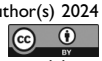
Article

MJ

Maastricht Journal of European and Comparative Law
2024, Vol. 31(2) 234–253



DOI: 10.1177/1023263X241279352
maastrichtjournal.sagepub.com


Common constitutional traditions: A story of genesis and normative transformations

Jaka Kukavica*

Abstract

This paper aims to inform our understanding of the past, present and future doctrinal nature of constitutional traditions common to the Member States (CCTs) in EU law by forwarding a novel historical narrative on their development. It tells not only a story of how CCTs came to be and what their function was or is today, but it also tells a story of how CCTs have transformed in the jurisprudence of the CJEU through time, what mechanisms affected that transformation, and how those mechanisms operated. It argues that, at first, CCTs had served different functions, the most important of which was serving as a source of normativity of fundamental rights in Community law. With time, this function dissipated, and the Court failed to sufficiently reinvent the purpose of CCTs. With the incorporation of the Charter, CCTs have undergone what the paper calls a process of 'charterization', through which they ceased being a source of normativity of the rights that have originated from them in the past. The Charter became the exclusive normative reference and CCTs of today and tomorrow are rhetorical devices at worst, and optional interpretative aids for the interpretation of the Charter at best.

Keywords

Constitutional traditions common to the Member States, EU Charter of Fundamental Rights, EU fundamental rights, interpretation, normativity, CJEU, European Convention on Human Rights

1. Introduction

Recently the relationship between the European and national legal orders has again become hotly contested. In this context, the debates on comparative law and constitutional traditions common to

*Assistant Professor, Faculty of Law, University of Ljubljana

Corresponding author:
Jaka Kukavica, Assistant Professor, Faculty of Law, University of Ljubljana, Ljubljana, Slovenia.
Email: Jaka.Kukavica@pf.uni-lj.si

the Member States[1] in the decision-making of the ECJ have regained traction. As Lenaerts and Gutman have noted, 'the study of comparative law in the Court of Justice of the European Union […] strikes at the heart of the relationship between the Union and the national legal orders'.[2] Indeed, its importance has been demonstrated by the increased interest in common constitutional traditions as scholars have taken on the challenge of addressing the notion of CCTs from a plurality of perspectives.[3] It has not only been scholars: in 2018, the European Law Institute (ELI) started two Europe-wide research projects on CCTs with a more practical focus, in which judges and scholars worked closely together at addressing the topic from various angles.[4]

And yet, despite the reinvigorated interest, coupled with scholarship produced on CCTs in the past, there are still questions about CCTs that have remained unclear. Sabino Cassese, one of the leading project reporters in one of the ELI projects, identified in a recent paper five crucial questions about CCTs that remain unanswered. One of the highlighted questions was whether CCTs may be used 'only [to] derive "general principles" that act as a source of law, or can they also derive criteria for the interpretation of European and national law?'[5] More broadly put, what has the function of CCTs been until today, and what might it be in the future?

This is the question that this paper seeks to answer. It does so by providing a comprehensive and coherent narrative of the doctrinal evolution of the concept of constitutional traditions common to the Member States, as well as a demonstration of how an appreciation of that evolution is necessary for our understanding of the role CCTs serve today, and of the role they might serve in the future. Unfortunately, attempts to provide such a historical narrative to inform our contemporary understandings of CCTs have been absent from literature. An exception to this are attempts by some Italian scholars to forward one comprehensive, though unorthodox, narrative. In essence, they argue that CCTs before the incorporation of the Charter were nothing more than empty rhetorical legitimizing devices, which have since the introduction of the Charter been given a new life and

1. Note that I use the terms 'constitutional traditions common to the Member States', 'common constitutional traditions' and 'CCTs' interchangeably.
2. K. Lenaerts and K. Gutman, 'The Comparative Law Method and the Court of Justice of the European Union: Interlocking Legal Orders Revisited', in M. Andenas and D. Fairgrieve (eds.), *Courts and Comparative Law* (Oxford University Press, 2015), p. 143.
3. See S. Cassese, 'Ruling from Below: Common Constitutional Traditions and Their Role', 29 *NYU Environmental Law Journal* (2021), p. 591; E. Hancox, 'The Relationship Between the Charter and General Principles: Looking Back and Looking Forward', 22 *Cambridge Yearbook of European Legal Studies* (2020), p. 233; S. Ninatti, 'Dalle tradizioni costituzionali comuni all'identità costituzionale', *Stato, Chiese e pluralismo confessionale* (2019), p. 102; Sir F. Jacobs, 'Comparative Law and European Union Law', in M. Reimann and R. Zimmermann, *The Oxford Handbook of Comparative Law* (Oxford University Press, 2019); K. Lenaerts, 'Discovering the Law of the EU: The European Court of Justice and the Comparative Law Method', in T. Perišin and S. Rodin (eds.), *The Transformation or Reconstitution of Europe: The Critical Legal Studies Perspective on the Role of the Courts in the European Union* (Hart Publishing, 2018).
4. See ELI Council Decision CD 2020/21 of 8 September 2020, approving the 'Fundamental Constitutional Principles' project; and the ELI Council Decision CD 2018/2 of 9 February 2018, approving the 'Common Constitutional Traditions in Europe' project.
5. S. Cassese, 29 *NYU Environmental Law Journal* (2021), p. 614. The other four questions pertain to the definition of the word 'tradition', to the addressees of the CCT clause, to the hierarchy between CCTs and the ECHR in cases of divergences and to the extent to which CCTs should take constitutional trends rather than merely traditions into account. Though questions worth asking, addressing them would be outside the scope of a single article.

now 'play an essential role within the reasoning of the CJEU in spite of […] the codification of a European bill of rights.'[6]

This paper forwards a different narrative; one where CCTs used to be an important source of normativity of fundamental rights but were made obsolete as they were demoted to empty rhetoric through the codification of rights with the Charter. It tells a story not only of how CCTs came to be and what their function was and is today, but also of how CCTs have transformed in the jurisprudence of the ECJ through time, what mechanisms affected that transformation, and how those mechanisms operated. The paper argues that, at first, CCTs had served different functions, the most important of which was serving as a source of normativity of fundamental rights in Community law. With time, this function dissipated and the ECJ failed to sufficiently reinvent the purpose of CCTs. With the incorporation of the Charter, CCTs have undergone what this paper calls a process of 'charterization', through which they ceased being a source of normativity of the rights that have originated from them in the past. The Charter became the exclusive normative reference and CCTs of today and of the future are rhetorical devices at worst, and optional interpretative aids for the interpretation of the Charter at best. In the language used by Cassese: CCTs no longer serve the function of sourcing the normative basis of general principles, but they can be used to derive interpretative criteria in the explication of Charter provisions. The paper furthers this narrative without a normative undertone; it takes no sides as to whether charterization of rights in EU law is a welcome development or one to be concerned about. It merely aims to identify, trace and explain these historical transformations of normativity in EU fundamental rights law.

To do so, the paper analyses the jurisprudence of the ECJ pertaining to CCTs from 1957 to today. We identified the relevant judgments by searching for all judgments in the relevant time period containing the keyword 'constitutional traditions'. This captured the different naming conventions used to refer to CCTs, including 'common constitutional traditions' and 'constitutional traditions common to the Member States' as the most common variations. The results obtained were manually screened and all false positives were excluded. We attempted to avoid false negatives by supplementing the results obtained through this method with CCTs-related cases that are discussed in academic literature and other secondary sources. Throughout the paper, the analysis of CCTs-related case law is juxtaposed with the developments in the case law on other sources of EU fundamental rights, that is the ECHR and the Charter, where the developments were examined by tracing citation networks within ECJ judgments, as well as the judgments discussed in academic literature and other secondary sources.

The paper forwards its narrative by breaking down the historical evolution of EU fundamental rights law into three historical stages based on the (non)existence of the Charter, and the changes in its text and legal value brought by the Lisbon Treaty.[7] The first period, analysed in section 2, runs from the establishment of the European Communities to December 2000, when the Charter was

6. M. Fichera and O. Pollicino, 'The Dialectics Between Constitutional Identity and Common Constitutional Traditions: Which Language for Cooperative Constitutionalism in Europe?', 20 *German Law Journal* (2019), p. 1097; O. Pollicino, 'Common Constitutional Traditions in the Age of the European Bill(s) of Rights: Chronicle of a (Somewhat Prematurely) Death Foretold', in L. Violini and A. Baraggia (eds.), *The Fragmented Landscape of Fundamental Rights Protection in Europe: The Role of Judicial and Non-Judicial Actors* (Edward Elgar, 2018). See also S. Ninatti, 'Ieri e Oggi Delle Tradizioni Costituzionali Comuni: Le Novità Nella Giurisprudenza Comunitaria', in G. D'Elia, G. Tiberi and M. Paola Viviani Schlein (eds.), *Scritti in memoria di Alessandra Concaro* (Giuffrè, 2012).

7. Admittedly, Maastricht Treaty and the inclusion of Art. F(2) in the TEU, which made references to the CCTs, could be another way periodizing the history of fundamental rights. However, because Art. F(2) had no observable impact on the jurisprudence of the CJEU on CCTs the paper neglects it for the purposes of periodization.

proclaimed but not yet binding. Section 3 discusses the second period, ranging from the proclamation of the Charter in December 2000 until the entry into force of the Lisbon Treaty on 1 December 2009, when the Charter was incorporated into primary law. Section 4 discusses the last period, that is from the incorporation of the Charter in 2009 up to the present. Section 5 concludes.

2. The heterogeneity of constitutional traditions common to Member States (1957–2000)

This section traces the emergence of CCTs in (then) Community law in the pre-Charter period, ranging from 1957 – when the first traces of this concept could be found in the *Algera* decision – to 2000, when the Charter was proclaimed. It demonstrates that CCTs had served many doctrinal functions in the jurisprudence of the Court; some of them fundamental to the emergence of fundamental rights, some of them less so. First, CCTs possessed normativity; they were a crucial *source of normative value* through which fundamental rights were 'discovered' as general principles of Community law. Second, in cases where normativity of rights was sourced elsewhere, CCTs served as an *interpretative tool* used to assist in determining the scope of a right. Third, they served a rhetorical or strategic function, where nothing but a one-line reference to them was included in the decision. Finally, a mention is made of the many fundamental rights cases in which CCTs served no apparent function as no reference was made to them whatsoever.

It should be noted before we proceed that the ECHR also played a prominent role in the history of fundamental rights in Community law; a role that was tightly interwoven with that of the CCTs as both acted as building blocks of general principles of EU law. Even though the ECHR was present in the picture of fundamental rights from early on, it was not until the Charter was proclaimed that it started to have an important influence on the development of CCTs and their interaction with the other sources of fundamental rights. For this reason, we set any discussion of the ECHR aside and return to it in section 3, in which we discuss the CCTs after the Charter is proclaimed but not yet incorporated into primary law.

A. The early years and the birth of fundamental rights (1957–1970)

Contrary to the incomplete standard account[8] that traces the emergence of human rights in Community law to the constitutional contestation between the ECJ and the German and the Italian constitutional courts in the late 1960s,[9] it was internal staff disputes that almost a decade earlier facilitated the birth of fundamental rights and the establishment of a nexus between fundamental rights in the laws of Member States and those recognized by Community law. In a 1957 case of *Algera v. Common Assembly*[10] the ECJ had to rule on whether an administrative measure that vests employees with individual rights may be revoked for illegality. The Court noted that this issue

8. For a rare exception, see P. Pescatore, 'Le Recours, Dans La Jurisprudence de La Cour de Justice Des Communautés Européennes, à Des Normes Déduites de La Comparaison Des Droits Des Etats Membres', 32 *Revue internationale de droit comparé* (1980), p. 337, 338.
9. For an overview of this contestation, see U. Scheuner, 'Fundamental Rights in European Community Law and in National Constitutional Law: Recent Decisions in Italy and in the Federal Republic of Germany', 12 *Common Market Law Review* (1975), p. 171.
10. Joined Cases 7/56 and 3 to 7/57 *Algera and Others v. Common Assembly*, EU:C:1957:7.

> is familiar in the case-law and learned writing of all the countries of the Community, but for the solution of which the Treaty does not contain any rules. Unless the Court is to deny justice it is therefore obliged to solve the problem by reference to the rules acknowledged by the legislation, the learned writing and the case-law of the member countries.[11]

The Court then engaged in a detailed comparative analysis of the regimes in the six Member States and concluded that 'the revocability of an administrative measure vitiated by illegality is allowed in all Member States.'[12] This relationship between the principles accepted by Community law and legal principles that are common to the Member States was reiterated in another staff dispute of *Alvis v. Council* six years later, when the Court held that

> [a]ccording to a generally accepted principle of administrative law in force in the Member States of the European Economic Community, the administrations of these States must allow their servants the opportunity of replying to allegations before any disciplinary decision is taken concerning them. […] This rule, which meets the requirements of sound justice and good administration, must be followed by Community institutions.[13]

In this passage the Court once more connected the existence of a right in the laws of the Member States with the existence of that right in Community law. It even hinted that normativity is drawn from the fact that a right is protected by all Member States; it was *because* the principle was found in domestic laws, and was in line with the requirements of sound justice and good administration, that it had to be followed by Community institutions.

Only after *Algera* and *Alvis* did the usual story of vertical contestation between the ECJ and the German and Italian courts begin and give the (in)famous *Geitling*[14] – *Stauder*[15] – *Internationale Handelsgesellschaft*[16] – *Nold*[17] line of jurisprudence. This classical account of the emergence of human rights in Community law is well known: it was through this line of cases that the Court first introduced and cemented the language of 'constitutional traditions common to the Member States' in its vocabulary. In *Internationale Handelsgesellschaft*, building on the sentiment of *Algera* and *Alvis*, the Court held that 'respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice'.[18] It added that 'the protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.'[19]

11. Ibid. at 55.
12. Ibid. at 56.
13. Case 32/62 *Maurice Alvis v. Council*, EU:C:1963:15.
14. Joined Cases 36, 37, 38–59, and 40–59 *Präsident Ruhrkohlen-Verkaufsgesellschaft and Others v. High Authority*, EU:C:1960:36.
15. Case 29/69 *Erich Stauder v. City of Ulm – Sozialamt*, EU:C:1969:57.
16. Case 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr und Vorratsstelle für Getreide und Futtermittel*, EU:C:1970:114.
17. Case 4/73 *Nold KG v. Commission*, EU:C:1974:51.
18. Case 11/70 Internationale Handelsgesellschaft, para. 4. This was confirmed in another case decided on the same day: Case 25/70 *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v. Köster and Berodt & Co.*, EU:C:1970:115, para. 22.
19. Case 11/70 Internationale Handelsgesellschaft, para. 4.

This passage has been widely considered as the birth of fundamental rights in EU law. Crucially, it demonstrates that fundamental rights in Community law were from the very beginning substantively connected to the notions of human rights as they existed in the Member States.[20] After this line of cases introduced and established the basic vocabulary of fundamental rights in the Community, the concept of CCTs began its jurisprudential growth. It featured in the case law of the Court in various capacities until the early 2000s, when the Charter was proclaimed. It is to this underappreciated breadth of functions that CCTs served between 1970–2000 that we turn to now.

B. Heterogeneity in action: Many faces of common constitutional traditions (1970–2000)

Many have hypothesized on the function of CCTs in the pre-Charter era. Some have argued that '[t]he shared constitutional traditions of the Member States were […] the primary substantive legal reference.'[21] Others have claimed that they were only 'a source of comparative study';[22] 'the source of human rights protected as general principles of Community law';[23] or that they were just a 'rhetoric tool'.[24] Pollicino, for instance, argued that 'far from playing a role on the formal normative level of sources of law in a strict sense, […] common constitutional traditions turned into a fundamental rhetorical instrument with persuasive effect on the Member States.'[25] While there is some truth in each of these accounts, none of them individually manages to capture the full picture. This section demonstrates that the reality was more complex by discussing and explaining three different faces of CCTs that literature has too often conflated: (i) CCTs as sources of normativity, (ii) CCTs as an interpretative tool and (iii) CCTs as a rhetorical device. It is through references to these three functions that the role of CCTs will also be analysed in the following two historical periods.

1. Constitutional traditions common to the Member States as sources of normativity. Perhaps the most important function of CCTs in this early period was that they served as a source of normativity of rights.[26] Given the human rights vacuum in the Community legal order at the time, it would have been impossible for the ECJ to invent fundamental rights out of thin air and maintain its legitimacy vis-à-vis the Member States or even other Community institutions. CCTs, in this context, acted as

20. N. Fennelly, 'Legal Interpretation at the European Court of Justice', 20 *Fordham International Law Journal* (1997), p. 656, 678. This nexus was soon confirmed and re-emphasized in *Nold*. See Case 4/73 Nold, para. 13.
21. J. Kokott and C. Sobotta, 'The Charter of Fundamental Rights of the European Union after Lisbon', 2012 *Revista Romana de Drept European* (2012), p. 93, 95.
22. U. Scheuner, 12 *Common Market Law Review* (1975), p. 185.
23. A. Young, 'The Charter, Constitution, and Human Rights: Is This the Beginning or the End for Human Rights Protections by Community Law?', 11 *European Public Law* (2005), p. 219, 223.
24. M. Fichera and O. Pollicino, 20 *German Law Journal* (2019), p. 1103.
25. O. Pollicino, in L. Violini and A. Baraggia (eds.), *The Fragmented Landscape of Fundamental Rights Protection in Europe: The Role of Judicial and Non-Judicial Actors*, p. 46.
26. In referring to 'normativity', I subscribe to the understanding of normativity by Venzke, who defined it as 'a sense of legal obligation that is located at the junctures between validity and effectiveness, between the sphere that speaks on what should be a norm and the sphere that speaks on what is a norm. It is neither one nor the other but a mixture of the two.' Put briefly: 'Normativity refers to a sense of obligation. In other words, it is the force that makes a rule binding. Like any force, it can come in different degrees.' See I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford University Press, 2012) 4–6.

an agreeable source of normativity that validated, facilitated and normatively grounded the 'discovery' of fundamental rights as general principles of Community law. This means that it was *because* a right formed part of CCTs that the Court decided it also formed part of Community law.

We have already encountered this when we discussed the decision in *Alvis*. There, the Court brought the right to sound administration into Community law *because* it found that it was a common principle in the legal orders of the Member States. A similar thing happened in *Hauer v. Land Rheinland-Pfalz*, in which the Court brought the right to property into the Community legal order. It made the normative foundation of that right explicit when it wrote that '[t]he right to property is guaranteed in the Community legal order in accordance with the ideas common to the constitutions of the Member States […].'[27] Likewise, in the cases of *Kirk*[28] and *Fedesa*,[29] the ECJ recognized the principle of non-retroactivity of criminal sanctions as a general principle of Community law on the basis that it was common to all legal orders of the Member States. In *Johnston*,[30] it was the requirement of judicial control that was accepted as a general principle of Community law based on CCTs. And in *Bosman*, the Court recognized that the principle of freedom of association as 'enshrined in Article 11 [ECHR] and resulting from the constitutional traditions common to the Member State, is one of the fundamental rights which […] are protected in the Community legal order'.[31]

But an even stronger demonstration of CCTs being the source of normativity for rights can be found in the negative inferences the ECJ made. These were cases where the Court refused to recognize a right as forming part of Community law because that right was not found in the CCTs: there was no normative basis for the inclusion of the right. In *Hoechst*, for instance, the Court refused to recognize the right to the inviolability of the home with regard to undertakings 'because there are not inconsiderable divergences between the legal systems of the Member States in regard to the nature and degree of protection afforded to business premises against intervention by the public authorities.'[32] Moreover, in *Orkem*[33] the Court refused to introduce the right to remain silent in competition proceedings into Community law on the basis that its comparative law analysis did not 'indicate the existence of such a principle, common to the laws of the Member States, which may be relied upon by legal persons in relation to infringements in the economic sphere […].'[34] It is precisely the negative inferences that demonstrate the normative force of CCTs at the time: if a right could not be considered as part of common constitutional traditions, the ECJ would be reluctant to recognize it as forming part of Community law.[35]

2. Constitutional traditions common to the Member States as an interpretative tool. Regardless of the essential role CCTs played as a source of normativity of human rights, they did not always give

27. Case 44/79 *Hauer v. Land Rheinland-Pfalz*, EU:C:1979:290, para. 17.
28. Case 63/83 *Regina v. Kirk*, EU:C:1984:255, para. 22.
29. Case C-331/88 *The Queen v. Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others*, EU:C:1990:391, para. 42.
30. Case 222/84 *Johnston v. Chief Constable of the Royal Ulster Constabulary*, EU:C:1986:206, para. 18.
31. Case C-415/93 *Union royale belge des sociétés de football association and others v. Bosman and others*, EU:C:1995:463, para. 79.
32. Joined Cases 46/87 and 227/88 *Hoechst AG v. Commission*, EU:C:1989:337, para. 17.
33. Case 374/87 *Orkem v. Commission*, EU:C:1989:387, para. 28–29.
34. Ibid., para. 29.
35. J. Gerards, 'Judicial Argumentation in Fundamental Rights Cases – the EU Courts' Challenge', in U. Boegh Neergaard and R. Nielsen (eds.), *European Legal Method: In a Multi-Level EU Legal Order* (Djøf Publishing, 2012), p. 50.

grounding to normativity of rights. CCTs were also used by the Court as a source of inspiration in interpreting the scope of a right irrespective of the source of its normativity.[36] In other words, they were used as an interpretative tool. This way of employing CCTs has also been described as a 'functional approach',[37] whereas 'the ECJ will at first have recourse to the comparative law method in order to identify [the different interpretive options available in national legal systems]. Next, the ECJ will choose the option which is best suited to the attainment of the objectives pursued by the EU.'[38] Here CCTs served as a starting point of an interpretative enterprise to which the Court added its own teleological flavour and found an interpretative solution best fitted to the Community legal order.[39] This way of engaging with CCTs was notably rare: the Court only explicitly used them as an interpretative tool in two cases.

In *Hauer*, the Court referred to the German, Irish and Italian constitutions, and to the legislative provisions of all the Member States generally, and found that 'all the wine-producing countries of the Community have restrictive legislation, albeit of different severity, concerning the planting of vines […]'.[40] The Court then concluded that 'taking into account the constitutional precepts common to the Member States and consistent legislative practices, […] imposed restrictions on the new planting of vines cannot be challenged in principle'[41] as incompatible with the right to property.

The second of the two cases was *AM&S v. Commission*,[42] in which the Court ruled on the scope of lawyer-client privilege. It noted that Member States share a common understanding that the laws on the confidentiality of written communications between a lawyer and a client are protected when such communications are made 'for the purposes and in the interests of the client's rights of defence and, on the other hand, they emanate from independent lawyers […].'[43] From this, the Court reasoned that the investigative powers of the Commission in competition proceedings 'must be interpreted as protecting […] the confidentiality of written communications between lawyer and client subject to those two conditions, and thus incorporating such elements of that protection as are common to the laws of the Member States.'[44]

3. Constitutional traditions common to the Member States as a rhetorical device. During this period, the Court also made references to CCTs without using them as sources of normativity of rights, nor as an interpretative tool. Instead, in some cases these references were one-liners, non-consequential

36. This is not to say that CCTs do not possess any normativity when they are used as an interpretative tool and, on the flipside, only possess normativity when they are used as sources of normativity. As explained above (n. 26), I take normativity to exist in different degrees. And though normativity of rights is entirely dependent on CCTs when they are used as sources of rights, CCTs also carry normativity – though to a significantly smaller degree – when they are used as interpretative tools.
37. G. Martinico, 'Exploring the Platonic Heaven of Law: General Principles of EU Law from a Comparative Perspective', 3 *Nordic Journal of European Law* (2020), p. 1, 9.
38. K. Lenaerts and J.A. Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice', 20 *Columbia Journal of European Law* (2013), p. 3, 50.
39. M. Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism', 1 *European Journal of Legal Studies* (2007), p. 137, 141; K. Lenaerts, 'The European Court of Justice and the Comparative Law Method', 25 *European Review of Private Law* (2017), p. 297, 307–310.
40. Case 44/79 Hauer, para. 21.
41. Ibid., para. 22.
42. See generally Case 155/79 *AM & S Europe Limited v. Commission*, EU:C:1982:157.
43. Ibid., para. 21.
44. Ibid., para. 22.

declaratory statements that were never followed up in the substantive reasoning of the judgment and had no discernible impact on the outcome of a case. Rather than bearers of normativity, references to CCTs were used as rhetorical devices. The classic recyclable formula the Court used was that 'fundamental rights form an integral part of the general principles of law, the observance of which the Court of Justice ensures, in accordance with constitutional traditions common to the Member States […]'.[45] This quotation is the full extent of the treatment of CCTs in the judgments; there is no further engagement with domestic laws or constitutional traditions at any point later in the argumentative parts of the judgments.

C. An overview of common constitutional traditions from 1957–2000

While CCTs were indeed fundamental in providing a source of normativity for human rights in Community law, they were not the exclusive source of normativity. The Court also partially sourced normativity from the ECHR, as Art. F(2) of the Maastricht Treaty attests.[46] Indeed, in many fundamental rights cases in this period, CCTs were not mentioned by the Court at all,[47] while in some of the cases vertical comparative law was used but no specific references were made to CCTs.[48]

The overall role CCTs have had during this period is conveniently illustrated by *Metronome Music*,[49] a case in which the ECJ was again called to interpret the scope of the right to property. Note that this right had been brought into Community law in *Hauer*, which sourced the normativity of the right from CCTs. In *Metronome Music*, though the existence of the right to property was normatively based in domestic law, its interpretation was conducted autonomously by the Court, the only reference to its normative origins being a one-line declaration that the right to property forms part of general principles of Community law (on the basis of CCTs).[50] This is emblematic of the period in which the Court did not refer to CCTs in a normatively meaningful way very often – much more common were rhetorical single-line references to them – but yet they were the main conceptual driving force behind the 'invention' of fundamental rights within the Community legal order.

3. The proclamation of the Charter and the shift to ECHR standards (2000–2009)

On 7 December 2000, the Charter of Fundamental Rights of the European Union was proclaimed.[51] Not (intended as) a binding instrument at the time, it was drafted with the purpose of strengthening

45. See, for instance, Case 136/79 *National Panasonic (UK) Limited v. Commission*, EU:C:1980:169, para. 18, Case 265/87 *Hermann Schräder HS Kraftfutter GmbH & Co. KG v. Hauptzollamt Gronau*, EU:C:1989:303, para. 14; Case 5/88 *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, EU:C:1989:321, para. 17.
46. See, for instance, Case C-415/93 Bosman. Art. F(2) read: 'The Union shall respect fundamental rights, as guaranteed by the [ECHR]and as they result from the constitutional traditions common to the Member States, as general principles of Community law.'
47. See, for instance, Case C-62/90 *Commission v. Germany*, EU:C:1992:169; Case C-368/95 *Familiapress*, EU:C:1997:325.
48. Case 59/85 *Netherlands v. Reed*, EU:C:1986:157, para. 13–15; Case C-249/96 *Grant v. South-West Trains Ltd.*, EU:C:1998:63, para. 32.
49. Case C-200/96 *Metronome Musik v. Music Point Hokamp*, EU:C:1998:172.
50. Ibid., para. 21.
51. Charter of Fundamental Rights of the European Union, OJ C 364/01.

the protection of fundamental rights in the EU and making them more visible to the general public.[52] It referenced CCTs in its preamble, reaffirming 'the rights as they result […] from the constitutional traditions and international obligations common to the Member States […]'. In the absence of Arts. 52(4)–(7) that were inserted later when the Charter was incorporated with the Treaty of Lisbon, and in addition to Art. F(2) TEU, this became the second textual reference to national constitutional traditions in the codified *acquis*.

Despite its non-binding nature, the proclamation of the Charter established the basis for the tripartite structure of sources of EU human rights law that many still consider exists today. Schütze described the three sources as three bills of rights: the *internal* bill – the Charter; the *unwritten* bill – general principles of EU law derived from CCTs; and the *external* bill of rights – the ECHR.[53] It is only through the assessments of all these three sources of rights, and the interplay amongst them, that the transformations of the role of CCTs from December 2000 to December 2009 can be understood. This section shows that during this period (i) the Charter had still not had the role it gained after December 2009 through its incorporation into primary law, that (ii) the normative potency of CCTs became progressively diminished, and that (iii) the ECHR filled the normative lacunae that had emerged as a result.

Firstly, due to its declaratory nature, case law on the Charter as the internal bill of rights was sparse during this period.[54] Only in a couple of cases did the CJEU refer to the Charter as 'reaffirming' the rights that had already been held to form part of general principles of EU law. In *max.mobil*, the Court noted that Arts. 41 and 47 of the Charter confirm that the right to sound administration and the right to an effective remedy, respectively, form part of general principles protected by Union law.[55] The same observation was made in *Unibet*[56] and *Kadi*.[57] Only in *Parliament v. Council*[58] did the Court give the Charter seemingly more weight; however, this was not due to principle but as a result of the specific wording of the impugned Directive.[59]

Secondly, before the proclamation of the Charter, the foremost function of national constitutional traditions – the unwritten bill of rights – was to act as a source of normativity of certain fundamental rights. However, this function was inherently precarious because sourcing normativity of a right in domestic constitutional traditions can only be a one-off act; it exhausts its very function. For instance, the normativity of the right to good administration that was sourced from CCTs in *Alvis* could only be brought into Community law once; at the point that it already forms part of general principles of Community law *because* CCTs gave it normative value, this function of CCTs in relation to the right to good administration is consumed. And with more and more rights having had formed part of general principles of Community law, fewer and fewer rights were still in need of a normative basis. Indeed, only in two cases throughout this period did the

52. See the Preamble to the Charter. See also G. de Búrca, 'The Drafting of the European Union Charter of Fundamental Rights', 26 *European Law Review* (2001), p. 126, 130.
53. R. Schütze, 'Three "Bills of Rights" for the European Union', 30 *Yearbook of European Law* (2011), p. 131.
54. See generally A. Young, 11 *European Public Law* (2005); S. Peers, 'The Rebirth of the EU's Charter of Fundamental Rights', 13 *Cambridge Yearbook of European Legal Studies* (2011), p. 283.
55. Case T-54/99 *max.mobil Telekommunikation Service GmbH v. Commission*, EU:T:2002:20.
56. Case C-432/05 *Unibet (London) Ltd and Unibet (International) Ltd v. Justitiekanslern*, EU:C:2007:163, para. 37.
57. Joined Cases C-402/05 P and C-415/05 *P Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council and Commission*, EU:C:2008:461, para. 335.
58. Case C-540/03 *Parliament v. Council*, EU:C:2006:429.
59. Ibid., para. 38.

Court decide that a Community right was normatively based in CCTs: in *Berlusconi*[60] it was the principle of the retroactive application of the more lenient penalty, and in *Mangold*[61] it was the principle of non-discrimination on the grounds of age. Thus, for CCTs to remain relevant, the locus of their function would have to shift to its role as an interpretative tool, or another role would have to be invented by the Court.

But the Court did not detach CCTs from their historically normative role. *D and Sweden v. Council*[62] was the only case during this period in which the Court considered laws of the Member States to interpret the scope of a right by interpreting the meaning of the term 'married official', albeit without explicit references to the notion of CCTs. Other than in *Berlusconi*, *Mangold* and *D and Sweden*, CCTs played a trivial role. In most cases the Court made rhetorical references, noting that it 'draws inspiration from the constitutional traditions common to the Member States […]'.[63] Similarly to the older cases, the Court never followed up on this declaration. Less reliant on CCTs still, the Court in a significant number of fundamental rights cases made no mention of CCTs and reached its decision on grounds unrelated to them.[64]

Finally, it was the ECHR – the external bill of rights – that gained the dominant role during this period on account of the diminished normative and interpretative influence of CCTs. Contrasting it to the one-line rhetorical declaration that became the rule for CCTs, the extent to which the Court adopted the language and the reasoning of the ECtHR and the ECHR is striking. The Court regularly discussed if there was an 'interference' with an ECHR right, if the interference was 'in accordance with the law,' if it was motivated by a 'legitimate aim' or if it was 'necessary in a democratic society'. It also examined whether the Member State managed to 'strike a fair balance' and acted within its 'margin of appreciation'.[65] Distinctly, this is the language the ECtHR has been using in its jurisprudence for decades; some of it is drawn directly from the text of the ECHR, and some are the linguistic inventions of the ECtHR.

Not only the EC(t)HR language, but also the ECHR-based reasoning was prominent and often the leading argument offered by the Court. *Kadi*, for instance, included a detailed discussion of the right to property under Art. 1 of Protocol 1 ECHR and the jurisprudence of the ECtHR more generally – both led the ECJ to rule that the appellant's rights had been infringed.[66] The Court took a similar approach regarding the right to respect for private and family life in *Parliament v. Council*.[67] And in a truly extraordinary decision of *Österreichischer Rundfunk*, the Court went as far as to

60. Joined Cases C-387/02, C-391/02 and C-403/02 *Silvio Berlusconi, Sergio Adelchi, Marcello Dell'Utri and Others*, EU:C:2005:270, para. 67–69.
61. Case C-144/04 *Werner Mangold v. Rüdiger Helm*, EU:C:2005:709, para. 74–75.
62. Joined Cases C-122/99 P and C-125/99 P *D and Sweden v. Council*, EU:C:2001:304.
63. See, for instance, Case C-94/00 *Roquette Frères SA v. Directeur général de la concurrence, de la consommation et de la répression des fraudes, and Commission*, EU:C:2002:603, para. 23; Joined Cases C-465/00, C-138/01 and C-139/01 *Rechnungshof v. Österreichischer Rundfunk and Others and Christa Neukomm and Joseph Lauermann v. Österreichischer Rundfunk*, EU:C:2003:294, para. 69; Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v. Republik Österreich*, EU:C:2003:333, para. 71–72; Case C-60/02 *X*, EU:C:2004:10, para. 63; Case C-263/02 P *Commission v. Jégo-Quéré & Cie SA*, EU:C:2004:210, para. 29.
64. See, for instance Case C-60/00 *Mary Carpenter v. Secretary of State for the Home Department*, EU:C:2002:434; Case C-148/02 *Carlos Garcia Avello v. Belgian State*, EU:C:2003:539; Case C-370/05 *Uwe Kay Festersen*, EU:C:2007:59.
65. See, for instance, Case C-60/00 Carpenter, para. 42–46; Joined Cases C-465/00, C-138/01 and C-139/01 Österreichischer Rundfunk, para. 71–90; Case C-112/00 Schmidberger, para. 79–82; Case C-540/03 Parliament v. Council, para. 53–56 and 62–67; Joined Cases C-402/05 P and C-415/05 P Kadi, para. 360.
66. Case C-402/05 P and C-415/05 P Kadi, para. 360–372.
67. Case C-540/03 Parliament v. Council, para. 53–56 and 62–67.

structure its decision by copying the structure of ECtHR's judgments and rendered the legality of national legislation as a matter of EU law contingent on its compliance with Art. 8 ECHR.[68] Not only is this somewhat ironic in light of the later Opinion 2/13,[69] but it also serves as a symbolic representation of the importance the ECHR had in the decision-making process of the Court at the time.

This demonstrates that the Court during this period had both exhausted the normative function of CCTs, as well as began making a slight normative shift towards the ECHR. At the same time, it did not transform the dominant role CCTs had had towards a more sustainable role of interpreting the scope of rights, or another function entirely. As a result, CCTs lost the normative potency they had had. While the Charter already featured in some of the cases, its doctrinal role was negligible, and the ECHR filled the lacuna. The incorporation of the Charter, however, changed that dramatically.

4. The Charter as (the) primary law: The incorporation of the Charter and the charterization of fundamental rights (2009–)

The Lisbon Treaty brought fundamental changes to the landscape of fundamental rights in the EU. For the position of CCTs in this landscape, two changes were crucial. First, through Art. 6(1) TEU, the Treaty gave the Charter 'the same legal value as the Treaties'. This incorporated the Charter into EU primary law and transformed it into a document of a constitutional nature – a genuine bill of rights for the Union. The second change was to the Charter:[70] while Art. 52 of the Charter proclaimed in 2000 contained only paragraphs (1)–(3), paragraphs (4)–(7) were added to the incorporated text of the Charter. Art. 52(4) above all should be mentioned, providing that '[i]n so far as this Charter recognizes fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.'

However, despite the addition of Art. 52(4), which seemingly gave CCTs a greater role, the ECJ's approach to CCTs did not change dramatically compared to the pre-incorporation period. The Court has continued the trend towards an ever-decreasing normative, interpretative, as well as rhetorical reliance on CCTs, which gave way almost entirely to the Charter as the primary point of reference for fundamental rights in EU law. Though the Court would still occasionally refer to CCTs as a rhetorical device, meaningful references to them are difficult to find in the Court's recent jurisprudence. Save for a couple of cases in which CCTs were still used as an interpretative tool, the Court has been referring to the Charter as the exclusive source of rights.[71] In this context, claims that the Court 'has in recent years relied on [CCTs] and [the ECHR] to arrive at an autonomous meaning of the concepts and terms of the EU Charter'[72] and that the Court 'often refers

68. Joined Cases C-465/00, C-138/01 and C-139/01 Österreichischer Rundfunk, para. 64–91.
69. *Opinion 2/13*, EU:C:2014:2454.
70. Charter of Fundamental Rights of the European Union, OJ C 303/01.
71. In Case C-550/07 P *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v. Commission*, EU:C:2010:512 the Court reopened the comparative inquiry it had conducted in *AM&S*. It noted that 'the legal situation in the Member States of the European Union has not evolved since the judgment in *AM&S Europe v. Commission* was delivered, to an extent which would justify a change in the case-law' (see para. 76). In Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschland*, EU:C:2010:811, the Court briefly referred to the comparative inquiry the AG had conducted in the Opinion (see para. 44).
72. J. Gerards, in U. Boegh Neergaard and R. Nielsen (eds.), *European Legal Method: In a Multi-Level EU Legal Order*, p. 52.

to national law in interpreting the [Charter]'[73] significantly overstate the frequency with which this has happened, as well as conflate rhetorical references to CCTs with their use as an interpretative tool. The latter, though still present, occurs seldomly.

Indeed, soon after the incorporation of the Charter, many commentators took note of almost exclusive reliance on the Charter by the Court. Peers, for instance, described the tendency of the Court 'to refer to the Charter in practice as the sole or main source of human rights rules' as 'the most fundamental development' post-Lisbon.[74] De Búrca also observed a 'remarkable lack of reference on the part of the Court of Justice to other relevant sources of human rights law and jurisprudence'[75] Similarly, Iglesias Sánchez noted 'the enhanced autonomy of the EU system for the protection of fundamental rights'.[76]

A. Charterization of rights and symbolic discursive ruptures

What has gone unnoticed in these discussions, however, are the conceptual mechanisms that underlie this transformation, as well as the discursive and the symbolic levels at which the rupture between the Charter and other normative sources of EU human rights law has occurred. The Court has engaged in a process of what this paper calls 'charterization' of rights. Charterization refers to the process of displacing normativity of rights that have been given normative value in Union law through CCTs, or from other normative sources, under the exclusive normative ambit of the Charter. A right that had become a source of EU law as a general principle based on it being common to the constitutional traditions of the Member States no longer draws normativity from CCTs. Instead, the Court charterizes the right by noting that the right in question is now protected by the Charter, which becomes the exclusive source of normativity for the right. The Court thus cuts any links the right had historically had to CCTs.

The right to judicial control that was invented in *Johnston* serves as a helpful illustration of charterization. Tracing the language the Court has used in relation to that right exemplifies how its normative focus has shifted away from references to CCTs, to a space where the Charter and CCTs discursively and normatively co-existed, and finally to the Charter as the only normative reference. This progression can be demonstrated as a three-step process. At first, the Court notes that

> (1) '[t]he requirement of judicial control […] reflects a general principle of law which underlies the constitutional traditions common to the Member States.'[77]

At this point, the right to effective judicial control is brought into Community law by sourcing its normativity from CCTs. Then, the Court adds to this observation to hold that

73. Ibid.
74. S. Peers, 13 *Cambridge Yearbook of European Legal Studies* (2011), p. 288.
75. G. de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?', 20 *Maastricht Journal of European and Comparative Law* (2013), p. 168, 173.
76. S. Iglesias Sánchez, 'The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty on the ECJ's Approach to Fundamental Rights', 49 *Common Market Law Review* (2012), p. 1565, 1606. See also B. de Witte and B. Smulders, 'Sources of European Union Law', in P. Jan Kuijper et al. (eds.), *The Law of the European Union* (Kluwer Law International, 2018) 197; P. Craig and G. de Búrca, *EU Law: Text, Cases, and Materials* (6th edition, Oxford University Press, 2015), p. 390.
77. Case 222/84 Johnston, para. 18.

(2a) 'the principle of effective judicial protection is a general principle of EU law, to which expression is now given by Article 47 of the Charter',[78]

or that

(2b) the principle of judicial control 'stemming from the constitutional traditions common to the Member States […] is now reaffirmed by Article 47 of the Charter.'[79]

Finally, in completing the discursive rupture from CCTs, the Court simply finds that

(3) a measure was 'not […] contrary to the requirements of the principle of effective judicial protection in Article 47 of the Charter.'[80]

In the first step, a fundamental right is discovered in EU law by sourcing its normativity in CCTs. In step two, the Court notes that the right already forms part of EU law on the basis of CCTs and is now also expressed or reaffirmed by the Charter. This already brings about a substantive shift as the Charter becomes (at least) a shared normative reference. And finally, in step three, CCTs as the normative origin of the right are no longer present and the Charter becomes the sole point of normative reference.

At the point that normativity of rights that had been normatively sourced from CCTs is displaced and brought exclusively under the Charter, CCTs cease to serve a normative purpose. Charterization extinguishes their function as a source of normativity that was central to what CCTs were throughout the development of fundamental rights in EU law. This concept of charterization, which we can only detect through a historical reading of the development of (specific) fundamental rights, helps us understand that the Court's reading of Art. 6(3) TEU and Art. 53(4) of the Charter is not that CCTs are normative sources of law as much of the literature has been suggesting, but are instead an optional interpretative aid at best,[81] or a rhetorical device at worst. Though this reading has never been made explicit by the Court,[82] the outlined historical development and the discursive shifts support such an inference. Additionally, charterization as Europeanization of normativity reinforces the autonomy of the Court and of EU fundamental rights law, perhaps over and beyond what the TEU and the Charter would necessarily imply.

This resonates particularly strongly once we realize that charterization has occurred not only in relation to the right to effective judicial protection but in relation to other rights as well. In *Achbita*[83] and *Bougnaoui*,[84] the Court noted that the right to freedom of conscience and religion is one of 'the rights resulting from those common traditions, which have been reaffirmed in the Charter' and proceeded to analyse the right through the relevant provisions of the Charter. Non-retroactivity of penal

78. See, for instance, Case C-69/10 *Brahim Samba Diouf v. Ministre du Travail, de l'Emploi et de l'Immigration*, EU:C:2011:524, para. 49; Case C-386/10 P *Chalkor AE Epexergasias Metallon v. Commission*, EU:C:2011:815, para. 52.
79. Case C-64/16 *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, EU:C:2018:117, para. 35.
80. Case C-272/09 P *KME Germany AG, KME France SAS and KME Italy SpA v. Commission*, EU:C:2011:810, para. 106; Case C-199/11 *Europese Gemeenschap v. Otis NV and Others*, EU:C:2012:684, para. 63–64 and 77.
81. S. Iglesias Sánchez, 49 *Common Market Law Review* (2012), p. 1599.
82. For a (legitimate) call to the Court to be clarify this, see E. Hancox, 22 *Cambridge Yearbook of European Legal Studies* (2020), p. 256.
83. Case C-157/15 *Achbita v. G4S Secure Solutions NV*, EU:C:2017:203, para. 27.
84. Case C-188/15 *Bougnaoui v. Micropole SA*, EU:C:2017:204, para. 29.

laws, discovered in *Fedesa* based on comparative considerations, and the principle of retroactivity of the more lenient penal law, brought into EU law from CCTs in *Berlusconi*, were also both subjected to the process of charterization in *Tarrico II*[85] and *Paoletti*,[86] respectively.

Charterization of CCTs is not an affair isolated to CCTs but is symptomatic of a larger push for autonomy through which the Court has made the Charter the sole source of normativity of fundamental rights. A similar process has also occurred, *mutatis mutandis*, in relation to the ECHR as the Convention has lost the role it had before the Lisbon Treaty. In the post-Lisbon era, the Court would thus note that 'reference should be made solely to Article 6 TEU and to Article 49 of the Charter',[87] or opine that 'an examination […] must be taken solely in the light of the fundamental rights guaranteed by the Charter',[88] or that 'it is appropriate […] to base the examination […] solely on the fundamental rights guaranteed by the Charter'.[89] In some cases, it would explicitly state that 'it is necessary […] to refer only to Article 47 [of the Charter]', rather than Art. 6 ECHR.[90]

In cases in which the Court would make references to the ECHR, these could be characterized as *obiter dicta* at best.[91] Moreover, the language that was used by the Court confirms the subsidiary role the ECHR has taken to the Charter. The ECHR would only be referenced 'by analogy',[92] which 'should be taken into consideration'[93] only to 'support [a particular] conclusion'.[94] On a more symbolic level a shift in the language used by the Court speaks to the rupture Lisbon has made with the past. No longer does the CJEU use the ECHR-based language of a 'margin of appreciation', or of measures being 'necessary in a democratic society'. This quintessential ECHR language originating in the limitation clauses of Arts. 8–11 ECHR that we have witnessed in the previous period has instead given way to the language of the general limitation clause of the Charter in Art. 52(1).[95]

B. The latent normativity of common constitutional traditions?

Admittedly, charterization as a concept says nothing about the commonly held view that CCTs still have a normative role in the post-Charter era because the Court can use them to source normativity of rights that had not been codified by the Charter. According to this view, there is still a latent normativity in domestic constitutional traditions that is dormant, but ready for the Court to use. The Court could thereby resort to the normativity of CCTs to bring hypothetical future rights that are not covered by the text of the Charter into EU law as a general principle of EU law, as it has consistently done in the pre-Charter era.

85. Case C-42/17 *M.A.S. and M.B.*, EU:C:2017:936, para. 51–54.
86. Case C-218/15 *Paoletti and Others v. Procura della Repubblica*, EU:C:2016:748, para. 24.
87. Ibid., para. 21.
88. Case C-601/15 PPU *N*, EU:C:2016:84, para. 46.
89. Case C-398/13 P *Inuit Tapiriit Kanatami*, ECLI:EU:C:2015:535, para. 46.
90. Case C-386/10 P Chalkor, para. 51. For a rare exception where the ECJ would examine ECHR standards in relative detail, see Case C-487/19 *W.Ż.*, EU:C:2021:798, para. 123–130 and Case C-132/20 *BN, DM, EN* v. *Getin Noble Bank S.A.*, EU:C:2022:235 para. 116–128.
91. See Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR and Hartmut Eifert v. Land Hessen*, EU:C:2010:662, para. 72; Case C-601/15 PPU N, para. 77.
92. Case C-293/12 *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others*, EU:C:2014:238, para. 47, 54–55.
93. Case C-398/13 P Inuit Tapiriit Kanatami, para. 61.
94. Case C-105/14 *Ivo Taricco and Others*, EU:C:2015:555, para. 57.
95. See, Joined Cases C-92/09 and C-93/09 Volker, para. 66–67; Case C-283/11 *Sky Österreich GmbH v. Österreichischer Rundfunk*, EU:C:2013:28, para. 50.

Different authors have described this notion of latent normativity of CCTs in different words. Some have argued that the post-Charter function of CCTs is the 'filing [of] normative gaps'.[96] Others have posited that there is still a 'possibility [for the Court] to recognise additional rights on the basis of general principles'.[97] Similarly, it was argued that CCTs still play 'an important role, […] especially where the fundamental right at issue in the case does not find its basis, or is not defined, in the Charter.'[98] To further the narrative this paper has been attempting to challenge, Ninatti has suggested that CCTs have played 'an essential role in this area […], especially with regard to identifying the so-called "new rights", that is rights that had not yet been codified by the Community legislature, but were recognized as a lived experience at the national level.'[99] In advancing that same disputed narrative, Fichera and Pollicino have argued that the post-Charter era has given CCTs an unprecedented role because they can 'apply to situations that fall beyond the scope of the corresponding rights contained in the Charter'.[100] The common thread of all these views is that even if we buy into the notion of charterization of rights, CCTs still possess normativity, but their normativity is latent. It will only emerge under very specific circumstances: either (i) when a certain 'new right' emerges in the future that is not recognized by the Charter, or (ii) to justify an interpretation of a Charter right beyond what the Charter would theoretically permit. In other words, for the theory of latent normativity to hold or to be meaningful, the two factual situations under which latent normativity is expressed would have to be realistically obtainable.

However, there are strong reasons to doubt the existence of latent normativity of CCTs and to suggest, instead, that the process of charterization has indeed *de facto* entirely extinguished the normativity of CCTs. This is due to the exceedingly low likelihood of a hypothetical future 'new right' forming part of constitutional traditions common to the Member States but not being already covered by the text of the Charter. The way in which the Charter is drafted has plenty to do with this: the list of rights included in it is more detailed and exhaustive than the lists of rights in most, if not all Member States' constitutions. This makes it unlikely that a right that is not enumerated in the Charter could be held to form part of CCTs. To this point, Iglesias Sánchez has noted that the 'autonomy of the system [of fundamental rights in the EU] is fostered by the innovative content of some of the rights enshrined in the Charter.'[101] Additionally, not only is the list of rights in the Charter close to as exhaustive as they get, but the way specific provisions are drafted is notably broad and open to a variety of interpretations. Again, Iglesias Sánchez has noted a 'wider and more modern formulation of already existing rights, with considerable potential [for the Court] to modify their interpretation'.[102] It is therefore hard to imagine a situation which would, on the one hand, not be covered by a provision of the Charter or could not be read into one of its broad provisions and, on the other hand, would be covered by a provision of the majority of European constitutions so as to fall under the ambit of constitutional traditions common to the Member States.

96. K. Lenaerts and J.A. Gutiérrez-Fons, 'The Place of the Charter in the EU Constitutional Edifice', in S. Peers et al. (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing, 2014), p. 1575.
97. S. Iglesias Sánchez, 49 *Common Market Law Review* (2012), p. 1597.
98. K. Lenaerts and K. Gutman, in M. Andenas and D. Fairgrieve (eds.), *Courts and Comparative Law*, p. 174.
99. S. Ninatti, in G. D'Elia, G. Tiberi and M. Paola Viviani Schlein (eds.), *Scritti in memoria di Alessandra Concaro*, (2019), p. 545. Translated by the author.
100. M. Fichera and O. Pollicino, 20 *German Law Journal* (2019), p. 1108.
101. S. Iglesias Sánchez, 49 *Common Market Law Review* (2012), p. 1600.
102. Ibid.

Indeed, the low likelihood of such a situation occurring is evidenced by the fact that the Court has not sourced normativity from CCTs since the incorporation of the Charter a decade and a half ago. Proponents of the theory of latent normativity have referred to the *DEB*[103] decision to illustrate that the Court continues to source normativity from CCTs when there is no legal basis for a right in the Charter.[104] However, in *DEB* the ECJ made the reference to CCTs only indirectly through referencing the Opinion of the AG who analysed CCTs in order to interpret Art. 47(3) of the Charter. CCTs were thus not used a source of normativity but as a source of indirect inspiration in the interpretation of the Charter. Sharing this reading of *DEB*, Iglesias Sánchez argues that the decision, rather than proving the latent normativity thesis, 'highlight[s] the role of the Charter as the primary source of fundamental rights in the EU legal order'.[105]

Without a concrete post-Charter ECJ decision to point to in which the Court sourced normativity of a right from CCTs, the narrative of their increasing jurisprudential importance and the theory of their latent normativity seem to be on shaky grounds. Add to this the innovative drafting and the progressive text of the Charter, and the ground becomes shakier still. In this context, the historical narrative of the development of CCTs and their normativity that this paper has advanced can be seen in an additional light. It reinforces our scepticism of the notion of latent normativity precisely because this notion is at odds with the historical trajectory of normativity of fundamental rights in the EU. Unlike what the proponents of the notion have argued, the source of normativity of fundamental rights has been consistently moving away from the Member States and towards the Charter, and not the other way around. This trajectory makes it unlikely that the Court would be willing to let go the hard-fought autonomy that EU human rights law has now gained with the incorporation of the Charter. Given its targeted discursive effort to displace any normativity away from CCTs to the Charter as *the* autonomous normative source of fundamental rights, it seems more likely that the Court would seek solutions to potential novel situations within the autonomous normative framework of the Charter rather than *de novo* sourcing normativity from the Member States' constitutional traditions.

For all these reasons, it is unlikely that there is a latent normativity of CCTs out there for the Court to use because there are no situations under which this latent normativity could likely be expressed. Instead, it is more plausible to argue that the charterization process has *de facto* extinguished the CCTs' normative authority and that normativity in EU fundamental rights law has been brought fully under the Charter.

C. A future for common constitutional traditions?

If we accept that the normative authority of CCTs to act as a (latent) source of normativity of general principles of EU law has been *de facto* extinguished through the process of charterization, what, then, is the future of CCTs? Is there one at all? I argue that their future lies in achieving what the Court has failed to do in the past, that is to reinvent the main conceptual role that CCTs play. Even though the days of seeking the normative foundations of rights in domestic constitutional traditions are gone, there is a path for the Court to seek a more limited normative guidance from CCTs. That is by interpreting the scope and the meaning of certain Charter rights in line with

103. M. Fichera and O. Pollicino, 20 *German Law Journal* (2019), p. 1108–1109; Case C-279/09 DEB, para. 44.
104. K. Lenaerts and K. Gutman, in M. Andenas and D. Fairgrieve (eds.), *Courts and Comparative Law*, p. 174.
105. S. Iglesias Sánchez, 49 *Common Market Law Review* (2012), p. 1599.

CCTs. Though the Charter is now the exclusive normative source of human rights in EU law, the interpretation of these rights should, in certain cases, be inspired by CCTs.

This is not an argument of constitutional theory, legal policy or political morality; it is a strictly positivist legal argument. Indeed, there is a specific and discernible textual obligation in the Charter that requires the Court to interpret some Charter rights with due regard to CCTs. Art. 52(4) of the Charter provides that '[i]n so far as this Charter recognizes fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions'. It is difficult to imagine a provision that would mandate an interpretative function upon CCTs much clearer than this. In spite of this clarity, let us dig deeper into what precisely it is that the plain and unambiguous provision of Art. 52(4) requires of the Court.

Above all, it obliges the Court to use CCTs as interpretative yardsticks when interpreting some Charter rights. This obligation is not all-encompassing. Art. 52(4) delimits it by requiring the Court to interpret rights in harmony with domestic traditions only *in so far as* the right that is being interpreted had been derived from these same traditions. If the Court had brought a right into Community law on normative basis other than CCTs (such as the ECHR, for instance) in the past, there is no Art. 52(4) obligation for the Court to interpret the right in question in harmony with CCTs. Situations covered by this largely neglected obligation would include, at the very least, the interpretation of (now Charter) rights which the Court had historically sourced from CCTs as a source of normativity, as explored in the previous sections of the paper.[106] More concretely, it would include certain aspects of the right to private and family life (normatively sourced from CCTs in *Hoechst* and *Dow Benelux*), freedom of association (sourced from CCTs in *Bosman*), the right to property (sourced from CCTs in *Hauer*), the right to good administration (sourced from CCTs in *Alvis*), right to judicial control (sourced from CCTs in *Johnston*) and non-retroactivity of criminal sanctions (sourced from CCTs in *Kirk* and *Fedesa*).[107]

Additionally, Explanations relating to the Charter of Fundamental Rights[108] identify some additional rights which should be understood as 'resulting from CCTs' and should therefore be 'interpreted in harmony' with them, as per Art. 52(4) of the Charter. These include the right to conscientious objection (Art. 10(2) of the Charter), the right to education (Art. 14 of the Charter) and the principle of proportionality between penalties and criminal offences (Art. 49(3) of the Charter).[109] Though Explanations to the Charter are not binding – and this includes their assessment of what rights have resulted from CCTs – they are nonetheless relevant as Art. 52(7) of the Charter requires the Court to give 'due regard' to Explanations when interpreting the Charter.

On the plain reading of Art. 52(4), the Explanations to the Charter, and the historical genesis of fundamental rights in Community law, we have thereby identified at least nine Charter rights – and this list is not exhaustive – that should have been interpreted by the Court 'in harmony' with CCTs. Our analysis in previous parts of this paper has shown that this has categorically not been the case and that the Court has extremely seldomly resorted to CCTs when interpreting Charter rights. In writing about this general *problematique*, President Lenaerts has somewhat missed the point when saying that the Treaties have 'vested the ECJ with the constitutional *authority* to engage in

106. See section 2.A, section 2.B.1. and section 3.

107. For other Charter rights that have originated from CCTs, see S. Peers and S. Prechal, 'Scope and Interpretation of Rights and Principles', in S. Peers et al. (eds.), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing, 2014).

108. Explanations relating to the Charter of Fundamental Rights [2007] OJ C 303.

109. Ibid. See Explanations to the respective rights.

a comparative study'.[110] Through Art. 52(4) of the Charter, primary law has vested the Court with the constitutional *obligation* to interpret rights through a comparative study of domestic constitutional traditions; an obligation that the Court has hitherto refused to respect. It is in acknowledging the plain meaning of this clear and unambiguous provision – and in the hope that Court begins to take the obligation it contains seriously – that the interpretative future of CCTs should be sought.

5. Conclusion

This paper has traced the conceptual development of constitutional traditions common to the Member States from their very inception to inform our understanding of what CCTs are today and discussed their potential use in the future. While CCTs played an essential normative role and have also served interpretative and rhetorical functions throughout the history of EU fundamental rights, the incorporation of the Charter in 2009 changed their normative role significantly. The Court has charterized rights that had been brought into EU law through other sources and extinguished their normativity. In doing so, the Charter has become the exclusive normative reference for rights that, in the past, had drawn their normative value from elsewhere, be it the CCTs or the ECHR. Though CCTs (and the ECHR) are still occasionally used by the Court as an (optional) interpretative tool, and slightly more often as a rhetorical tool, their normative exhaustion through charterization casts doubt on the pluralistic understandings of sources of EU fundamental rights law, as well as on possible normative functions they could serve in the future.

These developments are in line with the broader trends in the history of European integration, whereas the normative grip that the Member States had had over EU law has been consistently loosening.[111] The extinguished normativity of CCTs is also in line with the general trend towards increasing formal autonomy of EU law in the field of human rights,[112] as well as the protective stance the Court has taken of that autonomy. Opinion 2/13 is not merely exemplary but perhaps even symbolic of that attitude. With this backdrop, it is unlikely the Court would walk back on the ethos of charterization and reinvigorate the ethos of the 1960s and 1970s by seeking normativity in domestic constitutional traditions. Normativity is there to stay with the Charter; it is interpretative inspiration that CCTs should still provide.

Acknowledgements

I would like to thank Daniel Halberstam, Leonard Besselink, Urška Šadl, Marjan Kos, Maria Kotsoni, Lola Avril, Maarja Saluste, Andrew Cecchinato and Thomas Verellen for their helpful feedback on earlier drafts of the paper. I would also like to thank the participants at the 2019 e-NACT Workshop on the Application of the EU Charter, the 2019 EUI Doctoral Workshop in EU Law, the 2021 Michigan Law School Research Colloquia and the 2022 EUI Fundamental Rights Working Group Researchers' Workshop, and the 2023 YELS Conference for their comments. Last but not least, many thanks to the editors of this special issue for all their helpful pointers and suggestions. All errors, naturally, remain my own.

110. K. Lenaerts, 25 *European Review of Private Law* (2017), p. 297, 298 (emphasis added).
111. D. Halberstam, 'The Bride of Messina: Constitutionalism and Democracy in Europe', 30 *European Law Review* (2005), p. 775, 777.
112. G. de Búrca, 'The Evolution of EU Human Rights Law', in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law* (2nd edition, Oxford University Press, 2011), p. 486–489.

Declaration of conflicting interests

The author declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author received no financial support for the research, authorship, and/or publication of this article.

ORCID iD

Jaka Kukavica https://orcid.org/0000-0002-7346-6683

Author biography

Jaka Kukavica is an Assistant Professor at University of Ljubljana, Faculty of Law. He obtained his doctorate from the European University Institute (EUI) in Florence, Italy, and has held visiting positions at University of Michigan Law School, University of Copenhagen and Utrecht University School of Law.