

# A 'right to have rights' in the EU public sphere? An Arendtian justification for the application of the EU Charter of Fundamental Rights

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# A ‘right to have rights’ in the EU public sphere? An Arendtian justification for the application of the EU Charter of Fundamental Rights

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## Abstract

This paper discusses the Court’s reasoning in interpreting the EU Charter, using recent case law on horizontal effect as a case study. It identifies two possible means of interpreting the provisions of the Charter: firstly, an approach based on common values (e.g. equality or solidarity) and, secondly, an approach based on access to the public sphere. It argues in favour of the latter. Whereas an approach based on common values is more consonant with the development of the case law so far, it is conceptually problematic: it involves subjective assessments of the importance and degree of ‘sharedness’ of the value in question, which can undermine the equal constitutional status of different Charter provisions. Furthermore, it marginalises the Charter’s overall politically constructional character, which distinguishes it from other sources of rights protection listed in Art 6 TEU. The paper argues that, as the Charter’s provisions concretise the notion of political status in the EU, they have a primarily constitutional, rather than ethical, basis. Interpreting the Charter based on the very commitment to a process of sharing, drawing on Hannah Arendt’s idea of the ‘right to have rights’ (a right to access a political community on equal terms), is therefore preferable. This approach retains the pluralistic, post-national fabric of the EU polity, as it accommodates multiple narratives about its underlying values, while also having an inclusionary impact on previously underrepresented groups (e.g. non-market-active citizens or the *sans-papiers*) by recognising their equal political disposition.

## 1.1 Introduction

Is it necessary to justify the application of the EU Charter of Fundamental Rights, when a situation falls within the scope of EU law? Is it not sufficient to engage merely in a discussion – difficult in its own right<sup>1</sup> – of when the scope of EU law is engaged and to then apply the provisions of the Charter once the latter is established, as the list of fundamental rights applicable within the European Union?<sup>2</sup> In one sense, this is indeed the case. Perhaps there would be no reason to engage in a normative

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\* Lecturer, University of Westminster. I am very grateful to Lea Raible for comments.

<sup>1</sup> For insightful discussions see A Rosas, ‘When does the Charter of Fundamental Rights applicable at national level?’ (2012) 19:4 *Jurisprudence* 1269; K Lenaerts, ‘Exploring the Limits of the EU Charter of Fundamental Rights’ (2012) 8:3 *EuConst* 375.

<sup>2</sup> Case C-571/10 *Kamberaj v Istituto per l’Edilizia sociale della Provincia autonoma di Bolzano (IPES)*, ECLI:EU:C:2012:233, paras 62-63 and 79-81. See also L Ankersmit, ‘Case C-571/10 Kamberaj: the Charter and not the ECHR has effect in national legal orders’ *European Law Blog* 26 April 2012, available at: <http://europeanlawblog.eu/?p=433> (accessed 10 June 2016).

justification of the application of the EU Charter, if its provisions could be understood in the same manner across the Union, so that EU and Member State fundamental rights standards fully overlapped.<sup>3</sup> The Charter is, after all, as its preamble makes clear, an instrument that enshrines fundamental rights common to the Member States, which are therefore already protected, in some form, in national law.

Despite being ‘common’ as a matter of principle though, fundamental rights are not always commonly interpreted across the EU. Their meaning is the subject of a great deal of constitutional debate. For example, beyond a bare minimum, there are substantial variations in the interpretation of human dignity,<sup>4</sup> as well as, as the *Melloni* judgment revealed, in the interpretation of the scope of the right to a fair trial within the EU.<sup>5</sup> To the extent that the Charter does not give rise merely to a minimum floor of rights but, rather, to definitive interpretations of their meaning across the EU<sup>6</sup>, an assessment of why the Charter should apply and in what way it offers a ‘better’ protection of fundamental rights than national law is therefore necessary.<sup>7</sup> Establishing that a situation falls within the scope of EU law and the EU Charter is not in itself sufficient in order to justify the choice of a *particular* interpretation of its provisions by the Court of Justice. How should such an assessment be made? On what basis can the Court of Justice decide where to place the Charter standard, so as to ensure both legal certainty and the legitimacy of its interpretation across the Union, even where national constitutional standards differ?

The most prominent justification for the application of fundamental rights in the EU to date, both in academic discourse and in the Court’s case law, has been the commonality of values from which fundamental rights are derived (such as human dignity, solidarity etc). As this paper aims to demonstrate, this approach is problematic in the Charter context: it can result in rather arbitrary judicial assessments of the importance of its different provisions and, most notably, those contained in its Solidarity chapter. This risks marginalising the Charter’s overall politically

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<sup>3</sup> In this article, I shall leave aside the question of the application of the EU Charter to EU institutions and discuss only its application within the Member States.

<sup>4</sup> C McCrudden, ‘Human Dignity and Judicial Interpretation of Human Rights’ (2008) 19:4 *EJIL* 655, 698ff.

<sup>5</sup> Case C-399/11 *Melloni v Ministerio Fiscal*, ECLI:EU:C:2013:107.

<sup>6</sup> *Ibid*, paras 56-60.

<sup>7</sup> This is indeed essential in cases concerning shared competences, in line with the principle of subsidiarity (Art 5(3) TEU).

constructional character<sup>8</sup> as a list of EU-wide public law commitments, which differentiates it from other sources of rights protection listed in Art 6 TEU. Instead, this paper argues that, in light of its drafting history and relationship to other sources of fundamental rights within the EU (the general principles of EU law and the European Convention of Human Rights), the most appropriate normative justification for the application of the Charter lies in its potential of delivering political equality in the post-national context.

More specifically, it will be argued that the Charter gives concrete meaning to the notion of political status in the EU public sphere and thus has a primarily constitutional, rather than ethical, basis. Drawing upon Hannah Arendt's idea of the 'right to have rights' as a right to access a political community on the basis of equality, the paper proposes that the Charter should be viewed primarily as a commitment to the process of sharing, rather than focusing on the 'sharedness' of particular values as the underpinning of rights. Understanding the right to have rights as the main normative justification for the Charter has significant benefits from the perspective of post-national constitutional adjudication, as it retains both the pluralistic constitutional fabric of the EU polity and can accommodate multiple narratives about its underlying values. This approach is preferable conceptually, because it recognises the structural role of fundamental rights in a public sphere that does not merely comprise the market. At the same time, it also benefits the adjudication of fundamental rights claims in the EU on a more practical level: understanding the supranational operation of fundamental rights based on the right to have rights organises the interaction of the constitutional courts entrusted with protecting these rights across the different levels of the EU legal order and limits the homogenising character of the supranational standard.

The paper starts by discussing the constructional role of the Charter in the EU public sphere, demonstrating its constitutional significance (section 1.2). It then goes on to show that justifying the application of the Charter on the basis of commonality of values, often translated into the development of general principles of law, is unsatisfactory. It risks reducing the constitutional character of the Charter as the

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<sup>8</sup> On the constructional nature of fundamental rights in the public sphere, see G Souillac, 'From Global Norms to Local Change: Theoretical Perspectives on the Promotion of Human Rights in Societies in Transition' in SA Horowitz and A Schnabel (eds), *Human rights and societies in transition: causes, consequences, responses* (United Nations University Press 2004); J Habermas, 'Remarks on legitimation through human rights' in J Habermas, *The Postnational Constellation* (M Pensky tr, Polity Press 2001) 117.

product of a process of political authorship and ascribes to the Court of Justice the function of assessing the relative significance of its different provisions (section 1.3). Ultimately, the paper argues that, as a list of constitutional rights that take effect beyond the state level, the application of the Charter can be more adequately justified based on the right to have rights - a conception of fundamental rights as vehicles of political membership (section 1.4). The arguments made herein are illustrated through the use of examples drawn from the field of the horizontal effect of fundamental rights.

## 1.2 Understanding the Charter's constructional role in the EU public sphere

Constitutional law aims at the preservation of institutions that safeguard the conditions of common life that a given society commits to and is indeed premised on.<sup>9</sup> In a democratic polity, the constitution involves the idea of authorship on the part of its members (the public).<sup>10</sup> At the same time, the constitution also defines the authors in the sense that it envisions their collective 'politicalness' in a particular manner.<sup>11</sup> Thus, whereas most constitutional thought will entail some universalist aspirations, to the extent that it is intended to organise common life by making arrangements that are considered the best possible<sup>12</sup>, as Dowdle and Wilkinson rightly note,

'constitutional discourse always has to acknowledge its rootedness in a particular polity, to acknowledge some spatial boundary and limit. [...] [T]he constitution is always constructed in a specific social setting with a specific political morality and contributes towards the building of a particular state or polity.'<sup>13</sup>

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<sup>9</sup> G Teubner, *Constitutional fragments: societal constitutionalism and globalization* (OUP 2012) 142-3. See also: J Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries in L Alexander, *Constitutionalism: Philosophical Foundations* (Cambridge University Press 1998) 152, 152-154.

<sup>10</sup> J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press 1996) 143; H Arendt, *On Revolution* (London: Penguin, 1990) 145. See also: UK Preuss, 'Constitutional Power-Making for the New Polity: Some Deliberations on the Relations Between the Constituent Power and the Constitution' (1992-1993) 14 *Cardozo Law Review* 639.

<sup>11</sup> SS Wolin, 'Collective Identity and the Constitutional State' in *The Presence of the Past: Essays on the State and the Constitution* (Johns Hopkins University Press 1989) 9; Dowdle and Wilkinson (n 12) 6-7. See, more generally: M Loughlin and N Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2007).

<sup>12</sup> MW Dowdle, and MA Wilkinson, 'On the Limits of Constitutional Liberalism: In Search of a Constitutional Reflexivity' (November 3, 2015), NUS Law Working Paper No. 2015/009. Available at SSRN: <http://ssrn.com/abstract=2686013>, accessed 10 May 2016, 20.

<sup>13</sup> *Ibid.*, 20-21; See also Neil Walker, 'The Place of European Law' in G De Búrca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (OUP 2012) 57, 65.

In turn, fundamental rights instituted through constitutional law<sup>14</sup>, whether national or post-national, are important claims about how a particular political community can be legitimately run.<sup>15</sup> The creation of a set of rights with a ‘fundamental’ status ascribes to these rights direct organisational functions.<sup>16</sup> In addition to any questions about what protections a dignified, minimally worthwhile human life entails, fundamental rights concern the conditions of membership of a community defined by a particular institutional framework.<sup>17</sup>

Understood in this sense, fundamental rights to equality, freedom of speech, or privacy, do not just protect basic human needs, but are at the same time preconditions for the existence of a diverse and inclusive public sphere.<sup>18</sup> A breach of a fundamental constitutional right does not only concern the individuals affected by that breach, but also the way in which a political community collectively chooses to organise itself.<sup>19</sup> As Geneviève Souillac has usefully pointed out, particularly where constitutional transitions are taking place (such as in the EU today), fundamental rights lists can assume an ‘architectural role’.<sup>20</sup> They have a constructional function for an emerging public sphere, because they institutionalise conditions for ‘appropriate forms of governance’ to be developed and provide ‘structural legitimacy’ to newly founded political institutions.<sup>21</sup> In other words, fundamental rights proclaimed within a political community have an inherently public dimension. They are not only about the recognition of a person as a human being, but also about the recognition of their

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<sup>14</sup> I use the terms public law and constitutional law interchangeably to denote the law applicable to the process of governing : M Loughlin, *The Idea of Public Law* (OUP 2003) 5-7.

<sup>15</sup> Loughlin, *ibid.* See also M Loughlin, *The Foundations of Public Law* (OUP 2010) 108.

<sup>16</sup> Of course, this is true only to the extent that this political community can be considered as ‘authored’ by its members : Habermas, (n 10) 143.

<sup>17</sup> There are, of course, significant overlaps between human rights and constitutional rights taking effect within particular communities. It is important to clarify that separating the justifications for human rights and for fundamental constitutional rights is not intended to relativise the importance of the former within constitutional law: Habermas, (n 10) 118, 456ff. Rather, ‘human rights themselves are what satisfies the requirement that a civic practice of the public use of communicative freedom be legally institutionalised’: Habermas, (n 10) 89. The legitimacy of constitutional rights lists which do not include human rights could be strongly challenged, to the extent that human rights have enabling functions and thus constitute basic conditions in order for the members of a political community to take part in collective deliberation meaningfully: J Habermas, ‘On the Internal Relation Between the Rule of Law and Democracy’ in J Habermas (ed), *The Inclusion of the Other: Studies in Political Theory* (Polity Press 1999) 253, 259. A positive law paradigm that has rid itself of human rights will be inherently problematic: in order to bring about a free and substantively equal public sphere, human rights and positive law are mutually presupposed: *Ibid.*, 258-62.

<sup>18</sup> Habermas, (n 10) 321.

<sup>19</sup> PW Kahn, ‘Community in Contemporary Constitutional Theory’ (1989) 99 *Yale Law Journal* 1, 20-28; See also B Ackerman, ‘The Storrs Lectures: Discovering the Constitution’ (1984) 93 *Yale Law Journal* 1013, 1040-1043; and, more generally, Habermas (n 10)

<sup>20</sup> Souillac (n 8) 79.

<sup>21</sup> *Ibid.* 81, 93.

political status *within* a defined institutional framework.<sup>22</sup> In turn, constitutional adjudication aims precisely at the safeguard of the process of self-government / collective authorship.<sup>23</sup>

A constitutional understanding of rights resonates well with the EU Charter, when the latter is placed in its drafting context. As is well known, the concept of fundamental rights was initially absent from the Treaties. It only entered EU law through judicial interpretation, in the form of general principles of law developed in the Court's early case law.<sup>24</sup> Today, however, the Charter collects fundamental rights in the EU and ascribes to them a constitutional status.<sup>25</sup> It contains a diverse set of provisions, such as the right to life<sup>26</sup>, the prohibition of torture and inhuman and degrading treatment or punishment<sup>27</sup>, and respect for private and family life<sup>28</sup>, as well as rights to fair working conditions<sup>29</sup>, to be informed and consulted in the workplace<sup>30</sup> and the right to take collective action, including the right to strike.<sup>31</sup> Moreover, it includes a series of provisions with a less universal character, such as the free movement of persons<sup>32</sup> and political rights for EU citizens, such as the right to vote and to stand as candidate in European elections.<sup>33</sup>

Yet, in spite of the wide-ranging nature of the protections it enshrines, the Charter's preamble makes clear that this document does not introduce new rights, but merely enhances the visibility of existing rights within EU law.<sup>34</sup> For this reason, it has been argued that the Charter does not change much in the EU fundamental rights regime, because fundamental rights were already 'for the informed observer, there in the Court's case law prior to the entry into force of the Charter, in the form of general

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<sup>22</sup> H Arendt, *The Origins of Totalitarianism* (2<sup>nd</sup> ed, Harcourt 1958) 299-301; Habermas (n 10) 89

<sup>23</sup> MA Wilkinson, 'Political Constitutionalism and the European Union' (2013) 76:2 *Modern Law Review* 191, 209. See also M Loughlin (n 14) 108ff.

<sup>24</sup> Case 11/70, *Internationale Handelsgesellschaft v Einfuhr- Und Vorratsstelle Getreide* [1970] ECR I-1125, para 4.

<sup>25</sup> Article 6(1) TEU provides that the Charter shall have "the same legal value as the Treaties".

<sup>26</sup> Article 2 EUCFR.

<sup>27</sup> Article 4 EUCFR.

<sup>28</sup> Article 7 EUCFR.

<sup>29</sup> Article 31 EUCFR.

<sup>30</sup> Article 27 EUCFR.

<sup>31</sup> Article 28 EUCFR.

<sup>32</sup> Article 45 EUCFR.

<sup>33</sup> Article 39 EUCFR.

<sup>34</sup> House of Lords EU Select Committee, 'The Treaty of Lisbon: An Impact Assessment' (HL Paper 62, August 2007) paras 5.37-5.41.

principles.<sup>35</sup> While the Charter may not contribute to the EU fundamental rights regime in the sense of creating new content though, when understood in light of the functions of public law, discussed above, as well as the history of European integration, it does have a distinct constitutional import.

The Charter carried a symbolic meaning as EU Member States entered a phase of deeper political integration under the Lisbon Treaty.<sup>36</sup> In line with its preamble, its fifty substantive provisions express a commitment, on the part of ‘the peoples of Europe’, ‘to share a peaceful future based on common values’ (those of ‘human dignity, freedom, equality and solidarity’, which are in turn to be delivered based on ‘the principles of democracy and the rule of law’).<sup>37</sup> Furthermore, while the Charter only acquired binding force on the 1<sup>st</sup> of December 2009, together with the Lisbon Treaty, it is important not to forget that it is in fact at least one decade older. The Charter was drafted at the Cologne European Council in 1999, taking over the recommendations put forth in an influential report by Professor Simitis, which had expressed the worry that it was no longer sufficient for EU fundamental rights to mirror the ECHR but that, rather, a European Bill of Rights reflecting the “Union experience” was required.<sup>38</sup>

It was therefore clear from the very beginning that the idea of an EU Charter would not be designed merely as a mirroring of regional and global human rights standards, but precisely because these standards were not a sufficient reflection of the things that made up a properly-so-called EU constitutional identity.<sup>39</sup> The designation of a group of rights as ‘fundamental’ under EU law was intended to give these rights independent interpretative value vis-à-vis Member State and international standards (not necessarily by antagonising these standards but by emphasising that EU fundamental rights were based on but, at the same time, not simply reducible to, these standards alone). The Charter thus added structure to novel, at that time, concepts,

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<sup>35</sup> S Morano-Foadi and S Andreidakis, ‘Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights’ (2011) 17 *European Law Journal* 595, 599.

<sup>36</sup> G De Burca and B Aschenbrenner, ‘The Development Of European Constitutionalism And The Role Of The EU Charter Of Fundamental Rights’ (2003) 9 *Columbia Journal of European Law* 355, 364–65.

<sup>37</sup> Preamble to the EU Charter of Fundamental Rights, [2010] OJ C 83/389.

<sup>38</sup> European Commission Expert Group on Fundamental Rights, *Affirming Fundamental Rights in the European Union: Time to Act* (Office for Official Publications of the European Communities 1999) 10.

<sup>39</sup> See Articles 2 and 4 TEU.



such as EU citizenship, and aspirations, such as federalisation.<sup>40</sup> It was, in other words, proposed as an attempt to distil – or even to construct – a list of public goods that define a collective ‘we’ to which EU citizens from different states would relate. A binding Charter signalled not only an institutional commitment to fundamental rights in respect of EU action, but also a potential basis for civil society to exert pressure on the EU to ensure that its actions complied with basic rights and freedoms.<sup>41</sup>

While its substantive provisions were not drastically altered since its non-binding declaration in the Treaty of Nice, it was only under the negotiations concerning the Constitutional Treaty that the Charter would acquire its current preamble, a more defined scope of application and, crucially, a binding legal status. The working documents of the Constitutional Convention reveal that the Charter was understood as an important civic bond. Not only did the Constitution envisage a judicially cognisable and enforceable Charter, but it is also clear from the *travaux préparatoires* that all of the participants had either actively supported or, at least, favourably considered a form of incorporation in the Treaties that would give the Charter a constitutional – and not a merely legally binding – status.<sup>42</sup> As De Burca and Aschenbrenner note, ‘[t]he decision to confer legal status on the Charter is thus necessarily linked with the discussion on a constitution for Europe and especially with the political debate on the future shape of the EU.’<sup>43</sup> Its symbolism as a platform for a minimum common constitutional identity is therefore crucial to understanding the Charter’s constitutional role. Constitutional symbols are important in the forging of bonds and the creation of a public, especially in a post-national context, where the constitution does not stem from a cohesive demos with clearly identifiable characteristics.<sup>44</sup>

Of course, it is questionable whether the Charter was in fact capable of delivering outcomes such as heightened legitimacy, constitutional identification, or a sense of belonging. Its drafting process has been criticised precisely for a lack of civic

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<sup>40</sup> See P Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’ (2002) 39 *Common Market Law Review* 945, 990.

<sup>41</sup> *Ibid.*

<sup>42</sup> European Union, *Preparatory Working Documents for the European Convention* (EUR-OP 2004) 190-1 (Final Report of Working Group II, CONV 354/02, 22 October 2002, 189).

<sup>43</sup> De Burca and Aschenbrenner (n 36) 372.

<sup>44</sup> See N Walker, ‘Postnational Constitutionalism and the Problems of Translation’ in M Wind and JHH Weiler (eds), *European Constitutionalism Beyond the State* (CUP 2003) 27.

participation and, thus, for a lack of representativeness.<sup>45</sup> This concern is heightened in the aftermath of the rejection of the Constitution in referenda in France and the Netherlands and the integration of the Charter within the Lisbon Treaty. It is well-documented in the literature that the compromise reached in Lisbon resulted in a much more sombre Treaty, with the Charter being one of the few remnants of the symbolism that had characterised the Constitution.<sup>46</sup>

Indeed, the lack of a coherent constitutional narrative within the Lisbon Treaty has understandably left the Court hesitant as regards the Charter's legal value. Even though the Charter still rests 'at the highest possible level of European Union law equal to the Treaties'<sup>47</sup>, the grandiose opening of its preamble, which appeared at home in the Constitution for Europe, now seems to some extent out of place against the background of the dry and formal tone that characterises the biggest part of the Treaty of Lisbon, the Treaty on the Functioning of the European Union.<sup>48</sup> Furthermore, as Dieter Grimm has recently highlighted, the Charter does not have *higher* constitutional status than any of the provisions of the Treaties, including provisions of the TFEU.<sup>49</sup> This renders its role in respect of interpreting other aspects of the Treaty unclear, and can result in tension in case of conflict between the provisions enshrined in the Charter and the market freedoms, which also have constitutional status.<sup>50</sup> These are significant obstacles to developing a coherent interpretation of fundamental rights under the Charter framework.

In spite of these concerns though, it is clear that, once placed within its historical and political context, the Charter must be considered in light of an attempt at democratisation and not merely of an *instrumental* constitutionalisation of the EU.<sup>51</sup> As Paul Craig has put it, 'the very fact of putting those pre-existing provisions in a thing called a Charter of Fundamental Rights does give them a degree of peremptory

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<sup>45</sup> De Burca and Aschenbrenner (n 36) 375–76. It has also been argued that the Charter was used as a shortcut to democracy rather than indicating a substantive concern with political inclusion: J Baquero Cruz, 'What's Left of the Charter? Reflections on Law and Political Mythology' (2008) 15:1 *Maastricht Journal* 65, 74.

<sup>46</sup> *Ibid.*, 73. See also PP Craig, *The Lisbon Treaty : Law Politics, and Treaty Reform* (OUP 2013) 21-23. See also M Dougan, 'The Treaty of Lisbon 2007: Winning Minds, not Hearts' (2008) 45:3 *Common Market Law Review* 617.

<sup>47</sup> J Kokott and C Sobotta, 'The Charter of Fundamental Rights of the European Union After Lisbon', *EUI Working Paper 2010/6*, 6 <<http://cadmus.eui.eu/handle/1814/15208>> accessed 20 March 2013.

<sup>48</sup> See Baquero Cruz (n 45) 73.

<sup>49</sup> D Grimm, 'The Democratic Costs of Constitutionalisation : The European Case' (2015) 21:4 *ELJ* 460, 469-471. Grimm notes that this is a problem of 'over-constitutionalisation' of EU law.

<sup>50</sup> *Ibid.* See Case 294/83, *Parti Ecologiste "Les Verts" v Parliament* [1986] ECR 1339, para 23.

<sup>51</sup> See PP Craig, 'Constitutions, Constitutionalism, and the European Union' (2001) 7:2 *European Law Journal* 125, 141-2. See also Eeckhout (n 40).

force that they would not otherwise have had.’<sup>52</sup> The creation and, subsequently, granting of binding effect to the Charter, are constitutionally important actions, in themselves. The Charter is premised on the understanding that the language of fundamental rights is a code to which European institutions, the Member States and, crucially, their peoples, commit.<sup>53</sup> It selects, collects and narrates fundamental rights in a novel manner from the perspective of EU law. It would thus be an understatement to say that the Charter *only* codifies existing protections of fundamental rights: in doing so, it defines a set of politically negotiated rights that incorporate national constitutional traditions but remain subject to judicial review at the supranational level.<sup>54</sup> This is a substantive and not merely formal constitutional novelty.

The process of putting together a supranational charter reflects a political culture premised on the protection of fundamental rights across different levels of the EU legal order, as well as a belief that the peoples that make up the EU, and not just EU institutions and Member States, identify with their authorship. Thus, the story the Charter tells operates in parallel with the Treaties: it is not primarily concerned with questions of EU law, such as free trade or competition, even though it also comprises some of the most important features of the EU as a free trade union (such as the freedom to conduct a business).<sup>55</sup> Rather, it is about how the EU should operate at the most basic level, as a social, economic *and* political union. This political function – or, at least, aspiration – sets the Charter apart from other sources of fundamental rights in the European Union, namely the European Convention and the general principles of EU law.<sup>56</sup>

In turn, the application of the Charter can be distinguished, at least at the level of justification, from the application of individual rights within EU law to date, which mostly attached these claims to the exercise, albeit in some cases very loosely<sup>57</sup>, of

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<sup>52</sup> See PP Craig, European Scrutiny Committee, ‘Oral evidence: The Application of the EU Charter of Fundamental Rights in the UK, HC 979, 22 Jan 2014 (published 3 Feb 2014), available at <http://data.parliament.uk/writtenevidence/WrittenEvidence.svc/EvidenceHtml/5574>, accessed 30/1/2015.

<sup>53</sup> It is noteworthy that, whereas the Charter’s preamble states that ‘the peoples of Europe’ commit to these rights, and therefore retains the formulation used in the Constitutional Treaty, the preambles of both the TEU and TFEU refer only to the heads of state of the Member States.

<sup>54</sup> Opinion of Advocate General Cruz Villalón in delivered on 1 March 2011 in Case C-69/10, *Samba Diouf v Ministre du Travail, de l’Emploi et de l’Immigration* [2011] I-07151, para 39.

<sup>55</sup> Article 16 EUCFR.

<sup>56</sup> Article 6 TEU.

<sup>57</sup> See, illustratively, Case C-413/99, *Baumbast and R v Secretary of State for the Home Department* (2002) ECR I-7091; Case C-200/02, *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of*

market freedoms.<sup>58</sup> Whereas, in the past, individual rights were largely a *product* of other EU action, the Charter represents a constitutive moment for European integration, in the sense that it defines a set of rights that must be met in order for *any* activity to be compliant with the basic premises upon which the EU is founded. Thus, even though the Charter may not extend the situations in which the EU can act, it adds a constitutional layer to the way in which it can act, that its political members have an active role in preserving. As a collectivity of fundamentals<sup>59</sup>, it serves an institutional role within a process of further integration, even if this did not come about in the manner, or as fully as, it had initially been envisaged.

If the Charter is understood as a constitutional instrument serving symbolic and organisational functions – an instrument that is, in other words, more about legitimacy and identification than it is about human rights standards<sup>60</sup> – against what normative criteria can its provisions be interpreted? First of all, the Court could make reference to the European Convention and to international standards of rights protection. However, this would merely solve the problem of where the minimum standard for the application of (some of) the Charter’s provisions is set, but would not necessarily provide sufficient guidance as to where to set the binding standard of rights protection beyond such a minimum. Another way in which the Court could justify the imposition of a particular standard would be by engaging in a comparative analysis of the common constitutional traditions of the Member States. However, in order to provide guidance as to the reasons for choosing a particular standard in cases where conflicting interpretations are possible within the national laws of the Member States, an assessment of what level of protection is most useful from the perspective of EU law would also be required.

Indeed, in order adequately to justify a specific interpretation of the fundamental rights enshrined in the Charter the Court needs to demonstrate both that it has considered substantively the functioning of the national and international constitutional traditions that feed into the EU fundamental rights regime and that its interpretation provides a coherent fit for the EU constitutional order. This requires an

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*State for the Home Department* [2004] ECR I-09925; Case C-34/09 *Zambrano v Office national de l’emploi* [2011] I-01177.

<sup>58</sup> The Court has interpreted the Charter’s scope of application broadly, thus ensuring its application in all matters pertaining to EU law: Case C-617/10 Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, EU:C:2013:105, para 19.

<sup>59</sup> See, generally, Teubner (n 9) 144-5.

<sup>60</sup> Baquero Cruz (n 45).

engagement with the reasons for protecting fundamental rights within the EU, as well as an assessment of the ideal division of powers and responsibilities therein. It follows that adjudicating at the EU level requires not only constitutional reasoning, but a kind of constitutional reasoning that matches a post-national polity: one that recognises the limits of supranational adjudication in the effective rendering of fundamental rights, enables individuals to exercise their rights as close as possible to their lives, and takes their sometimes localised concerns and different life choices (some more and some less affected by EU action) seriously. EU law therefore requires a theory for judging the application of fundamental rights, which can both coexist with a plurality of national constitutional systems and provide an adequate justification for the application of the supranational constitutional standard, the Charter.<sup>61</sup>

### **1.3 A justification of post-national fundamental rights based on common values**

Making explicit reference to common values is one of the ways in which the application of the Charter might be justified. As noted above, the idea of commonality of values is prominent in the Lisbon Treaty itself: Article 2 TEU<sup>62</sup> and the Charter's Preamble refer to values. Furthermore, the Charter's substantive chapters are premised thereon: they codify 'the indivisible, universal values of human dignity, freedom, equality and solidarity'.<sup>63</sup> These values could therefore be seen as the first point of reference for guiding the interpretation of the Charter's provisions at the EU level. As Joseph Weiler has noted, 'there is no European *Volk*', as a demos rooted in a singular, shared social and historical experience.<sup>64</sup> However, the existence of a set of common values, such as the ones mentioned above, confirms that a basic agreement regarding the normative bases of the Union as a project broader than the market is in place (particularly insofar as these values now have a prominent place in the Lisbon Treaty and the Charter itself).

Indeed, justifying interpretations of fundamental rights based on common values resonates well with the academic literature in this field as well as with the Court's justification of fundamental rights to date. For Weiler, the EU public sphere

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<sup>61</sup> See C Joerges, 'The Idea of a 3-Dimensional Conflicts Law as Constitutional Form' (2010) RECON Working Paper 2010/05, May 2010, available at [http://www.europeanrights.eu/public/commenti/jeorges\\_testo.pdf](http://www.europeanrights.eu/public/commenti/jeorges_testo.pdf), accessed 10 May 2016.

<sup>62</sup> See A Von Bogdandy et al, 'Reverse Solange - Protecting The Essence Of Fundamental Rights Against EU Member States' [2012] *Common Market Law Review* 490.

<sup>63</sup> Preamble to the EU Charter of Fundamental Rights, [2010] OJ C 83/389.

<sup>64</sup> JHH Weiler, UR Haltern, FC Mayer, 'European Democracy and its Critique' (1995) 18:3 *West European Politics* 4, 10.

operates ‘on the basis of shared values, a shared understanding of rights and societal duties and a shared rational, intellectual culture which transcend ethno-cultural differences’.<sup>65</sup> A similar outlook can be gleaned from Advocate General Maduro’s Opinion in *Kadi*. He envisioned the European Union as a hierarchical ‘municipal’ constitutional order premised both on foundational treaties and on values that the Court of Justice as a constitutional adjudicator was ultimately required to uphold.<sup>66</sup> He argued that the Court

‘cannot [...] turn its back on the fundamental values that lie at the basis of the Community legal order and which it has the duty to protect. Respect for other institutions is meaningful only if it can be built on a shared understanding of these values and on a mutual commitment to protect them.’<sup>67</sup>

As such, it is necessary to devote some space to the problems to which an application of the Charter as an instantiation of common values can lead.

A crucial prerequisite of this view is that the understanding of values is in fact ‘shared’. This is not always easy to establish. Even if a set of values that can be commonly agreed upon across EU states can be identified in Article 2 TEU and the Charter’s Preamble, it does not necessarily follow that these values are understood and implemented in the same way across the EU or that they are considered foundational in equal measure in each of its constituent legal orders, so as to be able to justify with any degree of certainty the application of a particular rendering of the Charter’s provisions.<sup>68</sup> In order to justify the application of the Charter on the basis of common values, the Court would therefore, at the very least, need to carry out a substantive comparative assessment of the ways in which they are common/shared, or indeed an independent evaluation of their ‘true’ meaning within the EU. In other words, if the Charter can be normatively justified on the basis of common values, this can only be done by making a careful distinction between the commitment to values as bases for political organization (which indeed follows from the Treaties) and the assumption that they themselves translate to a common constitutional stance regarding the parameters of their protection (which does not).

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<sup>65</sup> Ibid, 19.

<sup>66</sup> Opinion of Advocate General Póitres Maduro delivered on 16 January 2008 in Joined Cases C-402/05P and C-415/05P *Kadi and Al Barakaat v Council of the European Union and Commission of the European Communities* [2008] ECR I- 6351, 21.

<sup>67</sup> Ibid, para 44.

<sup>68</sup> One of the clearest examples of this is the value of solidarity: see Protocol 30.

To date, the Court's case law does not make this distinction. Rather than speaking about the normative content of values as a pre-legal condition<sup>69</sup> interpreted on the basis of rational argumentation concerning the common good<sup>70</sup>, the Court has mostly advanced an analysis of the extent to which a general principle of law derived from common constitutional traditions is in place concerning a certain value, such as equality. This is a highly problematic position, as a line of case law in the horizontal context and particularly in the context of non-discrimination and social rights demonstrates. In cases such as *Mangold* and *Kucukdeveci*, the Court has translated the EU-wide commitment to equality into a general principle of EU law protecting against age discrimination.<sup>71</sup> In these cases, the Court appeared to presume – without engaging in a substantive comparative exercise – that this general principle was common to the Member States and could therefore be invoked throughout the EU legal order, against Member States and private actors. However, in reality, the commitment to equal treatment did not necessarily mean, prior to these rulings, that protections against discrimination on grounds of age were in place in most Member States.<sup>72</sup> As such, the Court's justification for the application of the right to equal treatment in respect of age, namely that it constituted a general principle derived from common constitutional traditions, was both contestable as a matter of comparative constitutional law<sup>73</sup> and at the same time failed clearly to define the substantive meaning of the common value from which that right was, arguably, derived: equality.

This approach has been maintained – and in some cases heightened – even after the entry into force of the Charter, as demonstrated in rulings such as *Dominguez* and *AMS*.<sup>74</sup> In spite of the fact that Charter rights are the product of political legitimation, the Court has continued in a number of cases to render their exercise

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<sup>69</sup> Cf *Brunner v The European Union Treaty* (Cases 2 BvR 2134/92 & 2159/92) [1993] WL 965303, paras 41-44, footnotes omitted. See MA Wilkinson, 'Authoritarian Liberalism in the European Constitutional Imagination: Second Time as Farce?' (2015) 21:3 *European Law Journal* 313, 318-19.

<sup>70</sup> See J Rawls, 'The Idea of Public Reason Revisited' 64 *University of Chicago Law Review* 765.

<sup>71</sup> Case C-144/04, *Mangold v Helm* [2005] ECR I-9981; Case C-555/07, *Kucukdeveci v Swedex GmbH* [2010] ECR I-365.

<sup>72</sup> [PP Craig, 'The ECJ and ultra vires action: A conceptual analysis' \(2011\) 48:2 \*Common Market Law Review\* 395.](#)

<sup>73</sup> 2 BverfGE 2661/06 – *Honeywell*, 61, 68; For a detailed discussion, see: M Payandeh, 'Constitutional Review of EU Law after Honeywell: Contextualising the Relationship between the German Constitutional Court and the European Court of Justice' (2011) 48 *CMLRev* 9.

<sup>74</sup> Case C-282/10, *Dominguez v Centre Informatique du Centre Ouest Atlantique and Préfet de la Région Centre*, EU:C:2012:33; Case C-176/12, *Association de Médiation Sociale v Union Locale des Syndicats CGT Hichem Laboubi Union Départementale CGT Des Bouches-du-Rhône Confédération Générale Du Travail (CGT)*, EU:C:2014:2.

dependent on the existence of an antecedent general principle of law.<sup>75</sup> It does not however explicitly refer to the broader values that these fundamental rights enshrine and which may have been, if one were to accept that their shared meaning can be pinned down, sufficient justifications for reaching a particular constitutional interpretation. Thus, even though substantively engaging in a value-based approach to the application of rights, the Court has not openly articulated the basic premises of this position, or assessed the relative worth of different conceptions of particular values, such as equality, dignity, or solidarity, from an EU perspective. Furthermore, the Court's actual discussion of the Charter has appeared to undermine the idea, also clear from the Charter's preamble, that the values mentioned therein are in fact 'indivisible': rather, put simply, the effect of the Court's case law to date is that fundamental rights concerning equality enjoy a higher degree of protection than those concerning, primarily, solidarity.<sup>76</sup>

Thus, whereas in its case law the Court presents conclusions on the basis of seemingly uncontroversial general principles of law, the exercise is far from normatively innocent. It appears to second-guess the equal constitutional status of Charter provisions and thus judicially to reassess the extent to which the EU is premised on respect for each of the values mentioned in the preamble. This approach appears to confirm a view of European law as the product of moral consensus on the common good and the Court of Justice as its authoritative interpreter.<sup>77</sup> Its undertone seems to be an understanding of EU law as a progressive force towards truth<sup>78</sup> and, in turn, a vision of national constitutional laws as naturally 'suspect'.<sup>79</sup> There is, in other words, an assumption that integration through law can deliver social justice, if

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<sup>75</sup> Ibid. See also Case C-447/09, *Prigge and Others v Deutsche Lufthansa*, EU:C:2011:573, para 48; Case C-69/10, *Samba Diouf v Ministre Du Travail, De l'Emploi Et De l'Immigration* [2011] I-07151 para 49.

<sup>76</sup> *Dominguez and AMS* (n 74) indeed both concerned provisions of the solidarity chapter (the rights to paid annual leave and information and consultation within the undertaking enshrined in Articles 31 and 27 EUCFR respectively).

<sup>77</sup> F De Witte, 'The Architecture of a Social Market Economy' LSE Law, Society and Economy Working Papers 13/2015, available at <http://ssrn.com/abstract=! 2613907>, 22.

<sup>78</sup> A Albi, 'An Essay on How the Discourse on Sovereignty and the Co-Operativeness of National Courts Has Diverted Attention From the Erosion of Classic Constitutional Rights in the EU' in M Claes and others, *Constitutional conversations in Europe: actors, topics and procedures* (Intersentia 2012) 63; H Schepel and R Wesseling, 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe' (1997) 3 *European Law Journal* 165, 186.

<sup>79</sup> De Witte (n 78) 20.



allowed to flourish, and that it can do so even ‘without the involvement of politics.’<sup>80</sup>

As De Witte rightly notes:

‘The role of law, in the integration process, is very particular. It is used to depoliticise political questions, create de facto convergence of national rules, and to push forward a messianistic idea of Europe.[...] The problem with this understanding of law, however, is evident: it presumes consensus on the ‘good’ to be achieved. As such, EU law runs against the problem of legitimacy whenever it engages in redistributive practices (as opposed to regulatory questions).’<sup>81</sup>

Even cases which *prima facie* advance the substance of fundamental rights, such as *Mangold* and *Küçükdeveci*, have not offered a broader discussion of the limits of the Court’s jurisdiction in these fields – a crucial aspect of the operation of constitutional law – or of the role that these fundamental rights played in the development of the EU as a constitutional order with economic and social dimensions. Rather, they have been confined to specific provisions that the Court has considered ‘general principles’ of law, in a line of case law that favoured individual assessments of specific rights (such as age discrimination, but not annual leave), without offering an overall view of the role of fundamental rights in the post-national context.<sup>82</sup>

It follows that Whereas the Court may be in a position to justify, in principle, particular interpretations of the Charter on the basis of common values that feed into an EU-wide understanding of fundamental rights, the manner in which the case law to date has reconstructed common values is objectionable as it generally avoids this assessment.<sup>83</sup> A theory of the adjudication of fundamental rights needs to be understood as a permanent, structural feature of the EU constitutional order in order to be meaningful. Developing adequate rational argumentation about justice is necessary so as to establish a culture of mutual respect in a constitutionally pluralist community.<sup>84</sup> As John Rawls imagined it:

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<sup>80</sup> Ibid, 19.

<sup>81</sup> Ibid, 22.

<sup>82</sup> For a more detailed account of these issues, see: E Frantziou, ‘The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality’ (2015) 21:5 ELJ 657,

<sup>83</sup> L Pech, ‘Between judicial minimalism and avoidance: The Court of Justice’s sidestepping of fundamental constitutional issues in *Römer* and *Dominguez*’ (2012) 6 CMLRev 1841, 1857.

<sup>84</sup> Habermas, *Between Facts and Norms* (n 10) 166 ; JS Dryzek, *Deliberative Democracy and Beyond. Liberals, Critics, Contestations* (OUP 2000) 48. See also RC Post, ‘Who’s Afraid of Jurispathic Courts?: Violence and Public Reason in *Nomos and Narrative*’ (2005) 17 *Yale Journal of Law and the Humanities* 9, 14-16.

‘We appeal to political conceptions of justice, and to ascertainable evidence and facts open to public view, in order to reach conclusions about what we think are the most reasonable political institutions and policies. Public justification is not simply valid reasoning, but argument addressed to others: it proceeds correctly from premises we accept and think others could reasonably accept to conclusions we think they could also reasonably accept.’<sup>85</sup>

While justifying interpretations of the Charter on the basis of commonality of values may be possible to the extent that it fosters a discourse about the appropriate meaning of rights across the EU legal order, this would involve a thorough re-evaluation of the Court’s existing case law. The Court’s approach fails to capture the Charter’s role in the European integration process and structurally prevents the interpretation and re-interpretation of fundamental rights in the public sphere, placing them instead within rather rigid, judicially determined assumptions about morally shared values, traditions or principles. This position cannot sufficiently articulate the necessity of political engagement with EU matters nor does it emphasise constitutional dialogue between different constitutional courts, as the interpretation of the Charter requires.

More broadly though, the desirability of justifications of fundamental rights premised on the sharedness of values can be challenged altogether, from a conceptual perspective. Such justifications often conflate two issues that require careful distinction: on the one hand, the common values rooted in moral convention, popular wisdom or indeed, a common intellectual and philosophical tradition<sup>86</sup>, which are openly tested in the public sphere, and, on the other hand, the commitment to constitutional rights as a premise of the public sphere itself.<sup>87</sup> Whereas the former, moral commonality, may be able to render a public sphere more cohesive, it is not required in order for commitment to fundamental rights to be effective as the product of a structured process of constitutional compromise. Conflating these issues is problematic, as it ossifies public morality through judicial interpretation and misunderstands the role of fundamental rights in the public sphere.

Furthermore, the neutrality of values as an interpretive benchmark for fundamental rights can be strongly contested.<sup>88</sup> Whereas the experience of war, the establishment of democratic governments and the fostering of largely private-centric

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<sup>85</sup> Rawls (n 70) 786.

<sup>86</sup> Weiler, ‘European Democracy’ (n 65) 19.

<sup>87</sup> Souillac (n 8) 79; and Habermas (n 8), 117.

<sup>88</sup> See E Frazer, *The Problems of Communitarian Politics: Unity and Conflict* (Oxford University Press 1999) 213.

market economies may create some of the conditions under which fundamental rights operate throughout the EU, it would be highly problematic to rely on an EU judicial narrative about these experiences alone to justify a particular rendering of a fundamental right.<sup>89</sup> In addition to potentially common histories and social problems, other, equally important histories and social issues diverge greatly. The development of post-communist regimes, the unequal wealth distribution encountered amongst EU Member States, and the vastly differently experienced EU financial crisis also shape the meaning that particular rights take in different European contexts. To justify interpretations of the Charter based on a single understanding of the meaning and scope of a value would appear to homogenise the plurality of identities, personal as well as constitutional, that coexist within the legal framework of the EU. At the same time, it would suggest that only those who share a particular narrative can be true members of the EU framework, thus creating precisely the type of exclusions from the EU public sphere that fundamental rights strive to contain.

Indeed, moral commonality within the demos is not required in order for the Court to determine what constitutional responsibilities ensue from the Charter. Value-based justifications for fundamental rights become particularly unconvincing once/if we disentangle the concept of post-national democracy from that of an overarching unity and conceptualise it in a more open-ended manner, as a democracy that includes a multitude of previously more or less uniform demoi, which discursively interpret and reinterpret their public commitments to one another in a novel political framework.<sup>90</sup> Furthermore, even if we were to accept that the EU gives rise to a ‘supranational, civic, value-driven demos’<sup>91</sup>, as Weiler has suggested, it is important to recognise that these adjectives do not all hold the same weight, from the perspective of justifying the application of a supranational constitutional standard. It is the civic character of the EU public sphere and not its attachment, as Craig puts it, to ‘some rigid set of common values’, that renders the political process democratic.<sup>92</sup> Assessments of constitutionality in a post-national polity committed to the democratic process must be primarily concerned with the former question (to ensure the civic

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<sup>89</sup> On the jurisgenerative impact of multiple constitutional narratives see R Cover, ‘The Supreme Court, 1982 Term – Foreword: Nomos and Narrative’, 97 *Harvard Law Review* 4.

<sup>90</sup> K Nicolaidis, ‘The Idea of European Democracy’ in *Philosophical Foundations of the European Union* 254.

<sup>91</sup> Weiler, ‘European Democracy’ (n 65) 23.

<sup>92</sup> PP Craig, ‘Democracy and Rule-making within the EC: An Empirical and Normative Assessment’ (1997) 3:2 *European Law Journal* 105, 130.

character of decision-making), rather than the latter (to give effect to particular values). In the words of Albie Sachs, the adjudication of fundamental rights within a particular constitutional framework is not just ‘about our commitment to the values expressed by the Constitution, but about which institutions the Constitution envisages as being primarily responsible for giving effect to those values’.<sup>93</sup>

In this sense, to justify the application of EU constitutional law on the basis of uniform prescriptions about how we should give effect to certain values becomes unconvincing. It is only political agreement implicit in membership of a constitutional order that is relevant from the perspective of constitutional adjudication, if the latter is understood, as section 1.2 has argued, as a safeguard of the political process. By contrast, the reassessment of values – and in turn, the re-imagination of constitutional form – takes place within the political process itself. It follows that, rather than making the application of constitutional law dependent on the sharedness of values, it is preferable to acknowledge the centrality of constitutional discourse itself to the strengthening and maintenance of the public sphere, in which different values are expressed and challenged.

#### **1.4 Post-national citizenship and the idea of the right to have rights**

Enjoying rights within a particular institutional framework for their protection is an indispensable part of a well-functioning and inclusive deliberative process, both at the national and at the post-national level.<sup>94</sup> As such, an adequate framework for interpreting fundamental rights under the Charter can be based on political equality, expressed through a ‘right to have rights’. This right is none other than, as Kant first formulated it, the right that all human beings have to ‘present themselves to society’.<sup>95</sup> But it is the Arendtian reinterpretation of the right to have rights, positing it as a precondition for political organisation, which is particularly interesting from the perspective of post-national constitutional law.

Arendt believed that all rights ultimately take effect within a particular community. ‘We are not born equal’, she explained, but ‘we become equal as members of a group on the strength of our decision to guarantee ourselves mutually

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<sup>93</sup> *Du Plessis v De Klerk and Another* (CCT8/95) [1996] ZACC 10, per Sachs J, para 190.

<sup>94</sup> S Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge University Press 2004) 140. See also Habermas (n 8) 117.

<sup>95</sup> I Kant, ‘Perpetual Peace: A Philosophical Essay’ (tr. M. Campbell Smith, Garland Publishing 1972) 137–138.

equal rights'.<sup>96</sup> More specifically, 'our political life rests on the assumption that we can produce equality through organisation, because man can act in and change and build a common world, together with his equals and only with his equals'.<sup>97</sup> By contrast,

'The human being who has lost his place in a community, his political status in the struggle of his time, and the legal personality which makes his actions and part of his destiny a consistent whole, is left with those qualities which usually can become articulate in the sphere of private life and must remain unqualified, mere existence in all matters of public concern.'<sup>98</sup>

For this reason, she thought that the one right that did not 'spring from within the nation'<sup>99</sup> and required more than national guarantees was the right to be recognised as a holder of rights *qua* right to membership of the political community: the 'right to have rights'.<sup>100</sup> Indeed, for Arendt, the right to have rights is not just the right to present oneself to society, but more concretely the right to belong. As Benhabib explains, it is a moral right to be recognised as the holder of political status, to which constitutional rights can then attach.<sup>101</sup> It is, in other words, 'the entitlement to all civil rights—including rights to association, property, and contract—and eventually to political rights'.<sup>102</sup> Only by having access to the rights guaranteed within a political community can a human being enter such a community on the basis of equality.<sup>103</sup> But how can this right apply to the EU legal order and, more specifically, how can it determine the application of the Charter?

#### ***1.4.1 Justifying the Charter on the basis of the right to have rights***

Arendt's conception of the right to have rights was not that it should apply to a post-national quasi-federal structure like the EU: it was a universal right to be recognised as the holder of political status *within* a nation state by the international community. Nonetheless, taking inspiration from this idea, one need not deny its value in the EU constitutional context, as a context defined by conditions of reduced sovereignty<sup>104</sup>

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<sup>96</sup> H Arendt, *The Origins of Totalitarianism* (2<sup>nd</sup> ed, Harcourt 1958) 301.

<sup>97</sup> *Ibid.*

<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.* 299, quoting Edmund Burke: E Burke, *Reflections on the Revolution in France* (Everyman's Library 1790, edited by EJ Payne).

<sup>100</sup> *Ibid.* 301. See also Benhabib (n 94) 88-91.

<sup>101</sup> Benhabib, *ibid.*, 140.

<sup>102</sup> *Ibid.*

<sup>103</sup> Arendt, *Origins* (n 96) 301.

<sup>104</sup> See P Eleftheriadis, 'Cosmopolitan Law' (2003) 9: 2 *European Law Journal* 241, 242.

and requiring, as noted earlier, a standard that accommodates multiple narratives about the protection of fundamental rights. In a tiered polity comprising local, national and supranational institutions and within which differences in cultures, identities and living standards abound, a basic set of fundamental rights as minimal equalising conditions accessible to all is required.<sup>105</sup> Arguably, this is the core overall function of the Charter: it sets out the rights that are in fact presupposed within the EU public sphere. It is necessary to interpret the Charter's provisions against this overarching function.

The Charter signals a shift in EU law not only in the sense that it concretises a set of rights which are necessary in order for human beings to live well and to make meaningful choices, but also because it is an explicit affirmation of a political commitment by 'the peoples of Europe' to conditions upon which they are building a 'common future', as proclaimed in its Preamble. As noted in section 1.2 above, the Charter's purpose was not to integrate approaches regarding fundamental rights in the European Union, but rather to establish a common code for fundamental rights, to which both the Member States and the EU commit. Indeed, it is only as a set of protections gathered together that the Charter adds to the EU constitutional landscape, especially to the extent that, one by one, many of its provisions may have formerly been enshrined in the Court's case law already.

For this reason, it is possible to understand the overall application of the Charter as a commitment not merely to the provisions in question – these were enshrined in EU and Member State laws already – but to the very right to have rights across the different layers of the EU constitutional order. If the right to enjoy rights contained in the Charter is prejudiced, whether in a localized or EU-wide context, this has implications for the quality of democracy as well as for the ability of the EU public to take part in the deliberative process in the EU, which operates at different levels: local, national and supranational. In the most basic sense, therefore, it is this right – the right to equal political status – that the constellation of constitutional rights contained in the Charter seeks to protect, to the extent that it sets out the preconditions for the exercise of communicative freedom in the public sphere.<sup>106</sup>

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<sup>105</sup> See generally Habermas (n 8, 10).

<sup>106</sup> See, in this regard, the dissenting opinion of Whittaker J in the US Supreme Court case of *Perez v Brownell*, 356 U.S. 44 (1958), p 64; See also: *Afroyim v Rusk*, 387 U.S. 253 (1967).

This justification for applying the Charter is attractive for two main reasons. Firstly, by adding a layer of review based on equality of status to the application of the Charter, the right to have rights supplies an answer to a pivotal issue: that of when a particular claim falls within the sphere of constitutional, public law entitlements *at the post-national level*. Secondly, this justification looks at society and the actors that comprise it without collapsing it into the market. It offers a dynamic, non-static conception of rights: it is a right to access the framework of fundamental rights protection in the EU political community, so that one can take part in its re-interpretation in the public sphere and thus meaningfully identify with its authorship. Indeed, in light of its constitutionally imbued drafting context and ‘federal’ implications<sup>107</sup>, the Charter articulates a set of provisions with a legitimating character for the EU public sphere and represents a possibility for reimagining fundamental rights in the EU as a polity of citizens/members. Understanding the right to have rights as its main justification recognises the Charter’s role in rendering the EU public sphere more substantively democratic, as discussed in section 1.2, and spells out the inherent link of fundamental rights with political membership (they are enabling conditions thereof).

#### ***1.4.2 The right to have rights as inclusion through citizenship / membership***

In light of the preceding discussion, it can be argued that a supranational guarantee by the Court of the right to have rights can mean, quite simply, that EU citizens should enjoy the Charter’s provisions equally across the EU legal order (and within the Member States). This requires the CJEU to *coordinate* Member State standards, where equal access to the fundamental rights protected in the Charter is prejudiced.

The link between fundamental rights and citizenship in the EU is well known. As Advocate General Sharpston had noted in her Opinion in *Zambrano*, insofar as fundamental rights have been integrated in the EU constitutional framework through the Charter, it is important to consider whether citizenship of the Union has now come to ‘mean something more radical’ than what it has meant so far, namely rights primarily attached to cross-border movement: can it mean ‘true citizenship, carrying with it *a uniform set of rights and obligations*, in a Union under the rule of law in

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<sup>107</sup> See Eeckhout (n 40).

which respect for fundamental rights must necessarily play an integral part?’<sup>108</sup> If that is the case, then fundamental rights at the EU level entail not merely a reaffirmation, but rather a redefinition of the political commitments made on behalf of (and largely in the name of) the peoples that make up the EU. The right to have rights as a right to participate within a political community is consonant with such a justification – and has indeed in the past been understood as the right to enjoy all those rights that ensue from citizenship.<sup>109</sup>

Does, then, a notion of citizenship operating within the EU mean that fundamental rights under the Charter should apply to those who have full political rights only, thus denying its universality? An approach that privileges citizens in respect of fundamental rights would be greatly problematic, not only in terms of social and political philosophy<sup>110</sup>, but also in terms of political accountability. The Charter’s appeals to a political order premised on universal values – one that owes, furthermore, responsibilities to the ‘human community’<sup>111</sup> – would risk not only sounding like empty rhetoric but, justified on the basis of citizenship of the Union, of also actually maintaining exclusionary patterns. As Jo Shaw notes,

‘A paradox faces all polities: so long as the criterion for allocating political rights of participation has been overwhelmingly the formal one of nationality [...], many who live and perhaps indeed are born within the boundaries of any given polity have been unable to participate politically, fully or even partially.’<sup>112</sup>

Indeed, the EU is not a universal political community, but rather a strict members’ club, in which only certain groups of people enjoy political rights. If, justified on the basis of the right to have rights, the Charter is ultimately intended to serve active forms of citizenship of the EU political order, how can this be reconciled with the universal aspirations of most of its provisions?<sup>113</sup> Does it not create rights/duties for the non-citizen finding him/herself within the scope of EU law? In the remainder of this section, I hope to clarify that it does.

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<sup>108</sup> Opinion of Advocate General Sharpston delivered on 30 September 2010 in Case C-34/09 *Zambrano v Office national de l’emploi* [2011] I-01177, para 3 (emphasis added).

<sup>109</sup> See *Afroyim v Rusk* (n 106).

<sup>110</sup> S Besson and A Utzinger, ‘Towards European Citizenship’ (2008) 39 *Journal of Social Philosophy* 185, 193ff.

<sup>111</sup> Preamble (n 37).

<sup>112</sup> J Shaw, ‘Sovereignty at the Boundaries of the Polity’ in N Walker (ed) *Sovereignty in Transformation* (Hart Publishing 2003) 461, 461.

<sup>113</sup> This is true only of the Charter’s Chapter V provisions, which include voting and free movement rights.



If EU citizenship in a technical sense provided the normative justification for the Charter, it would entail a rather restrictive conception of authorship that could exclude the concerns of non-citizens from the public sphere. In order to form a people though, it is not only necessary to have a legally protected community of equal citizens but also to ensure that no one is excluded ‘who is affected by the possible coercive measures of the legal community’.<sup>114</sup> For this reason, it is necessary to concede, firstly, that the current terms of political inclusion in the EU through citizenship, which acknowledge only Member State citizenship rules but shy away from offering any means of identification beyond those offered at the national level, need to be rethought.<sup>115</sup> Ideally, a re-imagination of the concept of European citizenship as a platform for non-national affiliation, independent of national citizenship, may be appropriate in the establishment of a fully inclusive, EU-wide public sphere and would be more compatible with the universal aspirations of the Charter than the current modes of inclusion/exclusion.<sup>116</sup> At the same time though, it would be mistaken, when considering how the Charter’s provisions should be interpreted at present, to construe the right to have rights as a right to citizenship in a strict sense.

The right to have rights can be posited as a normative justification for the application of the Charter, precisely because it conceptualises the rights granted to individuals within a political community themselves *as* means of political status. This requires that every individual affected by EU law be granted those rights. Indeed, the very practice and claiming of rights in the public sphere, even by those who do not possess full political rights, is a jurisgenerative process.<sup>117</sup> It includes a broad range of platforms of political participation, such as local politics, public debates, the free public expression and manifestation of opinion and belief, and of course, asserting rights in court. As Ingram puts it:

‘Far from being the apolitical basis of politics, rights are vehicles of politicisation: political movements arise to expand old rights or claim new

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<sup>114</sup> H Brunkhorst, *Solidarity: From Civic Friendship to a Global Legal Community* (tr J Flynn, MIT Press 2005) 170.

<sup>115</sup> See E Balibar, ‘Europe as Borderland’: The Alexander von Humboldt Lecture in Human Geography, University of Nijmegen, November 10, 2004, available at <http://gpm.ruhosting.nl/avh/Europe%20as%20Borderland.pdf> [accessed 25.03.2015], 2. See also: C Douzinas, ‘The Europe to come’, *Critical Legal Thinking* 15 December 2010, available at <http://criticallegalthinking.com/2010/12/15/the-europe-to-come/#fnref-1136-6> [accessed 25.03.2015].

<sup>116</sup> *Ibid.*

<sup>117</sup> See Cover (n 89) 33.

ones. Rights are not established in principle and then protected by power, be it by that of one's own state or another; they are invented and reinvented by particular actors through the very practice of claiming them'.<sup>118</sup>

In turn, participation in the modern public sphere does not simply depend on the exercise of political right in the sense of voting or imparting political speech, but can be participation through different means, e.g. through the exercise of rights in the workplace.<sup>119</sup> Fundamental rights operating within a political community (in line with which the Treaties must be interpreted) enable public deliberation. Therein lies, precisely, their fundamentality: they structure political life and allow individuals to participate in the matters that concern them.<sup>120</sup> The right to have rights is simply 'a universal right to political activity for every individual, in all the domains in which the problem of collectively organized possession, power, and knowledge is posed'.<sup>121</sup> The idea of the right to have rights as a guide to interpreting the Charter thus challenges the distinctions between citizen and non-citizen and attaches to 'citizenship' in a philosophical sense *qua* participation in a constitutional polity. It is, in other words, the recognition of the very ability to have rights acknowledged and re-interpreted in the public sphere as a type of political activity. As D'Entrèves puts it,

'Once citizenship is viewed as the process of active deliberation about competing identity projections, its value would reside in the possibility of establishing forms of collective identity that can be acknowledged, tested, and transformed in a discursive and democratic fashion.'<sup>122</sup>

As such, the determining factor for applying the Charter can be based on the question of whether effective access to a provision guaranteed therein has been compromised and not adequately remedied, on some level (national or supranational), within the fields of application of EU law. Determining the applicability of the

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<sup>118</sup> JD Ingram, 'What Is a "Right to Have Rights"? Three Images of the Politics of Human Rights' (2008) 102:4 *American Political Science Review* 401, 411. See also C Lefort, *The Political Forms of Modern Society: Bureaucracy, Democracy, Totalitarianism* (MIT Press 1986) 258.

<sup>119</sup> See P Craig, 'Theory, "pure theory" and values in public law' (2005) *Public Law* 440, 444-445.

<sup>120</sup> It is also for this reason that a procedural conception of law of the kind advanced by J Habermas is capable of accommodating a conception of law that comprises morality but remains, at the same time, open to its reinterpretation: J Habermas (n 10), 384. For this reason, a discourse enhancing proceduralist account of (constitutional) law is capable of accommodating procedural fairness as well as issues of substantive political morality – indeed, it requires both guarantees regarding procedure (e.g. legal certainty) as well as legitimacy (which it ascribes to the concept of authorship): 198. Cf LL Fuller, *The Morality of Law* (Yale University Press 1969) 74ff.

<sup>121</sup> E Balibar, *Masses, Classes, Ideas* (Routledge 1994) 212.

<sup>122</sup> MP D'Entrèves, 'Public and Private in Hannah Arendt's Conception of Citizenship' in MP D'Entrèves and U Vogel (eds) *Public and Private: Legal, Political and Philosophical Perspectives* (Routledge 2000) 68, 80.

Charter by assessing whether a right to access its provisions effectively has been breached recognises the potential for membership of non-members and indeed the multiplicity of membership types that a political community, particularly a multi-layered political community like the EU, can give rise to.<sup>123</sup> If the foundations of the protection of fundamental rights in the European Union are in turn understood on the basis of this, inclusive, conception of post-national membership/political status, they require – and justify – fundamental rights and obligations to observe them to the extent that citizens meaningfully identify as the authors of the constitutional arrangement.<sup>124</sup> Indeed, a right to enjoy the Charter’s provisions effectively can be seen as a code of ‘active participation and solidarity’ within the EU polity.<sup>125</sup>

#### ***1.4.3 What kind of standards are required for the operation of fundamental rights at the supranational level?***

Whereas I have so far explained why a political justification for the Charter is constitutionally preferable to justifications premised on the commonality of values, I have not discussed, more specifically, in what way normatively justifying interpretations of the Charter based on the right to have rights or, differently put, on equal access to fundamental rights, changes the existing EU fundamental rights landscape. It is worth exploring this question by briefly making reference to an existing debate in the field of fundamental rights. The horizontal effect of fundamental rights and the case law pertaining thereto provides a topical and illustrative example.

The horizontal effect doctrine is, in principle, three-dimensional and comprises direct, indirect and state-mediated forms of horizontality.<sup>126</sup> A legal order that seeks to offer a complete answer to the question of how fundamental rights can enter private relations must therefore take account of all three levels.<sup>127</sup> In practice, though, most legal orders only offer partial recourse to fundamental rights in horizontal relations and understand its dimensions very differently: some

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<sup>123</sup> I am grateful to Seyla Benhabib for highlighting this. See Benhabib, *Rights of Others* (n 100), 56.

<sup>124</sup> J Habermas, ‘Citizenship and National Identity: Some Reflections on the Future of Europe’ (1994) 264 (emphasis added). See also: J Habermas, ‘Historical Consciousness and Post-Traditional Identity’ in *The New Conservatism* (n 14) 257. 49 Habermas, ‘Struggles for Recognition in the Democratic Constitutional State’ (n 22) 225.

<sup>125</sup> JD Ingram, ‘What Is a “Right to Have Rights”? Three Images of the Politics of Human Rights’ (2008) 102:4 *American Political Science Review* 401, 413.

<sup>126</sup> R Alexy, *A Theory of Constitutional Rights* (OUP 2002) 355.

<sup>127</sup> *Ibid.*, 355-6.

conceptualise horizontality through indirect effect only (e.g. Germany) and few offer direct recourse to fundamental rights in private relations (e.g. Ireland and, in certain cases, the UK). As such, from a supranational perspective, it may be necessary to acknowledge that different forms of horizontality can be interchangeable in terms of outcome.

Indeed, as a matter of fact, the specific instantiation of horizontality followed has had little substantive impact on the outcome of particular cases, even within EU law: for instance, in a case like *Foster v British Gas*, the Court attributed the actions of a privatised undertaking to the state, thus requiring it not to discriminate *as if* it were a public authority.<sup>128</sup> In *Murphy*, it found an employer liable through indirect effect<sup>129</sup>; whereas in *Defrenne*, this outcome was reached through the means of direct horizontality.<sup>130</sup> All of these cases concerned, effectively, the same fundamental right (subsets of non-discrimination on grounds of gender) and all took effect in the employment context. Furthermore, the effect of all of these cases was that private employers had to observe the right in relations with their employees in the future and pay compensation for not having done so in the cases in question.

However, the horizontality case law both prior and after the entry into force of the Charter, presented these issues almost exclusively through the prism of the availability of direct horizontal effect only, without actually considering the legal structures available to give effect to fundamental rights in private relations within national law. However, it is not always clear whether it is essential to render the Charter's provisions available to a claimant through the mechanism of direct effect only, or in fact in what way this would undermine its effectiveness. Understanding the application of the Charter based on the right to have rights justifies a change to this approach. It confirms that it is neither the aim nor the mandate of EU constitutional law to harmonise national constitutional practices, but merely to integrate them in a mutually accommodating way, insofar as the scope of EU law is engaged. If, as I have argued above, the Charter is understood as a reflection of a right to have rights within the EU, stipulating the specific manner in which its provisions feed into relations between private parties is unnecessary *unless* access to the provisions set out in the

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<sup>128</sup> Case C-188/89, *Foster v British Gas* [1991] ECR I-3313.

<sup>129</sup> Case 157/86, *Murphy and Others v Bord Telecom Eireann* [1988] ECR 673.

<sup>130</sup> Case 43/75, *Defrenne v Sabena* [1976] ECR 455.

Charter is compromised because of the way in which horizontality is offered at the national level.

Indeed, perceived as a vehicle of equal access to the Charter's protections, horizontal effect can overall be particularly useful: it provides a mechanism for the inclusion of those affected by EU law but in fact excluded from legal protection at the national level, by using the institutional structures that are already in place nationally in order to give effect to fundamental rights. Interpreting the Charter through the lens of the right to have rights therefore operates as a limit to the Court's role: horizontal effect only becomes a question of EU law when a Member State fails to give effect to a provision of the Charter, such as the right to not to be discriminated against (Article 21 EUCFR) or the right to be informed and consulted in the workplace (Article 27 EUCFR), *in such a way* that it places a subset of EU citizens in an unequal position compared to those residing or working in another Member State (or indeed vis-à-vis other groups within the same state, to the extent that the latter situation remains within the scope of EU law).

Indeed, from the perspective of EU law, violations of fundamental rights matter when they affect the possibility of equal political status within the EU and deprive the notion of an EU citizenship premised on rights of practical meaning.<sup>131</sup> In other words, an understanding of the inclusionary features of horizontal effect at the constitutional level means that the primary legal question, that of horizontal *applicability*, engages the jurisdiction of the Court of Justice when a situation falls within the scope of EU law. By contrast, national courts are in principle best placed to determine how the Charter's provisions can be delivered, in light of the institutional tools at their disposal. Whereas the Court can and should give guidance as to the desired fundamental rights outcome from an EU perspective, national courts should in turn be allowed to determine how best to fit that outcome within the structures of national law. There is no inherent value in recognising an 'absolute nature' to constitutional-order rights derived from EU law.<sup>132</sup> Rather, it is important that we recognise that cases like *Defrenne* or *Küçükdeveci*, concern institutional exclusions from rights guaranteed within the European Union. The imposition of a horizontal obligation to observe the right to equal pay or the right not to be discriminated against at the supranational constitutional level is not only about the extent to which we value

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<sup>131</sup> See von Bogdandy, 'Reverse Solange' (n 62), 513.

<sup>132</sup> *Defrenne* (n 130), para 39.

equality, but also about recognising the link between the exercise of these rights and the ability to participate in public life.

The problems with prescribing a particular method for the application of fundamental rights are particularly clear in a context as terse as horizontal effect. The right to have rights as a guide in the supranational application of fundamental rights can nonetheless be extended to the Charter's overall application, as is clear from case law across the spectrum of the Court's fundamental rights judgments, such as *Zambrano*<sup>133</sup>, *N.S.*<sup>134</sup>, *Kadi*<sup>135</sup>, or *Delvigne*<sup>136</sup>. It is impossible for the Court to engage in meaningful interpretations of the Charter without setting out the content of fundamental rights within the EU and properly delimitating when the Charter standard is engaged. This does not concern only a determination of the fields of application of the Charter – an issue covered by Article 51(1) EUCFR and authoritatively determined in *Fransson*.<sup>137</sup> It also concerns the question of when supranational jurisdiction, as opposed to national standards of rights protection, should be utilised. Effectively, the right to have rights as a justification for engaging the Charter operates as a margin of appreciation for Member States in respect of how they deliver fundamental rights, but one that fully retains the prescriptive character of the latter within the EU. Unlike the minimum-level-of-protection-affirming margin of appreciation that exists, for example, within the Convention context, founding the supranational constitutional adjudication of the Charter's provisions on the basis of a post-national right to belong recognises that each of the Charter's provisions constitutes a basic tenet of what it means to be the holder of political status within the EU.

Thus, rather than being based on a determination of whether specific Charter provisions constitute general principles of law or values that should be recognised by all, it is possible to render the application of the Charter dependent on equality in particular, in the sense of the equal right to access a basic set of safeguards through

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<sup>133</sup> n 57.

<sup>134</sup> Joined Cases C-411/10 and C-493/10 *N.S. v Home Secretary and M.E. v. Refugee Applications Commissioner* [2011] ECR I-13905.

<sup>135</sup> Joined cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-06351; Joined cases C-584/10 P, C-593/10 P and C-595/10 P, *European Commission and Others v Yassin Abdullah Kadi*, EU:C:2013:518.

<sup>136</sup> Case C-650/13 *Delvigne v Commune de Lesparre-Médoc* ECLI:EU:C:2015:648.

<sup>137</sup> n 58.

which reasonable political discourse as authorship can be exercised.<sup>138</sup> Each of the Charter's provisions, as a specific instantiation of the right to have rights, must be examined in light of this function.

### **1.5 Conclusion: a political conception of fundamental rights in the European Union**

Today, it is impossible to imagine a form of EU constitutionalism that is disengaged from fundamental rights. These have developed in tandem with the Union and form part of its constitutional heritage, not only because they are enshrined in national constitutions but indeed because EU law itself has developed with – and through – the incorporation of fundamental rights standards, initially as uncodified commitments guaranteed by the Court of Justice and eventually as codified rights enshrined in its own Charter. Together with the Lisbon Treaty and following a process of successive Treaty revisions, the introduction of a binding Charter signals the evolution of an important aspect of EU constitutional law: that of the role of rights in the EU legal order as judicially determined commitments interpreted against the goal of EU integration. Under the Charter, a discourse about rights in the EU is centred on the person, both in their capacity as a self-interested individual engaged in modern forms of survival, such as commodity and services exchange within the single market but also, more importantly, as a political actor and part of a community shared with others.

This paper has sought to demonstrate that, in interpreting the Charter's provisions, it is necessary to take account of the links of this instrument to the structure of Europe's broader constitutional space. This space is comprised of, rather than antagonised by, national constitutions, together with cosmopolitan aspirations and ideals. At the supranational level, fundamental rights operate as guarantees of at least a minimal degree of inclusion within a vastly unequal political space and concern the ability to govern (and be governed) in a democratic fashion therein. As such, the most appropriate justification for assessing whether the application of national law amounts to a breach of the Charter, is to assess whether such application prejudices the very right to have rights, in the sense of a right to enjoy the rights granted within the EU constitutional framework and required in order meaningfully to access the EU public sphere on the basis of equality.

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<sup>138</sup> See Benhabib (n 94) 2004, 181.

Whereas a political justification for the Charter based on the right to have rights may therefore, at first glance, appear causally remote, its value becomes clear once we understand the Charter in its proper context, that is as part of a broader process of constitutional change that sought to restore a sense of authorship in the ‘peoples of Europe’ about the constitutional arrangement in which they live. The adjudication of fundamental rights operating within a multi-layered constitutional polity involves a great number of interpretations – even conflicting interpretations – about the values underlying these rights. Disagreement about these things is sometimes necessary and indeed desirable. Its *locus* is, however, within the public sphere, constructed and accessed through an existing rights framework, rather than being the subject of judicial determination. By contrast, the safeguard of access to the framework of fundamental rights that enables the operation of the public sphere falls squarely within the realm of constitutional adjudication and requires not only national but also post-national guarantees, in order to become effective.