ABSTRACT This article analyses proposals regarding non-discrimination, minority rights and social rights as discussed in the Convention on the EU Charter of Fundamental Rights. The article first develops a typology of arguments supporting the institutionalization of human rights on the EU level: the salience of institutionalizing a specific norm on the EU level, because the integration process undermines domestic human rights provisions unless they are also secured by the EU; the internal coherence of the norm with existing EU rules; and the external coherence of the norm with international human rights instruments. The empirical sections establish to what extent these types of arguments play an important role in the argumentation process within the Charter Convention, and whether propositions justified on the basis of these arguments are successful, i.e. find their reflection in successive drafts and the final Charter text.

KEY WORDS Charter of Fundamental Rights; constitutionalization; European Union; minority rights; non-discrimination; social rights.

INTRODUCTION

Although not legally binding, the European Union (EU) Charter of Fundamental Rights constitutes a major step in the constitutionalization of the Union in the field of human rights. In line with the theoretical assumptions regarding the driving forces of EU constitutionalization and the mechanism of rhetorical action as set out in the introductory paper of this special issue, this article investigates the role of salience, internal and external coherence for EU constitutionalization by analysing them as arguments used in the Convention drafting the Charter. It analyses the proposals, their justification in both oral statements and written amendments during the process, and their success in terms of whether they were reflected in the successive drafts and the resulting Charter text. The main aim is to establish whether the factors that have been singled out as the causes of constitutional development on the EU level actually worked by being successfully invoked as reasons in the argumentation process of the Charter Convention.
The article is structured as follows: the theoretical part develops a typology of arguments based on theoretical considerations regarding possible causes of constitutionalization in the EU context, featuring the salience, internal and external coherence of institutionalizing a specific norm on the EU level. Two further categories are included: references to domestic resonance and arguments referring to the enforceability of specific rights. The empirical part investigates the argumentation on three issues: equality before the law and non-discrimination, cultural diversity and minority rights, as well as the right to work and protection against unfair dismissal. Each case study first presents a reconstruction of the argumentation process and then evaluates the statistical data regarding the distribution and success of different argument types in each issue-area. The conclusion summarizes the overall findings with regard to the theoretical assumptions concerning the mechanisms leading to EU constitutionalization.

TRANSPOSING CAUSES INTO REASONS: A TYPOLOGY OF ARGUMENTS FOR EU CONSTITUTIONALIZATION

The following section develops an analytical framework to scrutinize the justification of proposals put forward in the Convention. To do so, the explanatory factors that have been used in previous causal analyses on the constitutionalization of the EU (see Schimmelfennig et al. 2006) are transposed into argument types: salience, internal (EU) and external (international) coherence. Two alternative argument types are considered as well: domestic resonance and the enforceability of rights. Finally, the mere statement of a position is treated as a residual category.

1. Salience can be defined as a deficit in the EU’s formal or informal *acquis* compared to an existing national or international human rights standard. Used as an argument, salience serves as a backing for propositions in favour of constitutionalization, if a speaker points out that without establishing a certain right on the EU level existing national or international human rights standards would be undermined. Salience can also be invoked against constitutionalization, namely by arguing that establishing a specific right would constitute an extension of the existing competencies of the Union. In such a case, the institutionalization of human rights itself would become a salient integration step.\(^1\)

2. Internal coherence refers to the existence of formal or informal institutional precedents within the EU. In an argumentation, reference to a proposal’s coherence with existing EU rules can be used positively to support claims for change in a pre-established direction, or negatively against a proposal that is supposedly not in line with the EU’s *acquis* or competence. Arguments building on internal coherence refer to the existing internal EU *acquis*, i.e. Treaty provisions, secondary legislation, European Court of Justice (ECJ) rulings, etc. Also included are arguments that back a claim with the fact that the EU promotes a norm in its external policy, e.g. in the enlargement context, even if it is not part of the internal *acquis communautaire*.\(^2\)
3. **External coherence** refers to the international institutionalization of the norms in question outside the EU. Argumentatively, the claim to include a proposed right in the Charter or to formulate it in a specific way can be backed by referring to international human rights instruments. Conversely, a speaker can reject a proposed formulation on the ground that it is not in line with international law, either because it is not an internationally accepted right at all or because the international instruments cited use a different formulation of this right, be it further-going or more restrictive.

4. **Resonance:** Constitutionalization is resonant if it is compatible with national constitutional cultures. Resonance therefore serves as an important factor in alternative explanations, both constructivist and rationalist (as an indicator for national preferences). Transposed to the argumentative level, references to domestic resonance can be used positively as examples to back a proposal for EU level constitutionalization. Negative use of resonance refers to domestic rules that are incompatible with a planned institutionalization of rights on the EU level and might be combined with a veto threat. Resonance arguments can include references to either domestic rules or traditions of a specific member state or to the common constitutional traditions of all member states more generally.

5. **Enforceability of rights:** An additional factor that might produce a ‘compliance pull’ (Franck 1990) towards the institutionalization of certain rights is their intrinsic character as rights (Finnemore 2000). Subjective rights can be directly invoked by the persons to whom they are granted, and are enforceable by courts. Much of the academic as well as political debate regarding at least a part of social and economic rights (so-called ‘rights of the second generation’) as well as ‘third generation’ or ‘solidarity’ rights such as environmental protection focus on the question whether they can and should be rendered as rights at all, or whether they constitute state obligations or mere policy aims, which are basically non-enforceable.

6. **Position:** Finally, arguments might simply state a proposal or position, without explicitly justifying it. Position statements should not be mistaken as indicating bargaining, because making a proposal is not equivalent to stating an interest, making a promise or issuing a threat in a bargaining situation. Instead, they are treated as a residual category without any explanatory significance.

**CASE STUDIES: THE USE AND SUCCESS OF ARGUMENTS IN THE CHARTER CONVENTION**

The following analysis systematically studies the discussions in the Charter Convention regarding three issues: first, equality before the law and non-discrimination; second, minority rights and cultural diversity; and, third, as a social right the right to work and protection against unfair dismissal. These cases were selected because in the previously conducted qualitative comparative analysis (QCA) they showed variation in both the configuration of independent variables and the dependent variable (see Schimmelfennig et al. 2006). The non-discrimination case has been singled out for further investigation as one rare
instance of constitutionalization without salience. The minority rights case provides largely unfavourable conditions for constitutionalization (no salience or internal coherence, comparatively weak external coherence), whereas the social rights case conversely features favourable conditions (salience, internal and external coherence). The latter also constitutes a crucial case in relation to alternative explanations, because national resonance with key players is low and the legal character of social rights contested.

To explain the research method, some notes on the drafting process are in order. The Convention was set up in 1999 by the Cologne European Council. It was comprised of fifteen representatives of the member state governments, thirty representatives of the national parliaments, sixteen representatives of the European Parliament (EP) and one Commission representative. Between 17 December 1999 and 2 October 2000, the Convention held eighteen meetings, in which successive drafts were discussed. Also, written amendments were handed in by the delegates. The drafting itself was conducted by the so-called Praesidium, which consisted of Roman Herzog as chair of the Convention and one representative each of the member state governments, national parliaments, the EP, and the Commission. The Praesidium was called to propose drafts and take amendment proposals into consideration that they deemed to be acceptable to all participants, until a consensual outcome was reached without formal voting. This means that argumentations were not ‘decided’ directly in the Convention plenum, but judged by the Praesidium as a final arbiter.

The following analysis is based on an evaluation of both the minutes of the Convention meetings and the written amendment proposals handed in by the delegates to the Praesidium. The propositions regarding the respective issue-areas were coded along the following parameters:

1 according to the *nationality of the speaker*, both as an indicator for member state positions and to control for alternative explanations based on bargaining power;
2 according to the *character of the proposal*, i.e. whether it advocates further constitutionalization (+), replicates the current status quo (=), or aims at restricting or rejecting rights already included in the draft at the time of the proposal (−). The reference point for each proposal is the current draft

<table>
<thead>
<tr>
<th>Cases</th>
<th>Salience</th>
<th>Internal coherence</th>
<th>External coherence</th>
<th>Constitutional change</th>
</tr>
</thead>
<tbody>
<tr>
<td>ND00</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>MR00</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>SR00</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>

*Source: Derived from Schimmelfennig et al. (2006)*
at the time of discussion, on the basis of the Praesidium proposals that were frequently updated;

3 according to the *arguments* put forward to back the proposal, i.e. whether it is a mere statement of position or backed with reference to salience, internal or external coherence, resonance, or enforceability;

4 according to the *success* of the proposal, i.e. whether the promoted (or opposed) right or formulation was included in (or excluded from) the following drafts of the Charter as proposed by the Praesidium.

Each case study presents first a reconstruction of the argumentation process and then evaluates the statistical data regarding the distribution and success of different argument types in each issue-area. The significance of above- or below-average usage or performance of a specific argument type in comparison to all other arguments is determined by using the chi-square ($\chi^2$) or Fisher exact probability test.6

**Equality before the law and non-discrimination**

The pre-Convention status quo of EU non-discrimination rules was established with the Amsterdam Treaty. In contrast to the non-discrimination provisions of most national constitutions and international human rights instruments, which usually combine a general principle of equality with a non-exhaustive list of grounds on which discrimination is prohibited, Article 13 of the Treaty Establishing the European Community (TEC) introduced an exhaustive list that only covers the grounds that are explicitly mentioned, namely sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Still, after the Amsterdam Treaty, salience of non-discrimination issues has to be considered low (Schimmelfennig *et al.* 2006). On the other hand, internal coherence with existing EU rules is given and can be used as a backing for a further broadening of the non-discrimination *acquis*, but also as an argument against such an extension of Community competences. In the latter case, salience comes into play, albeit in a negative way. External coherence and the law-like character of anti-discrimination measures are also high with the well-established non-discrimination clause featured in Article 14 of the European Convention for the Protection of Human Rights (ECHR). Although variation in domestic resonance is considerable with regard to the equality regimes and the grounds of non-discrimination covered (see Bell 2002: 149–80), anti-discrimination provisions in general are in place in all member states. We would therefore expect this to be a specifically interesting case to establish whether favourable conditions in the absence of salience are sufficient to bring about constitutional change. Bargaining-based explanations, by contrast, would only expect constitutionalization in the event of converging state preferences and the absence of veto players.

**Process reconstruction**

After the first proposals put forward by the Praesidium, which did not yet constitute full draft charters but several rather unsystematic lists of rights to be
considered, it was noted already in the second meeting of the Convention that ‘a number of essential rights were missing from the list submitted by the Praesidium, citing . . . the commitment to equal treatment’ (Meyer and Engels 2002: 325).

In reaction to this uncontroversial claim, the Praesidium introduced articles on equality before the law and non-discrimination (Charte 4137/00 Convent 8: 7–8). In its explanatory comments, the Praesidium justified the former provision on the basis of the ECJ ruling establishing equality as a fundamental principle of Community law, and the latter as a combination of Article 13 TEC and Article 14 ECHR. While this is true for the grounds mentioned, the list remains exhaustive and therefore more limited in its application than the ECHR article. On the other hand, the article is free-standing unlike Article 14 ECHR and not ‘parasitic’ upon other Charter provisions. In the subsequent discussion, some speakers complained that ‘the principle of equality ought to be inserted at a more prominent point in the Charter’ (Meyer and Engels 2002: 353). Consequently, the provision on equality before the law was moved to Article 1(2) on dignity in the first overall draft Charter (Charte 4284/00 Convent 28: 2), while the non-discrimination list was merged with the provision on nationality (ibid.: 22). In both cases, however, no substantive changes were made.

In the next stage, written amendment proposals by the members of the Convention were considered. Among the positive proposals, i.e. those going beyond the current draft, the most common request was to transform the non-discrimination article into a non-exhaustive list (Charte 4332/00 Convent 35: 542, 546, 550, 554, 558, 559, 560). A large number also proposed making equality before the law a separate article. Furthermore, additions to the grounds explicitly mentioned were made: genetic characteristics (ibid.: 49, 540, 542), any other (in addition to political) opinion (ibid.: 543–4), and health (ibid.: 49, 540). The negative proposals either tried to restrict the application of the non-discrimination article by making it ‘parasitic’ upon the rights granted in the Charter (ibid.: 28, 545, 551, 557), or proposed to delete certain grounds such as sexual orientation (ibid.: 548), restrict the list to the grounds of either Article 13 TEC, Article 14 ECHR, or gender equality (ibid.: 539, 545, 550, 551, 564), or delete the list entirely (ibid.: 554, 557). The Praesidium, which collected, summarized and structured the amendments and made compromise proposals, took up the calls to turn equality before the law into a separate article (Charte 4360/00 Convent 37: 2), to render the non-discrimination list non-exhaustive, and to add ‘genetic features’ and ‘any other opinion’ to the explicitly mentioned grounds (ibid.: 33).

In the following Convention debate the issue of genetic features was again under discussion (Meyer and Engels 2002: 419). Moreover, Lord Goldsmith, the representative of the UK government, ‘regarded a general ban on discrimination as unacceptable. The principle of non-discrimination should therefore be restricted to the forms of discrimination mentioned in the Charter’ (Meyer and Engels 2002: 419). However, the next drafts featured only minor editorial changes, and after the final debate on the equality chapter, no changes to the
non-discrimination article were made despite calls to delete the term ‘race’ from the list (Meyer and Engels 2002: 469–70) and the complaint that ‘the Treaty on European Union offered more effective protection of equality than the Charter. The wording used in the TEU should therefore at least be adopted for the Charter as well’ (Meyer and Engels 2002: 470). In the end, the Convention adopted a separate article stating the principle of equality before the law and a non-discrimination article featuring a non-exhaustive list that combined the grounds mentioned in Article 13 TEC and Article 14 ECHR under the addition of genetic features. The scope of the non-discrimination article was therefore extended considerably not only with regard to the status quo of Amsterdam (Article 13 TEC) but also during the Convention process by adding further grounds and changing the status of the non-discrimination list from exhaustive to non-exhaustive.

**Evaluation of results**

Of the member states with a considerable number of statements on non-discrimination, interventions by delegates from Italy and the Netherlands were overwhelmingly positive, French and German delegates were split on the issue (France mainly because of the opposition to including minorities in the list), and the UK argued strongly against the extension of the non-discrimination acquis. Obviously, there was no generally accepted consensus position, and at least one large member state was openly opposed to further constitutionalization in this area.

Apart from position statements, which make up half of the overall number of arguments, salience, internal and external coherence are the only arguments that are used to a significant degree. Of these, however, only external coherence has a high success rate. The impressive overall performance is qualified by the fact that external coherence has a perfect score when used to support positive proposals (e.g. to render the list non-exhaustive), but failed completely when used as an argument to restrict the non-discrimination clause (e.g. to restrict the list to the grounds mentioned in Article 14 ECHR). However, even among the generally quite successful positive arguments, external coherence shows a significant above-average result. It follows that references to internationally codified norms were very strong arguments for the further extension towards a general non-discrimination principle, but not so as a tool to limit the scope of the norm.

Internal coherence is used almost as often as external coherence, but references to the existing internal acquis were predominantly used for negative arguments; for example, to restrict the non-discrimination list to the grounds mentioned in Article 13 TEC, not as justifications for further constitutionalization. The performance of internal coherence arguments is weak overall, and even more so in the rare cases when it was used positively. Salience, invoked almost exclusively in the negative, is not successful at all, which does not come as a surprise given that non-discrimination is an issue-area with relatively low salience anyway. Resonance and enforceability are used so infrequently that no conclusion can be drawn as to their success. That they do not appear in a
significant number of arguments is again not a huge surprise. References to domestic resonance are not a strong argument unless used in areas that are completely incompatible with national rules, which is not so in the non-discrimination case, and the enforceability of rights is not a matter of contestation for non-discrimination. In summary, external coherence is the single most successful argument type in the case of non-discrimination.

Minority rights and cultural diversity

Although the issue of minority protection has acquired an important role in the EU’s external relations, the Union has not institutionalized any special minority rights on the European level (De Witte 2000). If the EU has in recent years tentatively addressed minority issues within the *acquis*, this has been indirectly, namely by including race discrimination in the list of Article 13 TEC, committing itself to combat racism and xenophobia on the level of policy initiatives and aiming 'to respect and to promote the diversity of its cultures' (Article 151 TEC). Hence, internal coherence for special minority rights is absent. Salience is also not given, since the EU has not so far undermined group-specific rights for national minorities in member states (Toggenburg 2005). External coherence exists in the form of international minority protection instruments such as the Council of Europe’s Framework Convention on National Minorities.
but this standard is weak and contested compared to the ECHR. Domestic resonance varies greatly among member states (see Pan and Pfeil 2002: 11).

We would therefore not expect good conditions for constitutionalization in the field of minority rights via the mechanism of rhetorical action on the basis of a shared community ethos, because the central factors (salience, internal precedents on the EU level, shared international norms) are all more or less absent. However, an explanation based on pure bargaining would also not predict constitutionalization owing to the veto power of member states with strong preferences against minority rights (France, Greece), and the legal character of minority protection in contrast to state obligations or mere policy objectives can be called into question as well.9

Process reconstruction

The issue of minority protection entered the Convention discussions at a very early stage. Already in the second meeting minority rights were noted as missing from the early Praesidium proposals (Meyer and Engels 2002: 325). When the Praesidium proposed a first draft article on non-discrimination, ‘membership of a national minority’ was included in the list (Charte 4137/00 Convent 8: 7). However, this does not seem to be the result of the specific request to address minority rights in the Charter, as the explanation referred only in general terms to the fact that the list was based on Article 13 TEC and Article 12 ECHR and made no specific mention of minority provisions. Also, the following debates showed that the proposed solution was not far-reaching enough for the supporters of minority protection.

In the general discussion on the first overall draft Charter presented by the Praesidium (Charte 4284/00 Convent 28), minority rights emerged as one of the most frequently mentioned shortcomings (Meyer and Engels 2002: 376). Although the claims to add a minority rights clause to the Charter were not openly contested in the Convention meeting, they achieved nothing – nor did the numerous written amendments on the issue. While some of the proposals endorsed the non-discrimination-based approach of the Praesidium draft, merely suggesting replacing the term ‘national minority’ with a more detailed formulation (Charte 4332/00 Convent 35: 536–7, 542), most requested adding a specific provision on minority rights, either as a new paragraph to be added to the non-discrimination article (ibid.: 538), or – more frequently – as an entirely new article (ibid.: 495, 516, 579, 607, 727, 728 and Charte 4332/00 Convent 35 Add2: 8–9). The language of the proposed provisions varied and featured both individual and collective formulations, but most included the right of minorities to preserve their identity and the right to use and develop their language and culture. By contrast, only two amendments (by a French delegate) rejected the ECHR-based Praesidium proposal as too far-reaching and opted for removing minorities from the non-discrimination list (Charte 4332/00 Convent 35: 557, 564). In its summary, the Praesidium noted the amendments, but made no proposal of its own in return.
As a result of the non-reaction of the Praesidium, minorities stayed high on the agenda in all discussions of the equality chapter. When the Praesidium draft following the written amendments was discussed, several delegates ‘called for more comprehensive provisions on minorities’ (Meyer and Engels 2002: 419), and in the final debate on the equality chapter a considerable number of speakers again ‘highlighted the failure to include minority rights in this Chapter’ (Meyer and Engels 2002: 469). The most far-reaching statements were that ‘not only should pro-active measures be taken to safeguard equal opportunities for minorities, but their rights should also be developed further’, and even that ‘minorities required more than equal treatment: it was necessary to guarantee group rights in order to safeguard their survival as minorities’ (Meyer and Engels 2002: 469). Conversely, it was only on this occasion, in all the Convention deliberations on the issue, that a French delegate openly contested the demands to include minority rights with the claim that ‘there was no need to mention the rights of minorities explicitly … Further provisions could then be developed at national level in accordance with national practices’ (Meyer and Engels 2002: 470–1).

Although after this debate a new article on cultural, religious and linguistic diversity was added to the equality chapter, which was explained as being ‘based on Article 6 of the Treaty on European Union and on Article 151(1) and (4) of the TEC concerning culture’ (Charte 4471/00 Convent 48: 21), this was in no way sufficient in the eyes of the supporters of minority protection, although the formulation and the reference to Article 151 TEC were used in some of the written proposals for a minority article (none of which, however, proposed the article that was inserted by the Praesidium). Therefore, even in the final discussion on the complete Charter delegates were critical that ‘the Charter set out the rights of minorities at a very low level. In this respect, the Charter was not a balanced document’ (Meyer and Engels 2002: 485).10

In summary, the two substantial outcomes with regard to minorities – the inclusion of ‘membership of a national minority’ in the non-discrimination list and the article on cultural and linguistic diversity – do not seem to be the result of any argumentation in the Convention, the frequent debates on minority issues notwithstanding. The inclusion in the non-discrimination list occurred early in the process, before any demands for minority rights were put forward, and was based on the general decision to merge the grounds mentioned in Article 13 TEC and Article 14 ECHR in the list. Neither positive claims to go beyond this formulation, nor negative proposals to delete minorities from the list were ever considered in any Praesidium draft. The article on diversity was a late addition to the equality chapter and may be seen as a slight concession to the pro-minority forces, but it did not follow any of their proposals and in the end replicates the status quo of Article 151 TEC.

Evaluation of results
The most frequent and far-reaching positive proposals came from Austrian and German delegates, followed by the British and Finnish. On the other hand, it is
striking how little open resistance there was to the numerous positive claims. Only in one oral intervention and two written amendments did French convention members openly oppose the claims to include a minority clause in the Charter, and they even found the inclusion of national minorities in the non-discrimination list as going too far. Greek delegates, as the second obvious candidates for opposition, remained completely silent on the issue. Still, as a powerful member state again, France showed clear resistance to constitutionalization.

With regard to the distribution and success of argument types, it has to be noted first that position statements, while again making up half of the overall number of arguments, were very frequently used among the – generally already predominant – positive statements, whereas negative position statements were absent. Otherwise, internal coherence was the most frequently used argument, both in terms of citing existing Treaty provisions such as Article 151 TEC (Charte 4332/00 Convent 35: 352–3, 495, 516, 538, 607) and emphasizing the need to include a minority protection clause because of the external promotion of minority rights in the enlargement context (Meyer and Engels 2002: 417, 481).

External coherence arguments were used, but less frequently than in other issue-areas. Moreover, more than half of the references to international minority rights instruments were intended simply to alter the wording established in the non-discrimination list (e.g. replacing the term ‘national minority’ with ‘ethnic, religious or linguistic minority’ with reference to Article 27 of the International Covenant on Civil and Political Rights). This means that the Council of Europe’s Framework Convention for the Protection of National Minorities in particular, as the current European standard on minority rights, was rarely invoked to support claims to include a minority clause, while other external coherence arguments concerned inconsistencies in the wording among different international instruments. Given the prominent role of external coherence in the other cases, it can only be concluded that the supporters of minority rights did not perceive any of the existing international instruments regarding minority protection as unambiguously accepted internationally codified norms that could forcefully justify their claims.

References to salience and resonance are rare; enforceability arguments do not appear at all. In contrast to the non-discrimination case discussed above, the low number or even absence of these argument types is slightly puzzling. Although resonance is generally not a very promising argument, in this case at least some negative arguments based on with the contradiction of minority rights in the constitutions of member states such as France and Greece could have been expected, as could positive references to certain far-reaching domestic minority protection systems, either because they could be presented as being undermined, or as a substitution for the relatively weak international minority rights standard.

As to the success of arguments, the fact that no argument type shows any significant success only underscores the finding of the process reconstruction
that the outcome in this case was not the result of any argumentative strategy in the Convention, but was determined by bargaining ‘behind the scenes’, so that neither positive nor negative proposals were reflected at any time in the Praesidium drafts or the final Charter, regardless of the arguments used to support the claims.

**Right to work and protection against unjustified dismissal**

The Amsterdam Treaty marked an important step towards the incorporation of social rights into the Treaties, although most issues were addressed in terms of social policy aims, not as enforceable rights. Still, social rights were not yet on a par with fundamental human rights mentioned in Article 6 TEU and their inclusion in the Charter was a contested issue. The following case depicts a single issue – the right to work and protection against unfair dismissal – in order to be able to trace the development of the subsequent drafts and assess the success of arguments. Since salience and internal and external coherence are present we would expect good conditions for constitutionalization through rhetorical action, whereas the contested legal character of social rights and the existence of strong opponents (most importantly the UK) would not lead the alternative explanations to expect constitutionalization in this area.

**Process reconstruction**

The original list of social rights drawn up by the Praesidium for consideration features the right to work and choose an occupation, based on Article 127 TEC as well as the European Social Charter and the Community Charter of Social Rights. However, the right to work was specified as a mere objective to obtain a high level of employment (which made it vulnerable to the criticism that the inclusion of social policy objectives was not covered by the Cologne mandate), whereas the respective right was framed in the freedom to choose
and engage in an occupation (cited in Charte 4192/00 Convent 18: 1).
Accordingly, when the first draft articles on social rights were presented by
the Praesidium, the article was restricted to the right to choose an occupation.
In the comment, the Praesidium noted that this right ‘is recognised without any
ambiguity in the case law of the Court as a fundamental right (see judgment of
principle in Case 4/73 Nold [1974] ECR 491)’ (ibid.: 3). A separate article
spelled out the right to protection in cases of termination of employment,
also with reference to the revised European Social Charter (ibid.: 12).

On this basis, the first debate on social rights issues in the Convention took
place. Proponents of a more far-reaching provision regarding the right to work
took up the initial justification of the Praesidium based on external coherence
and ‘argued that this Article should be made part of the right to work. This
was a right which was contained in the European Social Charter and therefore
had to be included in the Charter’ (Meyer and Engels 2002: 359). In the same
vein, it was ‘pointed out that the Member States had ratified the International
Covenant on Economic, Social and Cultural Rights, which included a right to
work’ (Meyer and Engels 2002: 359). On the other hand, opponents ‘called for
this right to be restricted to citizens of the Union’ (Meyer and Engels 2002:
359). The following draft, however, left the clause practically unchanged.
(Charte 4316/00 Convent 34: 2–3). The claim to reinstate an explicit
mention of a right to work was reiterated with more urgency in the next
debate: ‘Under no circumstances should the Charter offer a lower level of
protection than the Universal Declaration of Human Rights, which, for
example, also contained a right to work’ (Meyer and Engels 2002: 386).

This was also the main thrust of the positive arguments contained in the
written proposals on the issue of freedom of occupation (Charte 4372/00
Convent 39: 39–61). Several amendments proposed formulating the article as
a right to work, mostly citing international documents, especially the European
Social Charter (Charte 4372/00 Convent 39: 32, 41, 44, 45, 52, 53).
Opponents, while generally accepting the freedom to choose an occupation,
proposed restricting the right to EU citizens because otherwise ‘[t]he Union
has no jurisdiction for such a far-reaching provision’ (ibid.: 46, 47, 48, 54),
tried to limit the application of the clause in other ways (ibid.: 56, 59, 61),
and warned against formulating a right to employment (ibid.: 48).

Although the existing draft retained the separate article on the protection
against unjustified termination of employment from the first Praesidium pro-
posal (Charte 4316/00 Convent 34: 6), it was also argued that paragraphs on
job protection and protection against unfair dismissal be incorporated in the
right to work clause (Charte 4372/00 Convent 39: 32). In the amendments
on the specific article on unjustified dismissal (ibid.: 195–211), most proposals
did not refer to the substantial content but rather to the wording of the article,
either to reformulate it as a policy objective or to bring it closer in line with the
respective provision in the European Social Charter (ibid.: 199–200, 201,
202, 203, 204, 210, 211). In substantial terms, positive amendments
called for the inclusion of provisions regarding protection in the event of
collective redundancies and a right to compensation (ibid.: 205, 206, 207), or a ban on dismissing pregnant women, in most cases without giving specific justifications (ibid.: 208, 209). Opponents demanded the deletion of the entire article, because it ‘should come under national law’ (ibid.: 195), formulated an objective that was ‘not a classic fundamental right’ (ibid.: 196), and provided ‘for a general and unqualified right which goes well beyond existing law’ (ibid.: 197).

In reaction to the written amendments, the Praesidium incorporated the positive proposals regarding the right to work and job protection into the article on the freedom to choose an occupation (Charte 4383/00 Convent 41: 4), while the text of the article on protection in the event of unfair dismissal remained unchanged (ibid.: 13). In the following meeting, the inclusion of the right to work was welcomed by the proponents of the clause, but opponents renewed their criticism on the basis that ‘the right to work could not be enforceable by legal action’ (Meyer and Engels 2002: 428), that the clause clashed with national regulations because ‘not everyone had the right to work: for example, in most Member States, specific regulations applied to asylum seekers’ (Meyer and Engels 2002: 429), and that in fact ‘no state could guarantee the right to work’ (Meyer and Engels 2002: 431).

Regarding the protection against arbitrary dismissal, while a majority endorsed the article as expressing ‘the specific European model, as opposed to the American “hire and fire” model’ (Meyer and Engels 2002: 428), opponents upheld their rejection, arguing that ‘the rights to job protection and to free job placement services were impossible to implement in practice’ (Meyer and Engels 2002: 430), and voiced the fear of a creeping extension of EU competencies because ‘when the ECJ construed this Article, the term “unjustified” would be interpreted very broadly’ (Meyer and Engels 2002: 436), creating ‘the danger that the ECJ could increasingly intervene in national law’ (Meyer and Engels 2002: 436).

In the next draft of the Charter text, the provision on the freedom to choose an occupation was moved to the ‘freedoms’ chapter, but the explicit mention of a right to work was removed (Charte 4422/00 Convent 45: 6). The protection clause against unjustified dismissal remained unaltered in the ‘solidarity’ part (ibid.: 9). The subsequent Convention debate saw renewed discussion on the issue. Several proponents ‘highlighted the failure to make specific reference to the right to work . . . which must definitively be included in the social rights’ (Meyer and Engels 2002: 466). To counter claims that a right to work was merely a policy goal for high employment without legal character it was ‘emphasised that the “right to work” . . . not the “right to employment” . . . should be anchored in the Charter’ (Meyer and Engels 2002: 471).

However, despite several minor editorial changes, the call to restore the right to work remained unheard in the next draft Charter (Charte 4470/00 Convent 47: 7), so once again delegates ‘criticised the “bias” in the Charter, which contained no right to work’ (Meyer and Engels 2002: 485). Finally, the issue was resolved by adopting the formulation ‘freedom to choose an occupation
and right to engage in work’, which features in the final Charter text, while a reference to national and Community law was added to the article on protection in the event of unjustified dismissal.

**Evaluation of results**

Statements by delegates from Germany and the Netherlands were the most frequent, but both were divided into supporters and opponents along the left–right political spectrum. Among the nationalities with less frequent interventions, France, Austria, Belgium and Luxembourg were predominantly in favour, the UK, Sweden and Ireland clearly against inclusion of this right in the Charter. Again, we see no consensus position emerging and have major member states on opposite sides of the debate.

Although position statements are still the most frequently used category, their share is considerably less than in the two previous cases (one third compared to one half of the overall arguments). Moreover, the process reconstruction shows that the use of unjustified position statements was mainly due to two facts: first, the reiteration of claims by actors who had already made their arguments several times; and, second, the simple appraisal of their claims being reflected in the Praesidium drafts. The second fact in particular has the effect that positions are very significantly overrepresented in status quo arguments and are also predominantly coded as successful.

All other argument types are fairly evenly distributed, but with considerable variation in their distribution according to the character of the proposal (positive, status quo or negative) and their success rates. Salience is, as expected, much more prominent in social rights than in the other two cases, but its overall performance is still rather poor (although not in a statistically significant manner compared to the overall success of all arguments). This is, however, due to the fact that the vast majority of salience arguments are negative, i.e. invoking the extension of EU competencies and the subsequent danger of harmonization pressures on member states against the inclusion of social rights in the Charter. In the few cases when salience is used positively (and therefore in the way envisaged by the theoretical framework) to claim that the constitutionalization of social rights is necessary to prevent an undermining of international or national standards, it fares very well in terms of success, although the low number and the comparatively high overall success of positive arguments prevent this result from being statistically significant.

Internal coherence is also invoked to prevent the inclusion of a right to work rather than to support it and has a weak success rate. The same is true for arguments relating to the enforceability of rights. The majority of resonance arguments are also negative and show no significant results in terms of performance, which is, however, on the weak side. By contrast, external coherence arguments – mainly references to the European Social Charter, but also to United Nations and International Labour Organization documents – were predominantly used to support positive claims, and show a good performance. Overall, the data indicate that external coherence is the most powerful argument
to support claims to constitutionalization in the field of social rights, with salience playing a supportive role, although it is much less frequently invoked than could have been expected.

CONCLUSIONS

What can we learn from the analysis of arguments in the Convention debates leading to the Charter of Fundamental Rights in the fields of non-discrimination, minority rights, and the right to work? The findings seem largely to corroborate the theoretical assumption that the factors established as the main driving forces behind EU constitutionalization work through argumentative or rhetorical mechanisms. We do not see a full consensus among participants regarding any of the three issues in question, indicating constitutionalization by socialization or converging interests; nor do we observe open bargaining and vetoes, although in each case at least one major member state showed adverse preferences. Still, some modifications to the original assumptions have to be made.

First, all three cases indicate a very strong role for external coherence arguments. In the non-discrimination case, external coherence was the single most successful argument in favour of extending the non-discrimination clause of the Charter beyond the status quo constituted by Article 13 TEC. In the right to work case, external coherence is also a potent argument, only supported by salience, which is, however, not nearly as often used to support positive claims. Conversely, the minority rights case allows the plausible assumption that the lack of strong references to internationally codified norms was a major setback for the argumentative strategies of the proponents.

<table>
<thead>
<tr>
<th>Sum</th>
<th>(+)</th>
<th>(–)</th>
<th>(=)</th>
<th>Suc</th>
<th>Suc</th>
<th>Suc</th>
</tr>
</thead>
<tbody>
<tr>
<td>All</td>
<td>105</td>
<td>33</td>
<td>50</td>
<td>21</td>
<td>39</td>
<td>17</td>
</tr>
<tr>
<td></td>
<td>31.43%</td>
<td>47.62%</td>
<td>20%</td>
<td>37.14%</td>
<td>51.51%</td>
<td>2%</td>
</tr>
<tr>
<td>Pos</td>
<td>35</td>
<td>12</td>
<td>8</td>
<td>14</td>
<td>19</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>34.29%</td>
<td>22.86%***</td>
<td>40%***</td>
<td>54.29%**</td>
<td>41.67%</td>
<td>0%</td>
</tr>
<tr>
<td>Sal</td>
<td>15</td>
<td>3</td>
<td>11</td>
<td>1</td>
<td>4</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>20%</td>
<td>73.33%*</td>
<td>6.67%</td>
<td>26.67%</td>
<td>100%</td>
<td>0%</td>
</tr>
<tr>
<td>eCoh</td>
<td>15</td>
<td>9</td>
<td>3</td>
<td>3</td>
<td>8</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>60%*</td>
<td>20%*</td>
<td>20%</td>
<td>53.33%</td>
<td>55.56%</td>
<td>0%</td>
</tr>
<tr>
<td>iCoh</td>
<td>13</td>
<td>4</td>
<td>9</td>
<td>0</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>30.77%</td>
<td>69.23%</td>
<td>0%</td>
<td>7.69%*</td>
<td>25%</td>
<td>0%</td>
</tr>
<tr>
<td>Res</td>
<td>15</td>
<td>3</td>
<td>9</td>
<td>3</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>20%</td>
<td>60%</td>
<td>20%</td>
<td>26.67%</td>
<td>33.33%</td>
<td>0%</td>
</tr>
<tr>
<td>Enf</td>
<td>12</td>
<td>2</td>
<td>10</td>
<td>0</td>
<td>3</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>16.67%</td>
<td>83.33%**</td>
<td>0%</td>
<td>25%</td>
<td>100%</td>
<td>10%</td>
</tr>
</tbody>
</table>
Second, the cases shed some light on the two mechanisms assumed to lead to constitutionalization – either salience or, alternatively, a combination of internal coherence, external coherence and resonance. The non-discrimination case highlights the second mechanism for constitutionalization to proceed even in the absence of salience. Whereas the predominance of external coherence arguments is in line with this alternative mechanism, this is not true for the role of internal coherence, which is not a necessary ‘stepping stone’ as a positive justification for constitutionalization, but instead (unsuccessfully) used as a ‘blocking stone’ for expanding the Charter provisions beyond the existing acquis.

The social rights case, by contrast, is a typical case of a highly salient issue, so the expectation should have been that salience also plays a prominent role in justifying constitutionalization in this area. Although the findings do not contradict the assumption that this argument type serves as a strong justification for constitutionalization – positive arguments relating to salience are in fact very effective – the small number of references, especially when compared to positive claims based on external coherence arguments and the much more frequent (and much less successful) negative use of salience arguments, casts some doubts on the assumed predominance of salience in such cases. It seems that constitutionalization happened despite strong salience-based resistance, not so much because of its promotion on the basis of salience arguments.

Finally, at least the minority rights case indicates that not all decisions regarding constitutionalization are in fact decided by argumentative success. Neither the final Charter text nor the subsequent drafts reflect in any way the argumentation process in the Convention. It has to be noted, however, that in the minority rights case conditions for argumentative success were weak: low salience of the issue, no generally accepted international standard, no internal coherence with previously established EU rules, and lack of resonance in at least one important member state. In other words, the arguments available to the proponents were simply not good enough to lead to a ‘rhetorical entrapment’ (Schimmelfennig 2000) of the opponents; they did not even force the opponents to engage in a real debate.

Biographical note: Guido Schwellnus is a post-doctoral researcher at the Centre for Comparative and International Studies (CIS), ETH Zurich, Switzerland.

Address for correspondence: Guido Schwellnus, European Politics, Centre for Comparative and International Studies (CIS), ETH Zurich, Seilergraben 49, 8092 Zurich, Switzerland. Tel: +41 (0) 44 632 6369. Fax: +41 (0) 44 632 1289. email: schwellnus@eup.gess.ethz.ch

NOTES
1 Since salience relates to a discrepancy between a proposed institutionalization on the EU level and another existing rights standard, salience almost by definition requires a combination with a reference to the standard taken as comparison. This can
be national provisions (resonance), an international human rights standard (external coherence), or existing EU rules and competences (internal coherence).

2 The number of positional statements could also be artificially enhanced by the documents utilized for the analysis. Although the minutes of the Convention meetings usually state the reasons given for a proposal, they are summaries, not verbatim records of the words spoken by the delegates.


4 The minutes of the Convention meetings are reproduced in Meyer and Engels (2002: 318–404).

5 The written amendments were collected in Charte 4332/00 Convent 35 (plus the additions Add1; 2, 3) with regard to political rights and Charte 4372/00 Convent 39 with regard to social rights.

6 Which test is used to specify significance depends on the number of arguments in each cell of the respective cross tab (Fisher if \( n < 5 \) for any cell, otherwise \( \chi^2 \)).

7 However, since their success rate shows no significant deviation from the overall result, they do not distort the results of the other arguments.

8 Internal coherence shows a significantly better-than-average result among the negative claims. This does not, however, make it a successful argument, given the very bad performance of negative claims in general.

9 The Framework Convention as the only legally binding international minority rights instrument, for example, is formulated in a very ‘soft’ way when it comes to legal enforceability.

10 Several other speakers also criticized the fact that minority rights were ‘formulated too weakly’ (Meyer and Engels 2002: 487–8).

11 Cf. also, for a reference to national rules, Charte 4372/00 Convent 39: 197, 198.

12 Enforceability has a significant above-average success in negative arguments, but this result is based on a single statement, which is in fact the only negative claim to be coded as successful.

13 If position statements are excluded, external coherence becomes the only argument type with a significantly better-than-average overall performance.

REFERENCES


Draft Charter of Fundamental Rights of the European Union,
Präsidium Documents

Proposed Articles (Articles 10 to 19), Brussels, 24 February 2000, Charte 4137/00 Convent 8.
Proposals for social rights, Brussels, 27 March 2000, Charte 4192/00 Convent 18.
New proposal for Articles 1 to 30 (Civil and political rights and citizens’ rights), Brussels, 5 May 2000, Charte 4284/00 Convent 28.
New proposal for the Articles on economic and social rights and for the horizontal clauses,
Brussels, 5 May 2000, Charte 4284/00 Convent 28.
Amendments submitted by the members of the Convention regarding civil and political rights and citizens’ rights, Brussels, 25 May 2000, Charte 4332/00 Convent 35, Add1–3.
Summary of amendments presented by the Präsidium, Brussels, 14 June 2000, Charte 4360/00 Convent 37.
Amendments submitted by the members of the Convention regarding social rights and the horizontal clauses, Brussels, 16 May 2000, Charte 4360/00 Convent 37.
Summary of amendments received and of Präsidium compromise amendments on economic and social rights and on the horizontal clauses (Articles 31 to 50), Brussels, 3 July 2000, Charte 4383/00 Convent 41.
Complete text of the Charter proposed by the Präsidium, Brussels, 28 July 2000, Charte 4422/00 Convent 45.
Complete text of the Charter proposed by the Präsidium following the meeting held from 11 to 13 September 2000 and based on Charte 4422/00 Convent 45, Brussels, 14 September 2000, Charte 4470/00 Convent 47.
Text of the explanations relating to the complete text of the Charter as set out in Charte 4470/00 Convent 47 + COR I, Brussels, 20 September 2000, Charte 4471/00 Convent 48.