibid.

the minimum level below which the realisation of rights should not fall is not always clear.[146] Moreover, a variety of potential priorities and sub-distinctions may be made within this model that, whilst not resulting in a hierarchy of rights, influence the pace with which different fundamental rights may be protected. In *Basic rights,* for instance, Shue himself argues that subsistence and security (as basic rights) must take precedence over other rights,[147] for no other rights can be realised without them. Similarly, it may be thought that rights associated with self-actualisation rank lower as implementing priorities than physiological or safety needs.[148] As such, a meaningful analysis of human rights at the EU level could not stop merely at recognising that fundamental rights give rise to threefold duties. It must also entail a discussion of what these duties mean as a matter of 'core content'[149], who should be responsible for providing them (further discussed under 'B. Attribution') and how they should be applied within a democratic society (further discussed under 'C. Incommensurability'). As De Schutter points out, the respect-protect-fulfil typology should thus only be seen as a basic 'grid of analysis'[150] within which to embed minimum thresholds[151] of what the realisation of fundamental rights requires in more substantive terms.

In turn, organising the discussion of the essential content of rights around these threefold obligations could be an especially useful tool for rebuilding the Union's judicial apparatus in a manner that is more aptly transposable to all human rights. But what would the need for positive fulfilment look like in a Union where discrepancies in the available resources of Member States render the setting of minimum standards especially difficult and where, as noted in subsection III.B above, conditionality upon national laws and practices reduces the Court's possibility of imposing positive duties in respect of certain rights? The South African Constitutional Court's jurisprudence on social rights and, most notably, its ruling in *Grootboom*, a case which concerned the effectiveness of the South African government's post-apartheid housing programme, offers a useful illustration of the adjudication of this fulfilment function.[152] In that case, the South African government had not interfered with the right to housing (the respect element of the right) and legislation was in place to give effect to it (the protective aspect of the right). It was the deployment of the South African government's policy of building housing for the poor (the fulfilment function) that was challenged before the Court. The latter acknowledged both that it could not impose on government the obligation immediately to build all required accommodation, i.e. that there may be implementing priorities even within the delivery of this right, and that the minimum housing thresholds, i.e. what type of housing is made available, could vary. It found:

> The state's obligation to provide access to adequate housing depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person. Some may need access to land and no more; some may need access to land and building materials; some may need access to finance; some may need access to services such as water, sewage, electricity and roads. What might be appropriate in a rural area where people live together in communities

[146] CW Canaris, *Grundrechte und Privatrecht: eine Zwischenbilanz* (Walter de Gruyter 1999) 39; see also Mak (n 131) 9-10.
[147] Shue (n 140) 21-28.
[148] A Quintavalla and K Heine, 'Priorities and Human Rights' (2019) 23:4 *International Journal of Human Rights* 679, 686.
[149] De Schutter (n 72) 16-17.
[150] Ibid, 7.
[151] Eide (n 140).
[152] *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19.

> engaging in subsistence farming may not be appropriate in an urban area where people are looking for employment and a place to live.[153]

The right to housing thus did not entitle an individual 'to claim shelter or housing immediately upon demand.'[154] Nevertheless, in ultimately finding in favour of the applicants, the South African Constitutional Court noted that it was under an obligation to assess whether 'a coherent, co-ordinated programme designed to meet' the obligation to provide housing had been implemented.[155] In the circumstances, the application of the South African government's promulgated programme could not be accepted as expressing a reasonable allocation of state resources devoted to the purpose of providing housing for all, insofar as it 'failed to provide for *any* form of relief to those desperately in need of access to housing' in the Cape region.[156]

At this juncture, it is worth trying to anticipate a possible critique of the typology proposed in this section, namely that such a framework sets us up for an overly wide-ranging application of human rights. For some, this could be perceived as a danger to the normative priority of human rights, because it is over-inclusive.[157] For others, such a framework may signal a broader discomfort with a perceived direction towards a so-called 'human rights fundamentalism' which attacks, rather than safeguarding, a society made up of plural, autonomous choices.[158] However, while it is certainly true that the interpretation of the core content of rights and, even, the labelling of a broad set of rights as 'fundamental' within the Charter may give rise to such critiques, not all aspects of the human rights framework proposed in this sub-section justify this dissonance. For example, even if one were to reject the thicker conception of indivisible rights that gave rise to the assumption of the tripartite typology,[159] as a 'grid of analysis'[160] the typology can still be useful as a structural premise of human rights reasoning.

Crucially, as the judgment of the South African Court highlights, the typology does not suggest that fundamental rights should be invoked as if they gave rise to particular outcomes or prerogatives against all likely incursions by all actors. Article 21 of the Charter (non-discrimination) need not impose a ban on all age-restricted private gatherings. Article 15 (the right to work) need not be read as a right to a job for everyone that wants one. And Article 26 of the Charter (the inclusion of persons with disabilities) need not be seen as creating an immediate claim to facilities that accommodate every disability near every person's home. We are bound to continue to disagree both about the interpretive reach of fundamental rights and about which rights are worth including in a fundamental rights catalogue. However, the typology could help to change the immediate link that EU law presently draws between the enforceability of Charter rights and their effective realisation. The fact that fundamental rights might not give rise to *certain* claims of fulfilment, for instance, does not mean that they also should not give rise to *any* claims of protection or respect for disability, work, or housing, or that these rights do not give rise to any fulfilment

[153] Para 34.
[154] Ibid, 95.
[155] Ibid.
[156] Ibid.
[157] See, e.g. what Letsas aptly describes as 'rights inflation': G Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (OUP 2007) 127-130.
[158] See, e.g. A Supiot, 'The labyrinth of human rights: credo or common resource?' (2003) 21 *New Left Review* 118.
[159] And, similarly, within the European Convention system, through the use of positive obligations.
[160] De Schutter (n 72) 16-17.

duties for actors responsible for their realisation.[161] The clearer carving out of a fulfilment function within the content of different human rights obligations could indeed be a significant improvement on the current system of fundamental rights protection in the Union, where this dimension emerges predominantly, as shown in subsection III.C above, by way of an overuse of the right to an effective remedy.

It follows that the idea of fulfilment of rights should not be seen in terms of maximum harmonisation of standards or the stipulation of specific policies by the Court of Justice but, rather, as an assessment of the existing measures taken to fulfil rights by reference to the normative demands of the substantive provisions themselves and, in their absence, the attribution of appropriate remedies (which can, of course, then be assessed for effectiveness under the tab of Article 47). Similarly, while the less-than-satisfactory exclusion of positive duties for provisions deemed to be 'principles' in the text of Article 52(5) CFR would persist despite the employment of a tripartite conception of rights, an approach that more clearly shows where the relevant obligations fall within the respect, protect, fulfil spectrum could be a way of giving effect to 'principles', albeit in the more limited manner envisaged in the Charter's text. While the exclusion of positive fulfilment for provisions labelled as principles would remain problematic when seen through the prism of indivisibility, an approach supporting at least duties to respect and protect rights as part of the legislative function of the Union would be compatible with the wording of Article 52(5) for all provisions of the Charter.[162] It would, in turn, challenge the notion that those rights (or principles?) which are not invocable as such do not give rise to any justiciable claims at all. For example, this approach could have structured more coherently the Court's reasoning in cases like *Association de Médiation Sociale*. There, it would have rendered more meaningful any fallback claims for damages against the state, by building them into the core of an obligation to protect against breaches of the right by private actors in situations falling within the scope of EU law, rather than by relying on the – in that case unlikely – *Francovich* formula.[163] This would not only offer more hopeful prospects to future claimants, but it would also clarify the schema of obligations associated with different dimensions of the protected right for national courts.

Moreover, the mode of reasoning advocated above is not entirely foreign to the Court of Justice's own past practice in certain fields and, particularly, that of environmental protection. An analogous approach can, for example, be seen in the *Janecek* and *ClientEarth* judgments.[164] There, the Court found, firstly, that individuals 'must be in a position to require the competent national authorities to draw up an action plan' to fight pollution.[165] Secondly, the content of the action plan must be subject to judicial review in respect of its ability to contain pollution below certain thresholds, even though it remains for the Member States to determine the specific parameters of their policies by taking account of the various interests at stake in their application.[166] The problem is thus not necessarily the unavailability of fulfilment reasoning altogether in the Court's interpretive toolbox, but the fact that the obligations that are created thereby are not explicitly related to provisions of the Charter, such as the principle of environmental protection enshrined in Article 37 CFR (and further expressed in secondary legislation) – a problem which persists

[161] Nickel (n 53) 91, 136–53.
[162] As well as with the Charter's Explanations (n 78) 35.
[163] See further Frantziou (n 84) 343.
[164] Case C-237/07, *Janecek*, EU:C:2008:447; C-414/03, *ClientEarth*, EU:C:2014:2382
[165] *Janecek*, ibid, para 42.
[166] Ibid, paras 46-47; *ClientEarth* (n 164), para 57.

in more recent case law reaffirming the above findings, such as *Craeynest*.[167] In this respect, unlike the strong link drawn between the human rights obligations protected in the Bill of Rights in the South African Constitutional Court's approach, the Court of Justice's analysis allows the secondary legislation, rather than the Charter, to determine the reach of judicial scrutiny over questions pertaining to fundamental rights. Recognising these similarities in logic by including in EU case law an analysis of the core content of the Charter's provisions alongside any discussion of the applicable secondary legislation, would ensure that the constitutional status of all of the Charter's provisions is more coherently represented, as well as more clearly showing in which ways these provisions ought to be respected, protected, or fulfilled.

B. Attribution

Hand in hand with the question of what the minimum obligations to observe human rights are, goes the question of who is responsible (on a legal rather than a moral level) for delivering them. To acquire meaningful legal force, human rights must be adequately attributed to a plausible set of right-holders and duty-bearers.[168] As Onora O'Neill has put it, 'it would be absurd to claim that everyone has an obligation to provide a morsel of food or a fraction of an income to each deprived person. Goods and services have to be rendered by particular persons or institutions to some others.'[169] However trite or obvious these remarks might seem, it follows from the foregoing analysis that by associating fundamental rights with means of effective enforcement and, particularly, with the direct effect formula, EU law struggles to attribute fundamental rights to specific duty-bearers, while it assumes that all those with an interest in the application of the Charter also have a valid right to it.

Indeed, the extensive reliance on rights such as Article 47 and provisions invokable 'as such' and, by the same token, the generally restrictive interpretation of rights that are not phrased in a manner deemed sufficiently clear, precise, and unconditional so as to be so invoked, stem from a conception of direct effect as not just the key but, indeed, as the *only* principle of attribution within EU law. Once the relevant conditions for direct effect are met, duties are quasi-automatically attributed to those against whom the obligations are claimed. Occasional (and often re-amended) exceptions, such as the non-horizontality of directives, appear only to confirm this basic principle. Of course, it must be acknowledged that the Court has already started moving towards a more principled account of the application of fundamental rights, by placing greater emphasis on the role of national courts through consistent interpretation, than on the conditions for direct effect.[170] Nevertheless, such an approach still retains the direct effect of EU law as a guide, relying on it whenever consistent interpretation does not suffice.

This schema is problematic. As Craig rightly points out, while the Charter is 'not literally freestanding and presupposes some lock onto EU law in order to apply',[171] it is clear from judgments such as *Fransson* that it is already, in one sense, invocable as an interpretive

[167] Case C-723/17 *Craeynest*, EU:C:2019:533.
[168] J Nickel, 'How Human Rights Generate Duties to Protect and Provide' 15 (1993) Human Rights Quarterly 77, 81.
[169] O O'Neill, 'Hunger, Needs, and Rights,' in S Luper-Foy (ed), *Problems of International Justice* (Westview Press 1988) 76.
[170] See further, on this, Frantziou (n 68) chapter 4.
[171] PP Craig, 'The ECJ and Ultra Vires Action: A Conceptual Analysis' (2011) 48:2 *Common Market Law Review* 395, 434.

tool of EU law in all areas that fall within its scope. Thus, seen *qua* mere invocability,[172] direct effect appears obsolete since all rights give rise to some interpretive duties on courts, regardless of their ability to meet the direct effect conditions. Equally, seen as a means of enforcing rights (as the case law on Article 47 has highlighted), direct effect is irrelevant from the perspective of securing better constitutional protection of the core content of different provisions of the Charter, as it remains justifiable largely by rationales of primacy and effectiveness achievable through private enforcement.[173]

In turn, while the operation of rights in the Union to date has been capable of comprising a wide range of actors as both right-holders and duty-bearers,[174] which has certain benefits for the protection of human rights (e.g. in the field of horizontal application), it can be seen as unduly reductionist in two respects. First, the continued reliance on the direct/indirect effect framework is unresponsive to the purposes for which human rights are held. Attribution to particular actors has a clear impact on minimum standards of protection, as it can reduce limitations to fundamental rights created by the rights of others. For example, such a principle might have changed the outcome of headscarf cases such as *Achbita*, where the Court's analysis of the rights of others effectively comprised a right to a specific corporate image.[175] The foundation of this analysis in human rights law is not clear and can be contrasted with the much more limited accommodation of corporate rights in the Convention framework,[176] where they are served insofar they play a role in the democratic public sphere that fundamental rights set up (the ECtHR recognises, e.g., the need for freedom of expression for the press).[177] Secondly, a more detailed principle of attribution beyond direct effect could have altered the bearing of rulings such as *Egenberger*, where it is unclear, as discussed earlier, why the reliance upon procedural rights (e.g. an effective remedy) should be directed against the private actors breaching the substantive provisions (non-discrimination), rather than the state. While it is indeed compatible with the Charter's text and context[178] as well as with human rights theory that certain rights should create obligations for a range of actors beyond states,[179] that does not mean that they create the *same* obligations for all of these actors or that they do so for the same reasons.

It follows that, rather than seeing the individual as at once a subject and an object of EU integration,[180] the Charter requires a different principle of attribution – one which recognises that direct effect is just a way of invoking rights, and not necessarily the best legal representation of 'responsibilities and duties with regard to other persons, to the

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[172] S Prechal, 'Does Direct Effect Still Matter?' (2000) 37:5 *Common Market Law Review* 1047. For a more recent account, see S Robin-Olivier S, 'The Evolution of Direct Effect in the EU: Stocktaking, Problems, Projections' (2014) 12 *ICON* 165.
[173] For a critique of the Court's incrementalism, see C Barnard, 'The Charter, the Court – and the Crisis' (2013) Cambridge Legal Studies Research Paper Series, Paper no 18/2013, <http://www.law.cam.ac.uk/ssrn/>, accessed 8/01/2018, 8-9.
[174] Weiler (n 7) 103.
[175] Achbita (n 56) para 39.
[176] See, e.g. *Eweida and others v United Kingdom*, App. Nos. 48420/10, 59842/10, 51671/10 and 36516/10, ECtHR 15 January 2013, para 94.
[177] Ibid; see also *The Sunday Times v United Kingdom*, App. No. 6538/74, ECtHR 26 April 1979, esp. para 67.
[178] See further Frantziou (n 68).
[179] See, e.g., on the application of a form of the respect-protect-fulfil framework to corporations, J Ruggie, 'Protect, Respect and Remedy: A Framework for Business and Human Rights. Report of the Special Representative of the United Nations Secretary-General on the issue of human rights and transnational corporations and other business enterprises', A/HRC/8/5, 7 April 2008 (the so-called 'Ruggie Guidelines').
[180] Weiler (n 7).

human community and to future generations', as proclaimed in the Charter's Preamble. Combined with an understanding of all rights as entailing positive and negative elements, developing duties to observe human rights as requiring protection for and against specified actors depends *both* on the normative content of a human right and on the dynamics of the legal relationship within which that right is invoked, rather than being based solely on the nature of the obligation as invocable 'as such.'[181] In turn, acknowledging that direct effect is an inadequate way of ensuring that fundamental *rights and obligations* attach to the appropriate actors – i.e. those with a valid claim to the rights on the one hand and those who are capable of securing respect for fundamental rights within and beyond the individual case, on the other[182] – could help in structurally embedding standards for the protection of fundamental rights within EU law more consciously and less casuistically.

C. Incommensurability

If the attribution of fundamental rights to specific right-holders and duty-bearers depends on reasons for the protection of fundamental rights compatible with the Charter's understanding of the Union as a constitutional polity broader than the market, then the adjudication of those rights must, similarly, evolve away from market constitutionalism.[183] Such an argument does not result from the idea that all aspects of the Treaties have a constitutional status, taken in its initial context, but because today that parity of status prevents rights from assuming protection for positive reasons related to their content, rather than *in relation* to the potential restrictions they may create for other aspects of EU primary law.[184]

Indeed, as noted earlier on, the quest for a fair balance between social and economic Union interests rewrites the balancing exercises already inherent in the adjudication of the Charter's provisions. As section III.B has highlighted, the Charter itself expresses the need for a balanced approach to rights (rather than balancing between the two goals mentioned above) by defining specific limitations for some of its provisions through conditionality on pre-existing 'national laws and practices' as well as through the general limitations clause in Article 52(1). Emphasising a further need for a fair balance thus overshadows the Charter's attempt to identify its own justificatory apparatus, which its distinct sets of provisions reflect.[185] In proclaiming the indivisibility of a defined set of values through its thematic sets of provisions in particular, it may be argued that the Charter does not only seek to overcome the inferior status of the social rights embedded therein but also – if indeed not primarily – to express the need for rights to contribute to an overarching and non-abrogable system of values not just built for a social market economy but, rather, as the Charter's Preamble proclaims, for a democracy subject to the rule of law.

In such a context, rights cannot be meaningfully expressed in competition with other norms or split into economic, individual, or private autonomy-inducing elements on the one hand and participatory, collective, social or public-autonomy-manifesting elements on the other. That is not to say that rights cannot be defined with sensitivity to a multitude of

[181] Frantziou (n 68), chapters 7 and 8.
[182] E.g. by attributing those obligations to classes of employers, business associations, employee associations etc.
[183] See further PP Craig, 'Constitutions, Constitutionalism, and the European Union' (2001) 7:2 *European Law Journal* 125, 141– 2.
[184] On the need for a clearer hierarchy or rights over market interests see further Grimm (n 40) 469ff.
[185] Frantziou (n 67). See also Williams, 'Taking Values Seriously' (n 36) 567.

considerations or that they cannot be readjusted in the public sphere over time.[186] However, as Zürn reconstructs Habermas's famous argument, balancing is at odds with the character of fundamental rights as legal claims that 'may not be treated as merely one among other competing goods to be weighed and transitively ordered on a case-by-case basis.'[187] These rights have a 'transsubjective'[188] character, in that they amount to more than the sum of their outcomes: they at once support and are necessitated by the democratic process and it is in that process alone, as requiring an irreducible conception of freedom through both private and public autonomy, that they can achieve their interpretive potential. The incommensurability of rights with respect to other interests is thus a side-effect of the mutual presupposition between fundamental rights and democracy: rights attaching to basic subsistence (such as environmental justice and minimum welfare); freedoms (to entrepreneurial activity or to be free of government interference); and participation (such as the right to vote) are all in equal parts essential for making reasoned democratic decision-making possible.[189]

It follows that the need for a 'break' with prior case law suggested earlier need not be taken to mean that the Court should rely on legally uncertain or as yet unidentified principles of interpretation but, rather, that the adjudication of constitutional norms entails reasonable justifications for the interpretation of rights, rather than merely an application of past case law.[190] In this regard, defining the core content of rights by reference to the values – not rigid and metaphysical but explicit and politically agreed – which are expressed in the Charter's distinct titles, read in the light of the Charter's aspiration of democratic decision-making, can be a more convincing justificatory starting point than the idea of a 'fair balance' between the economic and social goals of the single market.

D. Interim Conclusion: A System for Protecting Fundamental Rights under the Charter

This section has proposed a system for protecting fundamental rights under the Charter through the recognition of: a. the tripartite typology of human rights; b. a principle of attribution of rights based both on the content of rights and on the relational dynamics that distinguish mere private power (sanctionable through civil law and its remedies) from public or political power (sanctionable through constitutional law and its remedies), and c. that fundamental rights are incommensurable as essential tenets of democracy and the rule of law, to which the Charter explicitly aspires. While each of these elements is significant in its own right, however, it should be borne in mind that they are not strictly distinguishable into compartments or possible to implement one by one in practice. Rather, their meaningfulness depends on a comprehensive system of rights protection that accommodates these dimensions alongside each other. Furthermore, it is not suggested that these three proposed changes would result in a perfect framework for the protection of fundamental rights under the Charter – a Charter which, after all, can itself be criticised for poor drafting, limited follow-through in its much-awaited innovations such as indivisibility

[186] See further, for such an argument, R Alexy, 'Balancing, Constitutional Review, and Representation' (2005) 3 *ICON* 572.
[187] CF Zürn, 'Deliberative Democracy and Constitutional Review' (2002) 21 *Law and Philosophy* 467, 514.
[188] Ladeur (n 58) 253.
[189] J Habermas, 'On the Internal Relation between the Rule of Law and Democracy' in J Habermas, *The Inclusion of the Other: Studies in Political* Theory (Polity Press 1999) 261-2.
[190] That function, arguably, distinguishes constitutional law from ordinary statutes. See Zurn (n 187) 515-16; see further K Günther, *The Sense of Appropriateness: Application Discourses in Morality and Law* (tr: J Farrell, State University of New York Press 1993).

and, despite the appeal to popular authorship, unimpressive recognisability by EU citizens.[191] Nevertheless, building these elements into the mounting case law on the Charter could offer a more coherent rendering of all rights, loyal both to their universal outlook and their politicising qualities. It could thus help with putting into practice the idea that fundamental rights are a tight network of interrelated, indivisible, and non-negotiable preconditions of the idea of ever-closer Union, within which the Charter emerged.

V. Conclusion

What distinguishes a successful bill of rights from a limited or unsuccessful one? Ultimately, one might argue, such an assessment can only rest upon the extent to which a bill of rights is used in practice, both in the sense of being invoked by right-holders before the courts and in being duly applied within the court system to appropriate duty-bearers with sufficient deterring effects. By using numerical indicators on the application of the Charter, cross-checked through a closer analysis of the ways in which the Court of Justice has altered its position vis-à-vis the protection of fundamental rights as a result of the Charter's entry into force in a selection of cases, this paper has sought to show that the Charter of Fundamental Rights has been successful in respect of its symbolic, procedural, and individual-rights-affirming aspects; but that it has been less radical in delivering on its promise of protection of the different types of rights enshrined therein.

More specifically, the analysis in both Section II and Section III highlighted that the case law over the ten years of the Charter's binding existence shows significant elements of progress towards an understanding of fundamental rights as constitutional obligations stemming from a unitary source, compared to the Court's earlier case law. Whilst no longer an 'afterthought'[192] for the Union, however, fundamental rights continue to display important limitations in terms of theoretical justification, due to a continued use of a misleading dialectic between the social and the market in the Charter era and to a view of rights as individually exercisable interests. This problem is manifested in the way and extent to which the Charter has been litigated, which shows a slower and much more diversified protection of provisions such as collective employment rights and freedoms. A lack of purposive justification is similarly evident in the embedding of positive duties into procedural rights and in a corresponding marginalisation of rights more vaguely or conditionally framed, resulting from a focus on direct effect or invocability of a right 'as such' – a focus which feeds a problematic assumption that rights that do not meet this test do not give rise to justiciable standards.

It follows that, ten years after the attribution of binding effect to the Charter, the 'federal question'[193] this instrument had raised at the time of its proclamation has only in part been answered: on the one hand, the case law speaks of a Union *qua* polity insofar as the Charter's field of application and the Court's reliance upon it, as opposed to other sources of protection, have been consistent. On the other hand, the continuing propensity of the Court to translate market freedoms into rights,[194] combined with a legalistic reliance on internal principles of adjudication stemming from the more hybrid private/public model of EU internal market law, loom over the Charter's effectiveness as a binding constitutional instrument. In the author's view, a more confident assumption of elements of human rights

[191] Commission Report 2018 (n 20), p 6.
[192] Douglas-Scott (n 39) 678.
[193] Eeckhout (n 32).
[194] See n 60.

law, including its tripartite conception of human rights obligations; a principle of attribution of these obligations beyond direct effect, and a conception of the core layers of fundamental rights as incommensurable with other goods, albeit subject to defined limitations, would be significant steps towards allowing a more confident, yet non-isolationist, human rights jurisprudence about the Charter to develop. It remains to be seen whether, in the next ten years of the Charter's application, such steps could succeed in ensuring that *no* fundamental rights – and not just fundamental rights which are invocable 'as such' – become, to return to Advocate General Bot's terminology, 'a mere entreaty.'[195]

[195] *Bauer* Opinion (n 1) para 95.