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EU Fundamental Rights Legislation: The Constitutional Imbroglio

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Introduction

An important shift has taken place over the past decades in EU fundamental rights law.[1] In a process that started with the Treaty of Maastricht and culminated with the Treaty of Lisbon, the mandate of the various European Union (EU) institutions on matters of fundamental rights protection has profoundly changed.

The analysis of the protection of fundamental rights in the EU is nowadays usually shaped around two main axes. A first and common question relates to the possibility to check EU acts, legislative acts in particular, or acts of the Member States falling within the scope of EU law for compliance with EU fundamental rights. This approach seeks to ensure 'the rule of law for the Union itself'.[2] A second and uniquely pressing question in recent years, is concerned with the empowerment of populist parties progressively eroding fundamental rights at domestic level across the EU. This line of research deals with 'the Rule of Law within the Union'[3] and asks how and to what extent the EU may help modifying this worrying trend.[4]

Departing from these usual approaches to the protection of fundamental rights in EU law, this contribution invites reflection on a less explored dimension of the challenges raised by the protection of fundamental rights in the EU: the increased emphasis placed on the role of the EU legislator in shaping European fundamental

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[1] The expressions 'fundamental rights' and 'human rights' are used interchangeably in this chapter.

[2] Editorial comments, 'The Rule of Law in the Union, the Rule of Union Law and the Rule of Law by the Union: Three interrelated problems' (2016) 53 *Common Market Law Review* 597.

[3] ibid.

[4] eg, L Pech and KL Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3 ff; D Kochenov, 'Busting the Myths Nuclear: A Commentary on Article 7 TEU' (2017) 10 EUI Working Paper.

rights law – as illustrated by EU anti-discrimination as well as data protection legislation over the past two decades.[5] Here, the focus is not so much on whether EU secondary law conflicts with primary law as in 'the rule of law for the Union itself'; nor is the focus on the calling into question of European values at domestic level as in 'the Rule of Law within the Union'. Instead, the process under scrutiny is one by which European values are being fleshed out through the democratic process at EU level. In other words, the law that governs EU approaches to the various dimensions of the rule of law identified above is substantiated by Union political institutions.

What are the constitutional implications of such a transfer of decision-making powers on fundamental right matters to the legislator in a supranational order such as the EU? Unlike in the process that led to the drafting of the Charter of Fundamental Rights of the EU (the Charter) in which much attention was devoted to ensuring democratic input in shaping primary law on fundamental rights,[6] it is now the legislator that gives expression to selected fundamental rights when empowered to do so by the EU Treaties. As is well known, the EU (still) does not have competence to 'protect against human rights violations *per se*'.[7] Yet, two important novelties impact the way one ought to understand decision-making on fundamental rights at EU level.

On the one hand, the mandate of the Court of Justice of the European Union (the Court) on matters of fundamental rights protection in the post-Lisbon era is much stronger than it used to be. The Charter now has the same legal value as the Treaties.[8] The Treaties are dotted with references to fundamental rights that enhance the legislators duty to take them into account.[9] The EU has also gained and exercised competences that touch upon fundamental rights much more directly than used to be the case, as in the fields of migration and criminal law, so that the Court acts as a more important fundamental right watchdog.[10]

[5] See, for instance, Council Directive (EC) 2000/43 of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22; Council Directive (EC) 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16; Directive (EC) 2006/54 of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23; Council Directive (EC) 2004/113 of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37; Regulation (EU) 2016/679 of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC [2016] OJ L119/1 (General Data Protection Regulation).

[6] See, for instance, R Bellamy and J Schönlau, 'The Normality of Constitutional Politics: An Analysis of the Drafting of the EU Charter of Fundamental Rights' (2004) 11 *Constellations* 412; G de Búrca, 'The Drafting of the European Union Charter of Fundamental Rights' (2001) 26 *European Law Review* 126.

[7] AG Toth, 'The European Union and Human Rights: The Way Forward' (1997) 34 *Common Market Law Review* 491, 497.

[8] Art 6(1) TEU.

[9] eg, Arts 10 and 67(1) TFEU.

[10] G de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 *Maastricht Journal of European and Comparative Law* 168, 174 ff.

On the other hand, the mandate of the EU legislator on matters of fundamental rights has also changed profoundly. The EU legislator has gained clear and explicit competences to express its understanding of selected fundamental rights such as the fundamental right to equal treatment (the main legal basis is Article 19 TFEU)[11] and the fundamental right to data protection (the legal basis is Article 16 TFEU). The same institutions have also gained competences in areas that are directly and intimately connected to fundamental rights so that the legislator may be called upon to flesh out its understanding of a specific fundamental right in this context too, for instance, the circumstances in which a person involved in a criminal trial must be deemed to have waived, voluntarily and unambiguously, his right to be present at his trial in the context of the European Arrest Warrant.[12] Furthermore, EU institutions have adjusted their legislative practices to assess the fundamental rights implications of the legal acts that they design and negotiate.[13]

These mutations in the constitutional landscape for the design of EU law-making on fundamental rights require understanding the function that the EU legislator performs in giving shape to EU fundamental rights, when compared with that of the Court, through a new lens: the Court, on the one side, is entrusted with the task of protecting fundamental rights enshrined in EU primary law (Article 19(1) TEU); the EU legislator, on the other, is intended by the Treaties to confer democratic legitimacy to decision-making on fundamental rights at EU level (Article 10(2) TEU).[14] The present chapter contextualises these changes and spells out the main conceptual as well as constitutional parameters for understanding the new mandate of the EU legislator on fundamental rights questions.

The analysis therefore proceeds in three stages. The phenomenon by which EU institutions can and do legislate specifically and explicitly in order to enhance the protection of a fundamental right is fairly new: this opens up a new era after a period in which the focus had been on elevating fundamental rights beyond the realm of ordinary politics (i). The institutional implications of this new setting are twofold: they emerge from the tension thereby created between political institutions and constitutional law-making (ii); and they are particularly intense in the context of the EU legal order where the interplay between two legal orders – domestic and European – adds to the complexity of the matter (iii).

Specific emphasis will be placed throughout the chapter on the important role that political institutions play in shaping EU intervention on fundamental rights.

[11] See also Art 157 TFEU.

[12] Art 4a(1) of Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1 as amended by Council Framework Decision 2009/299/JHA of 26 February 2009.

[13] See M Dawson, *The Governance of EU Fundamental Rights* (Cambridge, Cambridge University Press, 2017).

[14] I do not enter here the perfectly legitimate discussion on whether the Council and European Parliament indeed deliver the appropriate democratic input in EU decision-making processes.

These institutions enhance democratic debate on European values and allow for the plurality of approaches that may exist within the EU legal order to be exposed. The chapter therefore calls for maintaining a clear distinction between fundamental rights legislation, that marks political agreement at a given point in time and may be reopen for discussion, and related constitutional rights that lack the said flexibility, with a view to acknowledging the sensitive nature of EU intervention on such matters.

A New Mode of Fundamental Rights Law-Making at Supranational Level

Before delving into the constitutional challenges raised by the new form of fundamental rights law-making that EU legislation constitutes at EU level, we ought to briefly reflect on how this trend relates to mechanisms of individual rights' protection at domestic and European level.

The Dynamics of the Protection of Fundamental Rights in Europe

In contemporary history, three generations of tools for the protection of the rights of individuals may be distinguished. First, political and social rights were treated as ordinary rights, the protection of which was entrusted to the state through ordinary laws. Hoffmann recalls that in the period between the eighteenth-century revolutions and the twentieth-century world wars, it is the struggle for political and social rights that took centre stage in constitutions and politics.[15] In this context the state was seen as a guarantor of rights, rights which were regulated through ordinary laws.[16]

Secondly, selected rights were constitutionalised and internationalised: 'uploaded' to higher legal spheres for protection from the dangers of ordinary politics. In the mid-twentieth century, the mass violations that occurred during the Second World War triggered a call to entrench the protection of fundamental values in legal norms beyond the reach of 'ordinary' politics.[17] This resulted in simultaneous processes of constitutionalisation and internationalisation of selected rights as usefully accounted for by Garbaum for instance.[18]

[15] S-L Hoffmann, 'Genealogies of Human Rights' in S-L Hoffmann (ed), *Human Rights in the Twentieth Century* (Cambridge, Cambridge University Press, 2010) 7.

[16] ibid 9.

[17] A Somek, *The Cosmopolitan Constitution* (Oxford, Oxford University Press, 2014) 73–74.

[18] S Gardbaum, 'Human Rights as International Constitutional Rights' (2008) 19 *European Journal of International Law* 749, 759.

Thirdly and more recently, legislation is being adopted in order to give expression to some of the so-called fundamental rights protected at constitutional level, thus 'downloading' them and bringing them back into the political sphere. The adoption of such legislation is closely related to the uploading process just described in so far as legislation is adopted *in order to* flesh out rights that have been uploaded in a process of internationalisation and constitutionalisation.

In that sense, the process of legislating on select fundamental rights could be described as a complementary 'downloading' process bringing a protected right *back* into the political arena. The interplay between the two processes is important in so far as political institutions act in full awareness of the link between the legislation and the fundamental right protected through constitutional law. The relationship between the two layers of the same right is likely to be particularly ambiguous. The setting is thus different from where rights enshrined in legislation simply overlap with rights or principles protected at constitutional level, as is often the case.

Locating Fundamental Rights Legislation in the EU Legal Order

The last two trends, ie, the uploading and downloading of fundamental right protection, have been uniquely reflected in the development of the EU. On the one hand, the EU could be said to constitute a 'paradigm of a constitutionalised regime of international law'.[19] Although the EU has not been designed as an organisation with human rights as its core policy, the European integration process has resulted in the 'uploading' of human rights protection beyond domestic legal spheres. This uploading of fundamental rights protection has for a long time primarily resulted from the increasingly broad ability of the EU judiciary to ensure compliance with fundamental rights, protected at constitutional level in EU law by Member States when they act within the scope of EU law.

On the other hand, the 'downloading' process that is now complementing constitutional forms of protection is only *partial* when encapsulated in EU legislation. The process indeed remains contained within the upper layer of EU norms: a right enshrined in EU constitutional law becomes the object of EU secondary law taking primacy over domestic law in its entirety and thus remaining largely removed from the ambit of ordinary domestic policy- and law-making. From the perspective of each of the Member States, it is therefore fair to state that a significant chunk of fundamental rights protection is removed from the ambit of ordinary domestic policy- and law-making owing to the powerful process of European integration.[20]

[19] ibid.

[20] This is not to say that Member State interests are inevitably neglected. It is well established that the fundamental rights protection provided in the general principles of EU law and the Charter of

This new type of EU fundamental rights legislation, that is juxtaposed to the pre-existing set of constitutional rights, performs three functions in the EU legal order. To start with, in clarifying the scope of a given right, legislation defines the scope of political intervention. In the context of the EU, this political intervention further defines the contours of supranational intervention.

Legislation further defines the content of rights and may provide for procedures to give them effect. Greater visibility is thereby given to selected rights so as to enhance their political relevance and justiciability. Meanwhile, EU political institutions may engage in a deeper reflection on how to actually improve the protection of such rights through the creation of negative or positive obligations on a plurality of actors as well as the introduction of institutional structures designed to catalyse societal change.

Finally, legislation can affect the circumstances in which a selected fundamental right may be used in a given legal order. Legislation may indeed embody the mutation of the right from an instrument protecting individuals against state arbitrariness, ie, in vertical disputes, to a tool regulating interpersonal relationships, ie, in horizontal disputes.

Conclusion

The adoption of EU fundamental rights legislation is therefore closely related to the development of a constitutional set of rights for the protection of individuals in the EU; yet legislation performs a function that differs from that of constitutional rights. Furthermore, the said legislation results from broad political processes at European level while in many ways also depriving or at least constraining the ability of domestic spheres to further debate the matter. EU fundamental rights legislation therefore has profound implications on both the relationship between EU institutions, and between the different legal orders as we will see in the next two sections.

Debating Systems of Fundamental Rights Protection within a Single Legal Order: Inter-Institutional Tensions

The partial downloading of fundamental rights protection described in the last section warrants an enquiry into the constitutional system of checks and balances designed for the elaboration of fundamental rights norms within a complex multilayered legal order such as that of the EU. This section investigates the inter-institutional tensions that may arise in this context within a single legal order: either domestic, or EU.

The Interplay between Constitution and Legislation Giving Expression to Fundamental Rights in Domestic Legal Orders

Testing Legislation Against Constitutional Norms

The tension between constitutional and legislative law-making is traditionally examined in the context of the debate on judicial review of legislation for compliance with constitutional norms. Here, the two layers of norms – constitutional and legislative – are clearly distinguished and the academic debate revolves around which layer is the most appropriate to regulate fundamental rights protection.

In the context of a critique of judicial review of legislation giving preference to reliance on constitutional norms, a powerful argument is made by Waldron in favour of the definition of fundamental rights protection through legislation – which is to be contrasted here with constitutional forms of protection. He explains that the gain of constitutional protection, 'in terms of an immunity against wrongful legislative abrogation, is more than offset by the loss of our ability to evolve a free and flexible discourse of politics'.[21] This is in particular because,

> [t]he circumstances under which people make judgments about issues like affirmative action, … the proper extent of welfare provision, and the role of personal desert in economic justice are exactly those circumstances in which we would expect … that reasonable people would differ.[22]

It must therefore be accepted that people disagree (in good faith) about the common good and in particular about issues of rights. As a consequence, Waldron insists that this prospect of disagreement must be put 'in the core, not at the periphery' of one's understanding of the important role of legislation in shaping fundamental rights.[23]

The counter argument to Waldron's claim is that, as Kumm puts it, 'democracy without judicial review is deficient'.[24] The central point made in response to Waldron's call to centre fundamental rights law on ordinary political processes is that judicial review is necessary to ensure that the interests of those excluded from the majority-based decision-making process are protected.[25] Constitutional justice in that sense is not expected to *know about* theories of justice or policy but

Fundamental Rights is strongly inspired by domestic constitutional traditions. Furthermore, the adoption of EU legislation having fundamental rights implications is the outcome of decision-making processes ensuring representation of Member State interests.

[21] J Waldron, *Law and Disagreement* (Oxford, Oxford University Press, 1999) 221.

[22] ibid 112.

[23] ibid 93.

[24] M Kumm, 'Rights, Balancing and Proportionality' (2010) 4 *Law & Ethics Human Rights* 142, 143.

[25] J Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA, Harvard University Press, 1980) 8.

to *know the questions to ask others*.[26] Another way of understanding the purpose of judicial review is therefore to understand it as institutionalising 'a right to justification'.[27]

Reflecting on the EU context and reconciling the two lines of arguments above, Dawson stresses that procedural criteria can act as '*normative* benchmarks' to adjust the degree of judicial review.[28] He suggests that when judicial systems as well as the democratic process are functioning normally, judicial deference is justified; in the alternative though, the judiciary shall step in. This approach allows the political process to be placed in a central position in the reflection on fundamental rights law-making.

The 'Loose Coupling' of Constitutional and Legislative Tools for the Protection of Fundamental Rights

Next to these reflections on the relationship between legislation and constitutional norms in the context of judicial review, there is also a broader reflection on the changing role of constitutions and fundamental rights protected therein.[29] Political institutions are increasingly often expected to set the conditions for the realisation of fundamental rights set out in constitutions. This approach also presupposes the coexistence of two layers of norms – constitutional and legislative – but it acknowledges the existence of a particularly complex if not confused relationship between them. Constitutions are no longer understood as creating the circumstances for the exercise of public powers only; this is deemed necessary but insufficient. Instead, constitutions are increasingly perceived as calling for positive intervention by the state to ensure the realisation of fundamental rights, for instance, through legislation.

This transformation of the role of constitutional law is particularly well captured by Somek's analysis of what he calls 'Constitutionalism 2.0'.[30] In his view, constitutions shall now be understood as calling for public authorities to redress private asymmetries of power or violations of rights by private actors. Such a call results in the adoption of legislation specifically designed to give flesh to a fundamental right. This mutation is also connected to the debate on positive duties for the protection of fundamental rights as well as on their horizontal effects.[31] Both mechanisms complement the negative, defensive and vertical use of constitutional

[26] Paraphrasing, Kumm, 'Rights, Balancing and Proportionality', above n 24, 153.
[27] Kumm, 'Rights, Balancing and Proportionality', above n 24.
[28] Dawson, *The Governance of EU Fundamental Rights*, above n 13, 35.
[29] The author is particularly grateful to Bruno de Witte and Marco Dani for most helpful suggestions on this point and what follows. The usual disclaimer applies.
[30] Somek, above n 17, ch 2.
[31] ibid 103 and 109; K Möller, *The Global Model of Constitutional Rights* (Oxford, Oxford University Press, 2012) 36 and 40.

norms by allowing them to radiate further in society. Duties are thereby created for public and private authorities to give effect to the fundamental right.[32]

Such an approach is more comprehensive than the debate on judicial review as it explains the emergence of special forms of legislation. It also offers a less polarised vision of the role of fundamental rights as either framing political life in the form of constitutional norms or constituting the outcome of political processes as explored in the last subsection.[33] If constitutional norms themselves include both a negative and a positive dimension then constitutional rights ought to coexist with political activity in an intimate and complex way.[34]

As Somek puts it, the central question in terms of the relationship between constitution and legislation in this context is

> how the elaboration of fundamental rights by the ordinary legislature – ie 'sovereign power' determining the significance of rights – could ever be controlled by a court that does not seem to avail itself of a fixed basis in order to determine and enforce the controlling standards.[35]

When a fundamental right is given effect through positive intervention, the legislature must be afforded some discretion in delimiting individual spheres of freedom, structuring the legal system and relevant parts of social life.[36] Indeed, the positive dimension of fundamental rights is multifaceted: there are many ways of contributing to the realisation of a fundamental right through positive intervention. The constitutional principle of equal treatment, for instance, includes alongside its negative dimension (such as the prohibition to prevent X from doing something because X is a woman) a positive prong (such as a duty to grant the same benefit to X and Y)[37] and there are several practical avenues to remedy a breach of the abstract right to equality. One could decide to extend the granting of a given benefit to all those entitled to equal treatment; but one could also decide to end the benefit or to alter its content.

Constitutional adjudication related to the positive dimension of constitutional norms ought therefore to acknowledge the greater discretion that political institutions have in shaping such positive dimensions of fundamental rights in contrast to their negative dimension. To that effect Somek calls for a 'loose coupling' of constitutional and legislative tools. This account, as he himself warns, must not be mistaken for an 'awfully conservative' argument simply because it amounts to a call for greater leeway to the legislature.[38] Instead, it represents a sophisticated form of

[32] M Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice. A Review Essay on A Theory of Constitutional Rights' (2004) 2 *International Journal of Constitutional Law* 574, 584.
[33] Kumm, 'Constitutional Rights as Principles', above n 32, 574.
[34] ibid 574, 587.
[35] Somek, above n 17, 84.
[36] R Alexy, *A Theory of Constitutional Rights* (Oxford, Oxford University Press, 2002) 304.
[37] ibid 287.
[38] Somek, above n 17, 121.

reasoning calling for a cautious approach to the use of constitutional norms when the legislator has chosen to facilitate and give effect to a fundamental right. How are these debates reflected at EU level?

Constitutional versus Legislative Guidance on Fundamental Rights in the EU

A Fundamental Rights Policy for the EU?

There has been much debate in the past decades over the need and desirability of developing a fundamental rights *policy* at the EU level – and thus for the EU to develop a political discourse on fundamental rights. One of the triggers for this has been the call for deeper European integration in the 1990s. This related to the feeling that perhaps the EU should place fundamental rights at the core of its activities to complement and counterbalance its economic focus and enhance its legitimacy.[39] Furthermore, there remains a vivid awareness that the more plural the legal order, the more important the need to debate the shape of fundamental rights protection in political terms as well as at the political level, instead of leaving this process to constitutional law-making and adjudication.[40]

However, lukewarm responses have emerged out of fear that this would prevent the use of ordinary law to address classic societal imbalances, as well as lead to a blurring of the distinction between legislative and constitutional norms. Von Bogdandy in particular argues that although it is true that the protection against fundamental right violations in the context of EU intervention should be accompanied by 'corrective regulative and distributive mechanisms',[41] this should 'not be cast in human right terms, let alone in terms of human rights policy'.[42]

This is for two reasons. First, one should be cautious before giving a constitutional anchorage to rights. Casting corrective regulative and distributive mechanisms in human rights terms may ignore the careful balancing process between liberal freedoms, political rights and social entitlements that political institutions ought to perform.[43] This point is well illustrated by the comments

[39] P Alston and JHH Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy: The European Union and Human Rights' (1999) Harvard Jean Monnet Working Paper No 1/1999, 15.

[40] R Bellamy, 'Constitutive Citizenship versus Constitutional Rights: Republican Reflections on the EU Charter and the Human Rights Act' in T Campbell, KD Ewing and A Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford, Oxford University Press, 2001) 16.

[41] A von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) 37 *Common Market Law Review* 1307, 1315. See also D Kennedy, 'The International Human Rights Movement: Part of the Problem?' (2002) 14 *Harvard Human Rights Journal* 101, 109.

[42] von Bogdandy, above n 41.

[43] ibid.

expressed by Davies on the *Test-Achats* case of the Court.[44] The Court had been asked to rule on the validity of Article 5(2) of the Directive implementing the principle of equal treatment between men and women in the access to and supply of goods and services.[45] This provision allowed Member States to decide, before 21 December 2007, whether to permit differences in insurance premiums and benefits based on one's sex, under the condition that such differences indeed reflect situations where sex is a determining factor in the assessment of risk. No temporal limitation was placed on the use of this provision. The Court found the derogation of unlimited duration to a fundamental principle of EU law to violate the said principle.[46] A remarkable feature of the case is that the Court corrected the legislator in a context in which the latter had been specifically entrusted by the TFEU to give shape to the same fundamental right against which the legislation was tested. Davies has suggested that the legislature may have been granted a greater margin of manoeuvre by the Court if it had more explicitly addressed the policy considerations at hand.[47] In doing so, as Davies suggests, the legislator would have argued on the basis of its own expertise and avoided the more abstract and principled realm of fundamental rights which the Court considers to be its domain.

Secondly, political debate on fundamental rights in the context of daily decision-making procedures will inevitably remain intertwined with a strong 'constitutional' framing. This would create pressure on the Court to increasingly engage in a human rights discourse and place it – as well as itself – in a position of greater centrality in the European political process.[48] Von Bogdandy warns that the Court may not have the necessary legitimacy to depart to such a great extent from its primary function, which is to ensure that the result of the political process should be enforced.[49]

Risks of Interference between Constitutional and Legislative Layers of Norms on Fundamental Rights in the EU

The important point made by von Bogdandy is therefore that the adoption of legislation elaborating on fundamental rights cannot easily be disconnected from constitutionalisation processes, thus creating risks of interference between

[44] *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] EU:C:2011:100.

[45] Council Directive (EC) 2004/113 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37.

[46] *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres*, above n 44, para 34.

[47] G Davies, 'Legislative Control of the European Court of Justice' (2014) 51 *Common Market Law Review* 1579, 1597.

[48] von Bogdandy, above n 41, 1307, 1329. See also B de Witte, 'The Legal Status of the Charter: Vital Question or Non-Issue?' (2001) 8 *Maastricht Journal* 81, 84.

[49] von Bogdandy, above n 41, 1307, 1325.

two layers of norms. Such interference is unique *in* and *to* the EU legal order for two reasons.

On the one hand, EU law is characterised by a particularly high level of constitutionalisation – namely, of norms being enshrined in EU primary law (when it comes to economic law in particular) – because of the particular process by which EU integration has been engineered. The interplay between legislative law-making and constitutional interpretation on matters of fundamental rights creates a particularly strong case for 'uploading' the rights at hand.[50] Greater emphasis on fundamental rights discourses would therefore only enhance the appeal to intensify the constitutionalisation process due to the inherent 'fundamental' nature of such a discourse. The case law on the horizontal effects of the prohibition of discrimination on the grounds covered by the Directive establishing a general framework for equal treatment in employment and occupation[51] from *Mangold*[52] to the recent *Egenberger*[53] case aptly illustrates this point. The Directive indeed brought within the scope of EU law the prohibition of discrimination on grounds of age and religion or belief in employment and the Court has since then been using the general principle of non-discrimination as well as – in the latest case law – the Charter (ie, two sets of constitutional norms) to enhance the legal effects of the prohibition of discrimination in horizontal disputes.

On the other hand, and most importantly, the emphasis placed on either legislative intervention or constitutional guidance imply inter-institutional tensions which differ in a supranational legal order from those present in a domestic legal order as identified above. The debates on judicial review and the positive dimension of fundamental rights outlined above provide valuable tools to reflect on the legitimacy implications of the various sources of fundamental rights protection in the EU legal order. Nevertheless, both debates are largely shaped in the context of domestic legal orders.[54] The important role given to the legislator by the relevant theories developed in the US, UK or German contexts is to be related to the existence of large democratically accountable assemblies which have no EU equivalent. Similarly, the role of the Court as a constitutional adjudicator differs from that of domestic constitutional courts. Adding complexity, as the EU has no general fundamental rights competence and as the precise circumstances in which legislation-making takes place depends on the exact wording of the provision enabling the EU legislature to intervene, or on the 'legal basis', the practical

[50] M Dawson, 'The Political Face of Judicial Activism: Europe's Law-Politics Imbalance' in M Dawson, E Muir and B de Witte (eds), *Judicial Activism at the European Court of Justice* (Cheltenham, Edward Elgar, 2013) 11 ff; Davies, 'Legislative Control of the European Court of Justice', above n 47, 1579, 1582.

[51] Council Directive (EC) 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

[52] *Werner Mangold v Rüdiger Helm* EU:C:2005:709.

[53] *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* EU:C:2018:257.

[54] N Walker, 'Human Rights in a Post-National Order: Reconciling Political and Constitutional Pluralism' in T Campbell, KD Ewing and A Tomkins (eds), *Sceptical Essays on Human Rights* (Oxford, Oxford University Press, 2001) 127.

implications of the theoretical debates highlighted above can only be measured by reference to a specific domain of legislative intervention.

Conclusion

In the context thereby described, identifying institutional safeguards for the development of a fundamental rights narrative, reaching a healthy balance between democratic accountability and constitutional adjudication at EU level is a uniquely complex task. The work of both Waldron and Somek suggests that the adoption of legislation fleshing out fundamental rights provides a useful and welcome opportunity to debate European values through ordinary political processes. Yet, the contested democratic credentials of the EU legislative process as well as the Court's case law tending towards an ever broader range of constitutional rights make it difficult for the EU to firmly assert a new approach on the protection of fundamental rights through legislation. The implications of the debate are all the more important given that the EU is a multilayered legal order as we shall now see.

Tensions between Domestic and EU Legal Orders in the Process of Europeanisation of the Fundamental Rights Discourse

The particularly authoritative nature of EU over domestic law makes it important to fully spell out the constitutional implications of fundamental rights' law-making at EU level. The EU legal order indeed is a remarkably powerful supranational legal system. Using this infrastructure to enhance fundamental rights presents both advantages and disadvantages. Important advantages have been explored elsewhere: the EU enforcement machinery can be placed at the service of fundamental rights protection[55] and the process of EU law-making can be used to mainstream fundamental rights concerns across a broad range of policy areas.[56] Yet, the risks associated with the novel competences of the EU in the field of fundamental rights shall also be spelt out as will now be done.

Constitutive versus Divisive Effects of Supranationalisation of Fundamental Rights Discourse

If disagreement is as central to the fundamental rights discourse as suggested by Waldron, and thus potentially so divisive, why develop it in the form of a 'policy'

[55] M Dawson, E Muir and M Claes, 'Enforcing the EU's Rights Revolution: The Case of Equality' (2012) 3 *European Human Rights Law Review* 276.

[56] Dawson, *The Governance of EU Fundamental Rights*, above n 13, ch 3.

at European level? This question was already partly answered in the debate from the late 1990s on the need and desirability to develop a fundamental rights policy at the EU level. At that time there was a strong feeling that deeper European integration and a more central role for fundamental rights protection in EU politics would enhance the legitimacy of the EU legal order.[57] Walker in particular calls for an argument to be made beyond the democratic critique of the EU fundamental rights regime.[58] His reasoning is twofold. On the one hand, the protection of fundamental rights may be perceived precisely as a way of consolidating democratic scrutiny and control in the EU. On the other hand, this would compensate for the initial economic bias of the common market.[59]

The first prong of Walker's argument is useful for the purpose of a discussion of the democratic challenge of human rights in the EU. In his view, a greater focus on fundamental rights protection may actually attract greater political attention and thus act as a trigger for greater democratic activity at the European level.[60] In that sense, Walker stresses that the strength of the fundamental rights argument in such a legitimising function is that the definition of fundamental rights would be entrusted to EU political institutions – such as by Article 16 TFEU on data protection or Article 19 TFEU on non-discrimination – however imperfect these institutions may be from the perspective of democratic accountability. What is desirable then is a 'human rights *policy*'[61] with specific emphasis on the role of ordinary politics, so as to pay tribute to the 'sensitive and deliberative context for assessing the force and deciding the practical import for various compensatory arguments within the extended chain of rights'.[62] Understood through that lens, policy-making on fundamental rights matters at the EU level ought to be protected from 'constitutionalisation' or 'ossification'[63] to avoid reintroducing the democratic objection.[64]

Besides this argument that seeks to enhance the legitimacy of the very structure – the EU – that it pledges to consolidate, the most powerful and valuable external argument in favour of supranational protection of fundamental rights relates to the need for review. The existence of an exogenous set of actors monitoring fundamental rights compliance in national legal orders may indeed

[57] Alston and Weiler, above n 39. See also for instance, M Bell, *Anti-Discrimination Law and the European Union* (Oxford, Oxford University Press, 2002) 13.

[58] Walker, above n 54, 135. For another attempt at addressing the issue of legitimacy in the face of a possible deficit of the democratic juridification of governance beyond the nation state, see further J Habermas, *The Crisis of the European Union: A Response* (Polity Press, 2012) 41; this analysis however mostly focuses on constitutional law-making in the EU rather than policy-making.

[59] Walker, above n 54, 135.

[60] See also Dawson, *The Governance of EU Fundamental Rights*, above n 13, 20.

[61] (emphasis original) Walker, above n 54, 141.

[62] Walker, above n 54, 141.

[63] Opinion of AG Trstenjak, *Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre* EU:C:2011:559, para 157.

[64] Walker, above n 54, 137. See also von Bogdandy, above n 41, 1307.

permit the calling into question of the bias deeply enshrined in domestic and/or local systems.[65] Leaving the question aside of whether this role should be fulfilled in Europe by the EU or the Council of Europe,[66] one of the implications of this approach is that the supranational level is indeed used as a tool to review, or 'a check', on domestic policy-makers.

In this context, the danger of enhanced supranationalisation of fundamental rights questions – if the institutional design is not carefully thought through – would mean triggering, or feeding, a feeling among national constituencies that their political preferences are being disregarded. Enhanced supranationalisation of fundamental rights may not rely on channels that allow for genuine participation of all the stakeholders because of the disjuncture between the domestic and the EU legal order.[67] This disjuncture is related to specific criticisms of the EU institutional framework as much as to the general dynamics of supranational human rights governance. Sociologists have shown that while the supranational level offers multiple opportunities for fundamental rights actors to support and shape progressive agendas despite reticence at the domestic level, the same 'circumvention logic' explains why the outcome reached at the supranational level may trigger domestic resistance. By couching their policy and fundamental rights arguments at the supranational level in cosmopolitan terms or in terms of a broader European identity, civil society actors may create a source of resistance within domestic spheres related to the 'perceived threat to national identities and allegiances'.[68]

The risk here is therefore that an EU fundamental rights discourse becomes detached from the domestic sphere or perceived as so exogenous that it is ultimately rejected altogether. In order to achieve the objective of acting as a source for cohesion, EU intervention elaborating on the positive dimension of fundamental rights thus ought to be mediated through political discourse as well as to be able to accommodate claims for divergent national sensitivities. Both concerns point at the importance of political debate and legislative guidance on fundamental rights. The features of EU law however do not make it easy to fully address the said concerns within the process leading to the adoption of legislation as we shall now see.

[65] JHH Weiler, 'Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights' in N Neuwahl and A Rosas (eds), *The European Union and Human Rights* (The Hague, Martinus Nijhoff Publishers, 1995) 52, 74.

[66] To the extent that this book investigates policy-making on fundamental rights matters, the focus is on the EU legal order where political debates on the content of fundamental rights may lead to the adoption of related legislation.

[67] See for instance Bell, above n 57, 202.

[68] C Ruzza, 'Civil Society Actors and EU Fundamental Rights Policy: Opportunities and Challenges' (2014) 15 *Human Rights Review*, 65, 70. For a contrasting view specific to the feminist movement see C Hoskyns, *Integrating Gender: Women, Law and Politics in the European Union* (London, Verso, 1996) 17.

The EU Principle of Subsidiarity is Ill-Suited to Regulate EU Legislative Intervention in Fundamental Rights Matters

An attempt at reconciling the call for supranational intervention in fundamental rights matters with that of respect for domestic peculiarities leads us to turn to the principle of subsidiarity. The principle is indeed often alluded to in order to articulate the relationship – or alleviate tensions – between domestic legal orders and European legal orders by ensuring that decisions be made as closely as possible to citizens.[69] Although useful, as argued elsewhere,[70] the EU version of this principle is imperfect to fully grasp the sophisticated interplays between EU and national law in the field of fundamental rights protection.[71]

As it is defined in EU law, the principle of subsidiarity only provides limited guidance to justify EU intervention on fundamental rights matters. According to Article 5(3) TEU and as it is commonly understood, the principle relies on a two-tier comparative efficiency test. The EU may intervene only if the Member States cannot sufficiently achieve the desired objective and if the EU can actually do better on the matter. This comparative efficiency test may not be appropriate to guide fundamental rights standards-setting by political institutions. Indeed, it does not allow tensions between values that are central to controversies on the EU fundamental rights discourse to be addressed.[72] The reasons have been explored by several authors,[73] and are twofold.

The first explanation is that the *function* of fundamental rights protection in EU law differs from that of competences that have a cross-border component. That makes the EU principle of subsidiarity inappropriate to provide useful guidance. The definition of the principle of subsidiarity provided for in Article 5(3) TEU relies on the assumption that the principle articulates the relationship between the EU and the Member States in a transnational context.[74] However, certain EU fundamental rights competences – especially in the case of legislation designed to 'give specific expression' to a fundamental right such as EU equality law – are

[69] eg, Recital 1 of the Protocol (No 2) on the Application of the principles of subsidiarity and proportionality [2008] OJ C 115/206.

[70] E Muir, 'The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges' (2014) 51 *Common Market Law Review* 219.

[71] See further the distinction between functional and normative subsidiarity in LR Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 *European Journal of International Law* 125, 128.

[72] See by analogy, FW Scharpf, 'The Double Asymmetry of European Integration; or: Why the EU cannot be a Social Market Economy' (2009) MPIfG Working Paper No 09/2012, available at: www.mpifg.de/pu/workpap/wp09-12.pdf 21–22.

[73] eg, G Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time' (2006) 43 *Common Market Law Review* 63; P Craig, 'Subsidiarity: A Political and Legal Analysis' (2012) 50 *Journal of Common Market Studies* 72.

[74] T Horsley, 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw' (2012) 50 *Journal of Common Market Studies* 267, 275.

concerned with regulating relationships *within* states;[75] they go further in deepening European integration rather than merely regulating relationships *among* states.

There is thus a mismatch between the function of the principle of subsidiarity as defined in EU law and the function of fundamental rights standard-setting in the EU. With EU fundamental rights law-making, the EU's main aim is 'to bring into being a European public sphere based on a shared understanding of rights and so motivate agreement on a federal structure for Europe that in various ways goes beyond national allegiances and political cultures'.[76] A subsidiarity test concerned with the appropriate (national versus EU) level for the regulation of fundamental rights standards is thus foreign to the dynamics of fundamental rights standard-setting through EU legislation. This is especially so when such legislation is specifically designed to give expression to a fundamental right.[77]

The second – and closely related – element explaining the difficulty of applying the traditional EU subsidiarity test to legislation involving fundamental rights relates to the *nature* of fundamental rights standard-setting. As pointed out by Davies, genuine dilemmas and controversies on matters of fundamental rights protection primarily originate in shocks between objectives or values.[78] In contrast, the subsidiarity test as it is defined by EU law is based on an assessment of the effectiveness of the law to pursue a pre-established objective. Key conflicts on the definition of fundamental rights standards thus cannot be solved by comparative efficiency tests: they are instead concerned with prioritising and balancing values.[79] As Davies stressed, 'the value-violence [which is being done to] some states, or the autonomy cost which [is imposed by EU legislation on fundamental rights], is considerable … Subsidiarity, however, will not be involved'.[80]

The principle of subsidiarity thereby defined is ill-suited to regulate EU legislative intervention in fundamental rights matters. The principle therefore cannot easily be used for the domestic sphere to challenge the decision by the EU to set fundamental right standards through legislation. Instead, the outcome of the political negotiations leading to the adoption of fundamental rights legislation must be understood as encapsulating a subtle and sensitive balance between various values as well as levels of authority at stake.

[75] A von Staden, 'The Democratic Legitimacy of Judicial Review Beyond the State: Normative Subsidiarity and Judicial Standards of Review' (2011) Jean Monnet Working Paper No 10/2011, 9.

[76] R Bellamy, 'Still in Deficit: Rights, Regulations, and Democracy in the EU' (2006) 12 *European Law Journal* 725, 733.

[77] See also Horsley, above n 74, 275.

[78] Davies, 'Subsidiarity: The Wrong Idea, in the Wrong Place, at the Wrong Time', above n 73, 63, 67–72.

[79] Acknowledging that it is more difficult to apply precepts of comparative efficiency that underpin subsidiarity to heads of competence that are other than economic: Craig, above n 73, 72, 75.

[80] G Davies, 'Subsidiarity as a Method of Policy Centralisation' (2006) Hebrew University International Law Research Paper No 11/2006, para 5.

The EU is Not a Subsidiary Organ

The difficulty for the EU in addressing concerns raised by domestic sensitivities on fundamental rights matters is affected by another feature of the EU legal order: namely, the EU is anything but a subsidiary organ.

The Supranational Features of EU Law Apply to EU Fundamental Rights Law

Somek argues that the success of a system of fundamental rights protection such as that of the European Convention on Human Rights (ECHR) lies in the fact that it leaves participants sufficient leeway on the intensity of their involvement, allowing for a degree of self-determination.[81] The 'weak supranational character of the system', as well as techniques such as that of the 'margin of appreciation doctrine' help states to balance the costs of the narrowing of their sovereignty over the matter.[82] The ECHR thus relies on an element of subsidiarity, understood in the broad sense (not in the EU sense as discussed in the last section), that acknowledges national representative institutions as the central political bodies in the process of realisation of fundamental rights protection.[83] This allows for a combination of external monitoring and supervision of fundamental rights with internally driven mechanisms of change.

In contrast, the EU – when it intervenes on fundamental right matters – is not designed to be ancillary to national mechanisms of human rights protection.[84] This places the EU in a distinct position from that of the ECHR, the function of which is primarily to provide minimum standards, after exhaustion of domestic remedies, for all rights identified as human rights in the Convention.[85] The EU is an entity with a broad range of legislative powers that may lead to unification of selected fundamental rights. The system of allocation – and exercise – of EU competences results in circumstances in which EU law, since it takes primacy over national law,[86] may deprive Member States of any discretion in setting fundamental rights standards.

[81] Somek, above n 17, 180; see also Dawson, *The Governance of EU Fundamental Rights*, above n 13, 5–7.

[82] Somek, above n 17, 181–83.

[83] ibid 188.

[84] On the ECHR, see further Helfer, above n 71, 125, 128–30. Helfer stresses that even in the context of the ECHR, the evolution of the type of problems brought before the ECHR weakens the persuasiveness of treating the mechanism as subsidiary.

[85] See further Lord Hoffmann, 'The Universality of Human Rights' (Judicial Studies Board Annual Lecture, 19 March 2009), available at: www.judiciary.gov.uk/wp-content/uploads/2014/12/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.pdf, 12; and R Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14 *Human Rights Law Review* 487, 493. Nuancing the distinction between the EU and the ECHR, see G Martinico, 'Is the European Convention Going to Be "Supreme"? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts' (2012) 23 *European Journal of International Law* 401.

[86] LFM Besselink, 'Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union' (1998) 35 *Common Market Law Review* 629, 664.

The Court's *Melloni* case illustrates this point.[87] The European Framework Decision 2002/584[88] was so detailed about the application of the European Arrest Warrant mechanism to the situation of trials *in absentia* that Member States were left with no discretion and 'human rights protection [was] fully supranationalised'.[89] In other examples, Member States may be granted greater discretion, and thus, the EU may well be acting as a more ancillary organ. This is illustrated aptly by the *Fransson* case in which, although the Court asserted its jurisdiction over the matter, the actual implementation of the effect of the fundamental right at hand was left to the domestic court.[90] Yet, as Daniel Thym puts it, in both *Melloni* and *Fransson*, the Court determined the freedom of action of the Member States, unlike the European Court of Human Rights where greater leeway is usually left to constitutional courts or domestic authorities.[91]

Furthermore, whenever the EU exercises a fundamental rights competence, it may provide minimum as well as high levels of protection – thus clearly departing from an ancillary role.[92] EU legislation that gives expression to a fundamental right largely harmonises the way a fundamental right has to be conceptualised and implemented. The interpretation of that legislative framework equally bears the harmonising power of the said piece of legislation, and may therefore dictate a detailed and uniform understanding of a fundamental right which will be applied across the EU in both horizontal and vertical relationships.

The harmonising power of EU legislation giving expression to a fundamental right is epitomised by the controversies triggered by the Court's rulings in *Achbita*[93] and *Bougnaoui*[94] in which the Court placed a cap on employees' ability to wear headscarves by asserting the fundamental right of employers to conduct a business.[95] Irrespective of the normative choices made by the Court in this context, it shall be noted that the institutional setting of the dispute placed the Court in a remarkably delicate situation. The criticisms against these rulings become all the more intense that their outcome severely constrains the domestic sphere in the way it will be able to articulate its vision of the relevant fundamental rights.

[87] *Stefano Melloni v Ministerio Fiscal* EU:C:2013:107.

[88] Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States [2002] OJ L190/1.

[89] D Thym, 'Separation Versus Fusion – or: How to Accommodate National Autonomy and the Charter? Diverging Visions of the German Constitutional Court and the European Court of Justice' (2013) 9 *European Constitutional Law Review* 391, 402.

[90] *Åklagaren v Hans ÅkerbergFransson* EU:C:2013:280; Thym, above n 89, 391, 403.

[91] Thym, above n 89, 405–06. See also N Krisch, 'The Open Architecture of European Human Rights Law' (2010) 71 *Modern Law Review* 183, 214.

[92] See, eg, AG Poiares Maduro in *S Coleman v Attridge Law and Steve Law* EU:C:2008:61, para 24. See also A Stone Sweet and K Stranz, 'Rights Adjudication and Constitutional Pluralism in Germany and Europe' (2012) 19 *Journal of European Public Policy* 92, 105.

[93] *Samira Achbita and Centrum voor Gelijkheid van Kansen en voor Racismebestrijding v G4S Secure Solutions NV* EU:C:2017:203.

[94] *Asma Bougnaoui and Association de Défense des Droits de l'Homme (ADDH) v Micropole SA* EU:C:2017:204.

[95] E Cloots, 'Safe Harbour or Open Sea for Corporate Headscarf Bans? Achbita and Bougnaoui' (2018) 55 *Common Market Law Review* 589, 621 ff.

Inviting Judicial Deference

Which EU law concepts could be used to address such concerns? Cloots has suggested that the Court could be more deferential towards domestic courts and enable each Member State to have discretion when interpreting legislation regulating fundamental rights at a domestic level.[96] This approach can be supported with reference to Article 4(2) TEU, according to which the EU shall respect the national identities 'inherent in their fundamental structures, political and constitutional'. The concept of national identity is thus a tool that could be used to support self-restraint in judicial interpretation of legislative texts[97] and that could be particularly useful to acknowledge the particular nature of EU fundamental rights legislation.

A counter-argument to these claims is that, in the EU legal order, the role of the Court is to provide clear guidance on the interpretation of EU law. An integrationist vision of the EU legal order, as well as arguments drawn from legal certainty, therefore call for a uniform interpretation of EU legislation across participating Member States. The tension between the two lines of reasoning – one asking for deference and the other for uniformity and clarity – is particularly salient in relation to the interpretation of legislation giving expression to a fundamental right. Such an exercise indeed crystallises the structural difference between subsidiary forms of fundamental rights protection (such as the European Convention and Court of Human Rights) and the harmonising powers of EU legislative intervention.[98]

Conclusion

The challenge for the EU is to find a middle ground between, on the one hand, promoting and enhancing the protection of fundamental rights at supranational level when empowered to do so by the Treaties, and on the other hand, ensuring that this form of intervention does not result in the entire edifice of the EU legal order being perceived as unduly threatening domestic systems of values. The advantage of EU competences empowering the legislator to develop specific fundamental rights policies may precisely lie in setting the scene for a political debate on these European values.

Yet, the infrastructure of the EU legal order is (still) ill-equipped to deal with these types of competences. The principle of subsidiarity does not help in addressing calls for domestic control and, conversely, once EU law exists, it constitutes a uniquely powerful fundamental rights instrument at supranational level. One should therefore be cautious to carefully respect the political nature of the

[96] E Cloots, 'The CJEU's headscarf decisions: Melloni behind the veil?' (*VerfBlog*, 2017), available at: verfassungsblog.de/the-cjeus-headscarf-decisions-melloni-behind-the-veil/.

[97] E Cloots, *National Identity in EU Law* (Oxford, Oxford University Press, 2015) 323–26 and 327–29.

[98] Arguing along similar lines see Cloots, 'Safe Harbour or Open Sea for Corporate Headscarf Bans?', above n 95.

delicate balances and compromises enshrined in that legislation and avoid confusion with constitutional and rigid forms of protection of related rights.

Epilogue

The 'downloading' of fundamental rights protection, as identified above, is a process called for by constituent powers to allow the political sphere to reflect on the function performed by a fundamental right in a given legal order, on the scope of political intervention needed as well as on the means of action. In creating opportunities to download, constituent powers purportedly transfer authority to political institutions to substantiate a fundamental right. In the context of the EU, this invitation to download fundamental rights protection is all the more important as it has implications for the vertical allocation of powers between the EU and its Member States. Given that the rationale for EU intervention on such matters is inherently political and intended to contribute to the legitimacy of the Europeanisation process as a whole, the delineation of supranational intervention in the field is particularly sensitive.

Whether we look at fundamental rights law-making as entering a new stage in terms of its historical evolution, as a subject of inter-institutional competition within a legal order or as a controversial domain of supranational intervention, as has been done in the main three sections of this chapter, much emphasis is being placed on the political tensions underlying the process. It would be expected that a healthy EU fundamental rights policy such as that called for by Article 19 TFEU on equal treatment or that called for by Article 16 TFEU on data protection be built on two pillars. First, the constitutional value of the rights protected ought to be maintained in order to ensure compliance with the initial and legitimate objective of uploading fundamental rights protection. Secondly, the political dimension of decision-making on the matter ought to be acknowledged and respected. This is requested by the relevant constitutional framework but is also necessary to address disagreement on policy-making in the field through appropriate dialogue and to ensure the legitimacy-building function of the relevant policy. As pointed out above, this is not to say that EU legislation giving expression to fundamental rights shall be subject to no judicial review or no constitutional interpretation. The point is more nuanced: where the EU decision-making process is functioning normally, with a clear legal base and full legislative process, judicial deference may be justified.[99]

Yet, as we have seen political processes may not easily be disconnected from their constitutional framework, especially in a highly constitutionalised legal order such as that of the EU. This creates a genuine risk that the dynamics inherent to the

[99] Dawson, *The Governance of EU Fundamental Rights*, above n 13, 35 and 80.

EU legal order and to the powerful dynamics of uploading of fundamental rights protection pre-empt, hinder or hijack attempts at addressing important questions on the function, scope and tools for fundamental rights protection through political dialogue. In that sense, it may be useful also for the EU legislator and constituent powers in the future to recall the invitation issued by von Bogdandy to exercise restraint in casting corrective regulative and distributive mechanisms in fundamental rights terms. Fundamental rights narratives are so delicate for institutions and for policy-makers to articulate that they should be handled with great caution, especially as the outcome of the decision-making process carries the unique strength of the EU legal order.