**Fundamental Rights Review of National Measures: Nothing New under the Charter?**

*The case law under the Charter on the use of EU fundamental rights to scrutinize national measures represents a continuation of the earlier jurisprudence. The wording of Article 51(1) CFR has not resulted in a general roll back of EU fundamental rights. However, the Charter has focused attention on the issue, has resulted in important new guidance and some streamlining of the case law, and will make it hard for the Court to push the jurisprudence further. The normative justification for the* Wachauf *type cases can be readily found and has been convincingly articulated by the Court. This does not mean that it will be easy to decide whether the connection between the EU rules and the national measure is sufficient to count as implementation, but the Court has helpfully distilled factors to be taken into account. By contrast, the normative justification for* ERT *type cases is more difficult to establish. This case law represents a far-going interference with national legal systems. The standard explanation that since derogations are creatures of Union law, EU fundamental rights must apply fails to convince. The Court is expressing its distrust of national systems of fundamental rights protection. Unfortunately the distrust may be warranted, and the political system of the EU may not be well-equipped to correct matters. The case law can be defended as a judicial remedy for the failure of the political, but needs to be applied with care.*

**Introduction**

Should the European Court of Justice have the jurisdiction to scrutinize acts of Member States for their compliance with European Union fundamental rights? This issue has been called the 'federal question'.[1] Answering it has profound implications for the shape of the European legal order. As a result, the issue has been controversial and has given birth to a case law that is not free from difficulty.

The federal question is in principle open to very different answers. The extremes can be illustrated by comparing the approaches suggested by two British Advocates General, one of them extra-judicially. The broad approach was put forward by Advocate General Sharpston in her Opinion in *Ruiz Zambrano* in 2010.[2] Her proposal was truly radical:

> It seems to me that, in the long run, the clearest rule would be one that made the availability of EU fundamental rights protection dependent neither on whether a Treaty provision was directly applicable nor on whether secondary legislation had been enacted, but rather on the existence and scope of a material EU competence. To put the point another way: the rule would be that, provided that the EU had competence (whether

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[1] See P Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 CMLRev 945, and also eg X Groussot, L Pech, and GT Petursson, 'The Reach of EU Fundamental Rights on Member State Action after Lisbon' in S de Vries, U Bernitz, and S Weatherill (eds), *The Protection of Fundamental Rights in the EU after Lisbon* (Oxford: Hart Publishing, 2013) 99-106.

[2] Case C-34/09 *Ruiz Zambrano* EU:C:2010:560.

> exclusive or shared) in a particular area of law, EU fundamental rights should protect the citizen of the EU even if such competence has not yet been exercised.[3]

In other words, if the EU has in principle the power to legislate, EU fundamental rights are triggered. Given how broad this competence is, in particular as a result of the functional internal market power, the European Court's jurisdiction would be very wide indeed. The Advocate General recognized the far-reaching nature of her suggestion and admitted that a further evolution in case law plus 'an unequivocal political statement from the constituent powers of the EU (its Member States), pointing at a new role for fundamental rights in the EU'[4] would be needed.

At the other end of the spectrum stands an article written by Advocate General Jacobs extra-judicially and published in 2001 in European Law Review. He thought the Court had already gone too far. Specifically, he challenged the idea that Member States should be subject to EU fundamental rights when derogating from EU law - instead he suggested that they only be covered when implementing EU law, in the narrow sense of the word.[5]

Behind the debates lurk lessons drawn from the US experience.[6] There, under the so-called incorporation doctrine, the Supreme Court has held that it is not only the Federal Government but also the States that are subject to the Bill of Rights of the US Constitution.[7] In other words, the case law has had a strongly centralizing impact, which has reduced diversity among the States and led to a significant number of cases. Most recently, in 2010 in *McDonald v Chicago* the US Supreme Court ruled that the right to keep and bear arms contained in the Second Amendment of the US Constitution is incorporated and binds also the States.[8] As a result, certain gun control laws in force in Chicago were rendered unconstitutional. In its ruling, the Supreme Court expressly rejected arguments starting from the premise that the States should be free to experiment, that problems and conditions differ between them, and that the citizens of different jurisdictions have different views of gun controls.[9] The fundamental right to keep and bear arms took precedence. This is what is ultimately at stake.

The purpose of the present contribution is to chart the development of the EU fundamental rights scrutiny and to assess its rationality. The article first briefly describes the legal situation before the Charter of Fundamental Rights. It then sets out Article 51(1) CFR and examines the case law that has followed. The emphasis will be on the ruling in *Åkerberg Fransson*[10] and, in particular, on the recent case law that has sought to specify the implications of that seminal decision; in fact, it is only this recent jurisprudence that allows us to assess the state of the law and its normative justification reliably. The article concludes by considering whether the jurisdictional divide drawn by the Court is appropriate. The argument is that the case law has continued along the tracks established before the Charter, but that the Charter has focused attention on the matter, has resulted in important

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[3] Para 163.
[4] Para 173.
[5] FG Jacobs, 'Human Rights in the European Union: The Role of the Court of Justice' (2001) 26 ELRev 331, 335-339.
[6] See on some of the debates eg L Henkin, '"Selective Incorporation" in the Fourteenth Amendment' (1963-64) 73 Yale LJ 74.
[7] The Bill of Rights is the name given to the first ten amendments to the US Constitution. The incorporation is selective in that most, but not all, provisions bind the States.
[8] *McDonald v Chicago*, 561 US 742, 130 S Ct 3020 (2010). The opinion of the Court, delivered by Justice Alito, contains a useful summary of the main features of the incorporation doctrine at 3031-3036.
[9] ibid 3045-3046. Contra the dissent of Breyer J at 3128-3129.
[10] Case C-617/10 *Åkerberg Fransson* EU:C:2013:105.

more detailed guidance and some streamlining of the jurisprudence, and serves as a break for further expansion. Further, it is argued that the Court has managed to set out a sound normative basis for cases dealing with the putting into effect of EU law. The justification for the derogation cases is more contestable, but can be found in the deficiencies in the political protection of fundamental rights in the EU.

**Once upon a Time before the Charter**

The present section examines the two main strands of case law that predate the Charter of Fundamental Rights. It first briefly describes the adoption of and the limits to the implementation rulings and then does the same in the context of cases dealing with derogations.

The *locus classicus* for implementation cases is *Wachauf*.[11] The case concerned a German law that was based on an EU regulation. The system allowed milk producers to apply for compensation if they discontinued production. Mr Wachauf was a tenant farmer, and this meant that his application had to be supported by the landowner, which was not forthcoming. This raised a problem with the right to property. Mr Wachauf, who had set up the dairy farm and earned a valuable milk quota, was in the danger of being deprived of the fruits of his labour without compensation. The Court held that if the EU rules indeed were to have such an effect, they would violate EU fundamental rights. Following Advocate General Jacobs, it found that these rights also bind Member States when they implement EU rules. In the case at hand, this meant that the system had to be applied by the national authorities in a way that did not infringe Mr Wachauf's right to property. In other words, when Member States implement EU law, they must do so in a way that is compatible with EU fundamental rights.

The decision in *Annibaldi*[12] shows the limits of *Wachauf*. In issue was the refusal of Italian authorities to grant Mr Annibaldi a permission to plant an orchard within a regional park. Mr Annibaldi argued that this violated, inter alia, the right to property, the right to carry on business, and the right to equal treatment. The Court, following Advocate General Cosmas, decided it had no jurisdiction to consider whether the relevant Italian legislation was compliant with fundamental rights. The Italian law was not intended to implement EU law. Although it could indirectly affect the operation of the Common Agricultural Policy, its objectives were the protection of the environment and cultural heritage, not agricultural policy, and the law itself was general in character. Further, there were no specific EU rules on the matter. As a result, although the Italian law could have an indirect impact on EU policies, it could not be deemed to be implementing them.

The derogation strand is more complex. In these cases, the question is whether a Member State needs to comply with EU fundamental rights when derogating from the free movement rules of the Treaty. At first, the Court refused to consider fundamental rights in this context at all. In *Cinéthèque* at issue were French rules on the sale or rental of video-cassettes.[13] The rules set up a system that ensured that films would first be shown in cinemas and would only one year later become available on video. It was argued that this violated the free movement of goods as it made it impossible to sell video-cassettes of certain films in France, despite those videos being in free circulation in other Member States. The Court held that this amounted to a barrier on free movement but found that

[11] Case 5/88 *Wachauf* EU:C:1989:321.
[12] Case C-309/96 *Annibaldi* EU:C:1997:631.
[13] Joined Cases 60 and 61/84 *Cinéthèque* EU:C:1985:329.

the French rules were justified by the overriding aim of encouraging the production of movies by protecting their profitability against exploitation through video-cassettes. However, the plaintiffs had also raised the issue of fundamental rights, arguing that the French rules violated the freedom of expression. The Court refused to consider this argument, contrary to the advice of Advocate General Slynn. It held that it had no power to examine the fundamental rights compatibility 'of national legislation which concerns, as in this case, an area which falls within the jurisdiction of the national legislator.'[14] In other words, when assessing the legality of national rules imposing a barrier on free movement, the compatibility with fundamental rights was an issue left for the courts of the Member States or the European Court of Human Rights.

The Court changed its tack six years later in *ERT*.[15] The case concerned the compatibility of the Greek television monopoly with EU free movement rules. The Court held that the monopoly could on the facts potentially lead to discrimination contrary to the free movement of services, although it left the matter for the national court to decide. It then turned to the issue of justification. It held, contrary to the Opinion of Advocate General Lenz, that when a Member State relies on express Treaty derogations, such justifications, provided for by EU law and thus within its scope, must be interpreted in the light of fundamental rights. Thus, the relevant national rules could only be protected by the exceptions if they complied with the freedom of expression. The *ERT* judgment is noteworthy both for examining fundamental rights in derogation situations and for a change in the language of the Court. In *Wachauf*, it had talked about fundamental rights scrutiny when Member States *implement* EU law. In *ERT*, it said that such scrutiny would take place within the *scope* of EU law.

There is a technical way to reconcile *Cinéthèque* and *ERT*, and indeed the Court cited the earlier ruling in its judgment. In *Cinéthèque* the Member State rules were justified by the unwritten overriding requirements in the public interest developed in the case law,[16] while in *ERT* the attempt at justification relied on the written Treaty exceptions. It can be argued that the former take the matter outside the relevant Treaty provision, as the national measure does not constitute a restriction at all,[17] while the latter do not. However, in the light of subsequent case law, such as *Familiapress*,[18] which does not draw such a distinction between written and unwritten justifications, this reconciliation cannot be maintained. Rather, the decision in *Cinéthèque* has to be considered overruled by the subsequent case law and situations where a national rule *prima facie* creates a barrier on free movement fall within the purview of EU fundamental rights.

The limits of this case law can be seen in *Kremzow*.[19] In this ruling the Court, following Advocate General Pergola, held that the mere fact that Mr Kremzow, who had been sentenced to life imprisonment, was deprived of his ability to engage in free movement, did not bring the matter within the scope of Union law. A purely hypothetical prospect of exercising the right to free movement was not sufficient to justify the application of EU law. In other words, there has to be a

[14] Para 26.
[15] Case C-260/89 *ERT* EU:C:1991:254.
[16] Case C-120/78 *Rewe-Zentral v Bundesmonopolverwaltung für Branntwein* EU:C:1979:42 (Cassis de Dijon).
[17] See for discussion eg G Davies, 'Can Selling Arrangements Be Harmonised?' (2005) 30 ELRev 371, 376-377.
[18] Case C-368/95 *Familiapress* EU:C:1997:325 para 24.
[19] Case C-299/95 *Kremzow* EU:C:1997:254.

*prima facie* violation of one of the four freedoms for the Court to have jurisdiction to consider fundamental rights under the derogation strand.[20]

To conclude, the initial application of EU fundamental rights to national measures concerned situations where Member States were *implementing* Union law. This was expanded further in the case law where the Court was dealing with national measures that were derogating from the four freedoms of the Treaty. In these cases the Court came to hold, after some twists and turns, that EU fundamental rights were relevant whenever the matter was within the *scope* of EU law.

**The Text of the Charter**

The purpose of the current section is to consider the wording and the origins of Article 51(1) CFR, which deals with the applicability of the Charter to Member State activities. It provides that:

> The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

The wording of the Charter reflects an attempt to limit its application in the case of Member States. There is no desire to centralize fundamental rights protection; rather, the Charter applies to Member States only when they are implementing Union law. Any US-style doctrine of incorporation appears to be ruled out.

Does the Charter attempt to roll back the reach of EU fundamental rights? On a plain reading of some language versions of the text, including the English and the German, this appears to be the case.[21] Article 51(1) CFR has selected a wording that harks back to the formula of words employed in *Wachauf*, which talked of implementation. It has not opted to employ the broader formulation referring to the scope of EU law that *ERT* adopted. This is further strengthened by the addition of the word 'only'. But was this a conscious intention of the Masters of the Treaties? It does not appear so.[22]

[20] A further complication was added in Case C-71/02 *Karner* EU:C:2004:181, but this has been overruled in the context of the Charter in Case C-483/12 *Pelckmans Turnhout* EU:C:2014:304, which will be discussed in some detail below.

[21] See on this issue Lord Goldsmith, 'A Charter of Rights, Freedoms and Principles' (2001) 38 CMLRev 1201, 1205, and PM Huber, 'The Unitary Effect of the Community's Fundamental Rights: The *ERT*-Doctrine Needs to Be Reviewed' (2008) 14 EPL 323, 331-332; the first writer was the UK Attorney General, the second is now a Justice at the German Constitutional Court.

[22] See on the drafting history G de Búrca, 'The Drafting of the European Union Charter of Fundamental Rights' (2001) 26 ELRev 126, and on the debates in the European Convention that drafted the failed Constitutional Treaty, A Knook, 'The Court, the Charter, and the Vertical Division of Powers in the European Union' (2005) 42 CMLRev 367, 373-374.

First, the different language versions use different formulations. A number of them talk not of implementation, but of application of EU law.[23] According to them, the Charter binds the Member States only when EU law is applied.

Second, there are the Explanations.[24] According to Article 6(1) TEU and Article 52(7) CFR, the Charter shall be interpreted with due regard to this document, which was prepared by the Praesidium of the Convention drafting the Charter and thus reflects the intentions of the drafters. The Explanations on Article 51(1) CFR do not support the contention that the narrowing of EU's fundamental rights jurisdiction was consciously intended. The relevant extract is the following:

> As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law (judgment of 13 July 1989, Case 5/88 *Wachauf* [1989] ECR 2609; judgment of 18 June 1991, Case C-260/89 *ERT* [1991] ECR I-2925; judgment of 18 December 1997, Case C-309/96 *Annibaldi* [1997] ECR I-7493).

Two things are readily apparent. First, the Explanations use the term 'scope', rather than the narrower expression 'implementation'. Second, they refer to the *ERT* case, not just to *Wachauf*. This does not support the claim that there was an intention to roll back the case law.[25]

Further, the basic idea of the Charter was not change but consolidation and showcasing. The Cologne European Council meeting that set the project in motion stated in its conclusions that 'the fundamental rights applicable at Union level should be consolidated in a Charter and thereby made more evident.'[26] In essence the project was meant to make the rights more visible to the citizens, not to bring about a fundamental change to the legal situation. This is also reflected in the Preamble to the Charter, which provides that it reaffirms rights as they result, inter alia, from the case law of the Court.

In conclusion, analysis of the wording of and the Explanations relating to the Charter reveal a contradictory picture. On the one hand, some language versions support the contention that the Charter sought to roll back the case law. On the other hand, other language versions offer less support, and the Explanations and the context suggest that there was no intention to challenge the existing jurisprudence.

**The Case Law on Article 51(1) CFR**

Within the last couple of years the Court has had to take a position on the interpretation of Article 51(1) CFR. This has not been entirely smooth sailing and has also elicited an alarmed reaction from the German Constitutional Court. It is submitted that in essence the case law represents a confirmation and continuation of the earlier jurisprudence. Article 51(1) CFR has not made a major

[23] For example, the Finnish version uses the word 'soveltaa'. See eg the Opinion of AG Sharpston in Case C-390/12 *Pfleger* EU:C:2013:747 para 40, and A Rosas, 'The Applicability of the EU Charter of Fundamental Rights at National Level' [2013] European Yearbook on Human Rights 97, 105.
[24] Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17.
[25] Similarly eg AG Bot in Case C-108/10 *Scattolon* EU:C:2011:211 paras 119-120.
[26] Presidency Conclusions, Cologne European Council, 3 and 4 June 1999, para 44.

difference to the reach of EU fundamental rights, although it has resulted in important further guidance and some streamlining of the case law, and will render any further expansion difficult.

While the Court had touched on the meaning of 'implementation' in Article 51(1) CFR in several cases,[27] such as *NS* in 2011,[28] the first judgment where it attempted to offer more general guidance on the interpretation of the term was *Iida*,[29] decided by the Third Chamber in November 2012. In issue were residence rights of Mr Iida, a Japanese national with Union citizen family members. On the facts he did not fall under the relevant secondary legislation and could not benefit from the Union citizenship. As a result, there was no connection to EU law and consequently no need to consider EU fundamental rights, such as the right to respect for private and family life or the rights of the child. Nevertheless, the Court stated that:

> To determine whether the German authorities' refusal to grant Mr Iida a 'residence card of a family member of a Union citizen' falls within the implementation of European Union law within the meaning of Article 51 of the Charter, it must be ascertained among other things whether the national legislation at issue is intended to implement a provision of European Union law, what the character of that legislation is, and whether it pursues objectives other than those covered by European Union law, even if it is capable of indirectly affecting that law, and also whether there are specific rules of European Union law on the matter or capable of affecting it (see Case C-309/96 *Annibaldi* [1997] ECR I-7493, paragraphs 21 to 23).[30]

This paragraph does not appear strictly necessary for the ruling. It is perhaps best seen as the first attempt to work out how the term 'implementation' might generally be approached. Interestingly, by drawing from *Annibaldi*, it creates an express link to the earlier case law suggesting that the Charter does not represent a fundamental disruption to the law.

The decisive step came in February 2013 in the Grand Chamber ruling in *Åkerberg Fransson*.[31] In issue was the application of Swedish tax rules that could result in both a tax surcharge and a sentence of imprisonment being imposed on a tax offender. The question was whether this complied with the prohibition of double punishment found in Article 50 CFR. However, before the substantive question could be answered, the matter of jurisdiction had to be settled. Mr Åkerberg Fransson was accused of having given false information inter alia in respect of VAT, which is a tax that is based on EU directives. But did this mean that the Swedish system of penalties was implementing EU law? Advocate General Cruz Villalón, the Commission, and a number of Member States thought not. The Advocate General argued that the connection between Union law and the exercise of the public authority by Sweden was 'extremely weak'[32] and did not justify the application of EU fundamental rights.

The Court found that the requirement of implementation was satisfied. The Court begun by setting out its general view of Article 51(1) CFR. It did so without any reference to either the ruling in *Iida* or

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[27] See on the detail of this case law 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' (2012) 49 CMLRev 1565, 1583-1592.
[28] Joined Cases C-411 and 493/10 *NS* EU:C:2011:865 paras 64-69, where the Court, focusing on the facts of the case, found that a Member State use of a discretionary power under an EU regulation determining the State responsible for examining an asylum application did qualify as implementation.
[29] Case C-40/11 *Iida* EU:C:2012:691.
[30] Para 79.
[31] N 10 above.
[32] Case C-617/10 *Åkerberg Fransson* EU:C:2012:340 para 57.

to the Opinion of the Advocate General. For the Court, the provision confirms its earlier case law. The essence of this was that EU fundamental rights apply in all situations governed by Union law. In other words, if the national legislation falls within the scope of EU law,[33] it is within the fundamental rights jurisdiction of the Court. The Court based this conclusion on the Explanations relating to the Charter. From this reasoning, the Court drew a distinction between two situations. First, if Union law is applied, the Charter is also applicable. By contrast, the Charter alone cannot bring a matter within the scope of Union law, as this would violate Article 51(2) CFR. To put it differently, the Charter applies if any rule of Union law other than the Charter is applicable.

After setting out the principles, the Court turned to the facts of the case. Under the terms of the relevant VAT directives, Member States may impose obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion. Further, VAT is connected to the budget of the EU, as a part of its own resources is based on a levy on the VAT base of each EU country. According to Article 325 TFEU Member States have a duty to protect the financial interest of the Union, in particular by taking the same measures to counter fraud against the Union as they employ for the protection of their own interests. For the Court, this meant that the national measures to counter tax evasion were implementing VAT rules and Article 325 TFEU in the sense of Article 51(1) CFR. The fact that the Swedish rules, which predated its entry into the EU, were not adopted to transpose the relevant VAT directive was irrelevant, as their application was 'designed to penalise an infringement of that directive and is therefore intended to implement the obligation imposed on the Member States by the Treaty to impose effective penalties for conduct prejudicial to the financial interests of the European Union.'[34] As a result, the requirements of Article 51(1) CFR were met and the Swedish rules were assessed against EU fundamental rights.[35]

The basic thrust of the ruling is clear: it confirms that the old case law is still good law. In the light of the Explanations analysed in the previous section and referred to by the Court, this seems correct. The detail of the ruling may be open to some criticism. In particular, it appears odd that the judgment in *Iida* was not mentioned. The facts of the case appear to be borderline, for example the Swedish rule was not intended to implement a directive and was of general character, [36] and it would have been helpful for the Court to either demonstrate how the *Iida* criteria were fulfilled, or alternatively to reject them. In fact, while *Åkerberg Fransson* did decide the issue of principle, it is very light on more detailed practical guidance on what exactly counts as implementation, and it is only the more recent case law that has begun to answer that question.

The ruling in *Åkerberg Fransson* was met with immediate criticism by the First Senate of the German Constitutional Court. The German Court declined to make a reference under Article 267 TFEU in the *Counter-Terrorism Database* case, as it considered that the relevant German rules were not

[33] Interestingly, this formula of words had been expressly rejected by the Convention drafting the Charter. See C Ladenburger, 'FIDE 2012: Protection of Fundamental Rights Post-Lisbon - The Interaction between the Charter of Fundamental Rights, the European Convention of Human Rights and National Constitutions', available at http://www.fide2012.eu/index.php?doc_id=88, at 14.
[34] N 10 above, para 28.
[35] For an analysis of the substance of the case, see eg M Szwarc, 'Application of the Charter of Fundamental Rights in the Context of Sanctions Imposed by Member States for Infringements of EU Law: Comment on *Fransson* Case' (2014) 20 EPL 229.
[36] See for discussion D Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe' (2013) 50 CMLRev 1267, 1278-1279.

implementing EU law.[37] It specifically commented in this context on *Åkerberg Fransson*, which had been delivered some weeks earlier. In the words of the English language press release:

> As part of a cooperative relationship, [*Åkerberg Fransson*] must not be read in a way that would view it as an apparent ultra vires act or as if it endangered the protection and enforcement of the fundamental rights in the member states in a way that questioned the identity of the Basic Law's constitutional order. The Senate acts on the assumption that the statements in the ECJ's decision are based on the distinctive features of the law on value-added tax, and express no general view. The Senate's decision on this issue was unanimous.[38]

The specific concern of the German Court emerges from paragraph 91 of the ruling:

> Insofern darf die Entscheidung nicht in einer Weise verstanden und angewendet werden, nach der für eine Bindung der Mitgliedstaaten durch die in der Grundrechtecharta niedergelegten Grundrechte der Europäischen Union jeder sachliche Bezug einer Regelung zum bloß abstrakten Anwendungsbereich des Unionsrecht oder rein tatsächliche Auswirkungen auf dieses ausreiche.[39]

What this means is that the German Court would object to a reading of *Åkerberg Fransson* that rendered the Charter applicable already if the content of the national rule came *ratione materiae* within the merely abstract scope of Union law or if the national measure had a purely factual effect on it.

The objection lodged by the German Constitutional Court appears somewhat puzzling. The European Court does not seem to be suggesting the kind of standard that the German Court objects to. Whatever criticism one might direct at *Åkerberg Fransson*, surely it does not stand for the proposition that the Charter is activated by purely abstract connection with or factual impact on Union law.[40] Perhaps the German Court was sending more general messages about the need to leave national courts with sufficient autonomy in human rights matters, and that the European Court's case law was being carefully watched.[41] There is a certain irony in this. In decades past, the German Court encouraged the European Court to develop the protection of fundamental rights in the EU; now the message is rather different: stay out of our fundamental rights turf. With tongue in cheek it could be asked whether the German Court is really taking the rights seriously or is seeking to decelerate the process of legal integration.[42]

The European Court of Justice added more nuance in *Siragusa*,[43] a ruling of the Tenth Chamber, delivered without an Opinion of an Advocate General in March 2014. Mr Siragusa owned a property

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[37] BVerfG, 1 BvR 1215/07 of 24 April 2013.
[38] http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg13-031en.html.
[39] Para 91. 'In this respect, the decision must not be understood and applied in such a way that any material connection of a measure to the merely abstract scope of Union law or purely factual effects on this is sufficient for a Member State to be bound by the European Union fundamental rights laid down in the Charter of Fundamental Rights.' (Translation by the author.)
[40] Extra-judicially, the idea of the applicability of the Charter on the basis of the abstract scope of EU law has been rejected eg in Rosas, n 23 above, 108.
[41] See along similar lines Editorial Comments in (2013) 50 CMLRev 925, at 929.
[42] This terminology was used in J Coppel and A O'Neill, 'The European Court of Justice: Taking Rights Seriously?' (1992) 29 CMLRev 669 at 670.
[43] Case C-206/13 *Siragusa* EU:C:2014:126.

that was situated in a landscape conservation area. He had made alterations to it without getting the necessary permits and was ordered to restore the site to its former state. He argued that this violated EU fundamental rights.

The Court denied that it had jurisdiction. It cited *Åkerberg Fransson* for the proposition that EU fundamental rights apply if the national law falls within the scope of EU law. It then engaged in a careful examination of whether this was indeed the case here. It admitted that there was a link between the national law and the EU environmental law, as the latter does include the protection of the landscape. However, the Court noted that there had to be a sufficient connection going 'above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other'. [44] It then drew on *Iida* to establish criteria that could be used to consider whether implementation was involved, namely 'whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it'.[45] Also of importance was whether EU law imposed relevant obligations on the Member State. On the facts, this was not the case. Further, the aims of the Italian law and the closest EU rules were different. The mere indirect impact of national law on EU legislation would not suffice to establish jurisdiction.

The Court bolstered its reasoning by discussing the objective of protecting fundamental rights in EU law. For the Court, this is

> to ensure that those rights are not infringed in areas of EU activity, whether through action at EU level or through the implementation of EU law by the Member States….The reason for pursuing that objective is the need to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in such a way as to undermine the unity, primacy and effectiveness of EU law.[46]

The ruling in *Siragusa* has at least three particular virtues. First, it demonstrates the connection between the rulings in *Iida* and *Åkerberg Fransson*. The latter contains the statement of general principle, while the former provides practical tools for assessment. Second, it answers effectively the specific concerns of the German Constitutional Court, showing in a clear manner that neither abstract scope of application nor factual impact would automatically establish jurisdiction under Article 51(1) CFR. Thirdly, it lays out reasons behind the law, which can only help its rational development.[47]

In fact, for practical purposes *Siragusa* and *Iida* may prove more useful than *Åkerberg Fransson*. While the latter judgment did settle the issue of principle, it is unhelpful in guiding us on its detailed application. It is the task of the subsequent case law to provide clarity to the difficult question of when exactly is the connection between the national and the EU sufficient to bring the matter within the scope of EU law and therefore within Article 51 CFR.

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[44] Para 24.

[45] Para 25.

[46] Paras 31-32.

[47] The approach of *Siragusa* was followed in Case C-198/13 *Julian Hernández* EU:C:2014:2055, a ruling of the Fifth Chamber delivered without an Opinion. Again there was a reference to the *Iida* criteria followed by a careful examination of the national legislation, in particular its objectives, and the Court also relied on the unity aim of the EU fundamental rights protection. The result was that the relevant Spanish legislation did not fall within the scope of Union law and the Charter did not apply.

*Siragusa* was promptly followed by another important ruling on the reach of EU fundamental rights, *Pelckmans Turnhout*.[48] In issue was the legality of Belgian legislation on shop opening hours. The First Chamber, proceeding without an Opinion of an Advocate General, applied the principle established in *Keck*,[49] where the Court had held that the free movement of goods did not prohibit non-discriminatory national rules concerning selling arrangements. As a result, it found that the Belgian law did not infringe Article 34 TFEU or any other Treaty provision, which in turn meant that the matter did not fall within the scope of EU law and the Charter was inapplicable. In this, the Court seems to have overruled the Fifth Chamber's pre-Charter decision in *Karner*,[50] although it failed to mention the earlier case. *Karner* had dealt with Austrian rules on advertising, which were also national provisions concerning certain selling arrangements in the sense of *Keck*. As the rules did not discriminate, they had not been caught by Article 34 TFEU either. However, in *Karner* the Court had continued to investigate whether or not there was a violation of the freedom of expression, finding that on the facts there was not. It had not denied jurisdiction on the ground of the matter falling outside the scope of EU law. In other words, in the case of selling arrangements, *Karner* had established that national rules may exceptionally be scrutinized under EU fundamental rights even if they do not fall within the four freedoms. After *Pelckmans Turnhout* this is no longer the case.

*Pelckmans Turnhout* may be applauded as a welcome streamlining of the meandering pre-Charter case law. It demonstrates the increased salience of the application of EU fundamental rights to national measures: the kind of 'expansion by stealth' in an obscure judgment that had been possible earlier was no longer acceptable in the post-Lisbon EU. However, the criticism that was expressed in the context of *Åkerberg Fransson* about the Court's failure to refer to earlier decisions that appear in tension with the current one is applicable here. The Court does not mention *Karner* at all, although in reality it is overruling it. This does not serve the cause of transparency or the coherence of the case law.

The final ruling that needs to be considered is *Pfleger*,[51] a judgment concerning the free movement of services and gambling handed down in April 2014. The case involved Austrian rules on gaming machines. A licence was needed for such a machine, unlicensed machines were confiscated and destroyed, and organizers were punished. It was claimed that this violated Article 56 TFEU and various provisions of the Charter. However, the applicability of the Charter was contested by a number of governments. They argued that the area of gambling is not harmonized and that the Austrian legislation was not an implementation of EU law in the meaning of Article 51(1) CFR. The Third Chamber of the Court rejected the argument, following Advocate General Sharpston. It reasoned that *Åkerberg Fransson* had established that the Charter confirms the Court's existing case law. It then cited *ERT* and held that:

> As follows from that case-law, where it is apparent that national legislation is such as to obstruct the exercise of one or more fundamental freedoms guaranteed by the Treaty, it may benefit from the exceptions provided for by European Union law in order to justify that fact only in so far as that complies with the fundamental rights enforced by the Court. That obligation to comply with fundamental rights manifestly comes within the scope of European Union law and, consequently, within that of the Charter. The use by a Member State of exceptions provided for by European Union law in order to justify an obstruction of

[48] N 20 above.
[49] Joined Cases C-267 and 268/91 *Keck* EU:C:1993:905.
[50] N 20 above.
[51] Case C-390/12 *Pfleger* EU:C:2014:281.

> a fundamental freedom guaranteed by the Treaty must, therefore, be regarded, as the Advocate General states in point 46 of her Opinion, as 'implementing Union law' within the meaning of Article 51(1) of the Charter.[52]

In other words, the Court confirmed the *ERT* line of derogation cases. This applies both for the situations where the written Treaty exceptions are at stake and for the situations where unwritten overriding requirements are pleaded. The existence of secondary legislation is also irrelevant; whenever a Member State has created an obstacle in *prima facie* breach of one of the four freedoms, it is implementing EU law. The speculation that the Charter might produce a change in the law proved unfounded. The normative justification for this will be considered in the next section.

What is the overall conclusion that can be drawn from this case law? I think it is twofold. First, the Charter has not rolled back the case law in general. Rather, there is a remarkable continuum between the pre- and post-Charter cases.[53] Article 51(1) CFR has not caused a major disruption, although it has prompted important further guidance and some tidying up. This appears justified from the doctrinal perspective. In the light of the aim of the Charter to consolidate and showcase, and in particular the Explanations, it is hard to argue that the narrow wording employed in some language versions was intended to bring significant change. However, methodologically some of the judgments can be criticized for failing to address openly the tensions between different rulings.

Second, the salience of the issue of fundamental rights jurisdiction has increased. Article 51(1) CFR is not seen as a relatively innocuous provision, but as one of the key pillars in the structure of fundamental rights protection that is of major concern to the senior national courts, whether for reasons of principle or institutional self-interest. This will undoubtedly make it very difficult for the European Court to develop its case law further. The case law has not been rolled back in general, but it has probably been brought to a halt. This is in line with the overall approach of the Lisbon Treaty, which inserted numerous warnings against judicial activism in the field of fundamental rights, for example providing in Article 6(1) TEU that the 'provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.'

**Is the Jurisdictional Divide Rational?**

The article has so far attempted to establish where the line between Member State and EU jurisdiction lies. It is now time to consider whether it has been drawn in the right place. Does the divide make normative sense?

The starting point of analysis has to be that fundamental rights are not truly universal in the sense that they would or should be applied in the same way everywhere.[54] Their application normally involves careful balancing between two competing rights or between a right and a general interest. Different societies may legitimately arrive at different results, according to their values and preferences. This is reflected inter alia in the margin of appreciation that the European Court of Human Rights leaves for its Member States. For example, although there is a general consensus that the freedom of expression is a fundamental right, there is no agreement of what exactly amounts to

[52] Para 36.
[53] See more generally on continuity versus change Iglesias Sánchez, n 27 above.
[54] See generally eg P Leino, 'A European Approach to Human Rights? Universality Explored' (2002) 71 Nordic J of Int'l L 455 and JHH Weiler, *The Constitution of Europe* (Cambridge: Cambridge University Press, 1999) 102-107.

hate speech that is not protected. As a result, it seems rational to leave the matters to the Member States at least in some circumstances. Heterogeneity has the virtues of allowing experimentation, and responding to local conditions and preferences.

It is sometimes argued that the imposition of a uniform standard of protection would create unity and foster European identity. This seems overly optimistic. Forcing a society to accept results that it regards as wrong is likely to prove a recipe for resentment, not for unity. It should not be forgotten that while fundamental rights may be popular *in abstracto*, they may not be so *in concreto*. Often it is the groups that lack voice in the political process that are the most vulnerable and need protection. It is typically not the median voter who appeals to fundamental rights in concrete cases but the suspected criminal, or the institutionalized, or the member of a minority.[55] This is not to say that fundamental rights protection in general should be shied away from; rather the point is that the EU should not engage in it on a misguided assumption that it automatically fosters integration.[56]

Further, for the European Court, there is a danger of a damaging institutional struggle with senior national courts.[57] Much of the daily work of national constitutional courts involves the application of fundamental rights.[58] Any attempt by the European Court to extend its jurisdiction may elicit a defensive reaction, as was seen already from the response of the German Constitutional Court to the ruling in *Åkerberg Fransson*.[59] This would be unlikely to advance either the cause of integration or the cause of human rights.[60]

There is also a practical point. The European Court of Justice already has a substantial case load. In recent years, it has taken steps to improve the efficiency of its operations and has managed to deal with the increase in cases and even to bring down the average time it takes to reply to preliminary references. However, the underlying issue of growing case load due not only to a general increase in litigation in European countries but also to the expanding scope of EU law and the greater number of Member States is not going to disappear. A sizeable increase in fundamental rights cases has already taken place as a result of the greater visibility brought by the Charter. A further growth would appear a mixed blessing at best. Here, it is important to appreciate that the Court is not just the constitutional court of the EU, but also the supreme court, with the duty of providing interpretation of a wide variety of EU acts. The Court's diet ranges from trademarks, to company law, to tax law, to competition law and so on. Much of its work is technical, but this does not make it any less important for the uniformity of Union law and the functioning of the internal market.

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[55] Or sometimes the rich and famous eg to protect their privacy.

[56] Ladenburger, n 33 above, at 17 warns of 'the potential danger to the EU's very legitimacy if its institutions ended up being drawn into various highly sensitive national debates, commenting from a human rights angle even though there is no particular aspect of EU policy or law at stake'.

[57] T von Danwitz and K Paraschas, 'A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights' (2012) 35 Forham Int'l LJ 1396 warn of this at 1418. See further K Tuori, 'Pluralism of EU Fundamental Rights Law' in S Douglas-Scott and N Hatzis (eds), *Research Handbook on EU Human Rights Law* (Cheltenham: Edward Elgar, forthcoming). Tuori also argues that an attempt by the ECJ to acquire a general fundamental rights jurisdiction would challenge the position of the ECtHR and might incite a counter-move from it.

[58] See Sarmiento, n 36 above, at 1300.

[59] N 10 above.

[60] On the other hand, there might be situations where the national court would find it difficult to engage in the fundamental rights review without the support of the ECJ, and might welcome the extension of EU fundamental rights.

Having said all this, there is undoubtedly a case for the scrutiny of some national measures. The issue is best approached by considering separately the two main strands of case law, namely the *Wachauf* strand and the *ERT* strand.[61]

In *Wachauf* Advocate General Jacobs thought it 'self-evident that when acting in pursuance of powers granted under Community law, Member States must be subject to the same constraints, in any event in relation to the principle of respect for fundamental rights, as the Community legislator.'[62] There are at least two reasons for this. First, if Member States implementing EU law were subject to lower standards than the Union itself, the EU legislature would have the incentive to push all fundamental rights –sensitive issues to the national level to avoid awkward judicial scrutiny. This would clearly be unacceptable. In fact, in *Digital Rights Ireland*[63] the Grand Chamber of the Court specifically struck down the Data Retention Directive[64] on the grounds of it failing to provide sufficient safeguards for the right to privacy and the right to the protection of personal data. It was not sufficient that the Member States were in general terms exhorted to put protections in place.[65]

The other reason was put forward by the Court in *Siragusa*. If every Member State implementing EU rules would apply its own fundamental rights standard without any central control, the uniformity of EU law could not be guaranteed. In the words of the Court, there 'is the need to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in such a way as to undermine the unity, primacy and effectiveness of EU law.'[66] Given the importance of uniformity in EU law, for example for the purposes of the internal market and as reflected in the Article 267 TFEU procedure itself, the Court's reasoning is persuasive. [67]

It may be difficult in practice to decide whether a particular situation is one of implementation or not,[68] although the Court has in *Iida*[69] and *Siragusa* offered a useful list of factors, distilled from older case law, that need to be taken into consideration. Yet the basic idea that the EU fundamental rights jurisdiction must exist in these cases cannot be doubted.

The *ERT* line of judgments is altogether more difficult to justify.[70] It will be remembered that in these cases the Court assesses the fundamental rights compatibility of a national law when it seeks to derogate from the demands of EU free movement law. These situations are a multitude. A significant proportion of national laws are tolerated only due to the existence of written derogations and unwritten overriding requirements developed by the Court. The four freedoms have been

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[61] Notes 11 and 15 above. It has to be admitted that the distinction between the two strands is not water-tight. Eg *NS*, n 28 above, concerned the application of a derogation contained in a regulation. AG Trstenjak went out of her way to analyse this in terms of *Wachauf* at paras 79-82.
[62] Case 5/88 *Wachauf* EU:C:1989:179 para 22.
[63] Joined Cases C-293 and 594/12 *Digital Rights Ireland* EU:C:2014:238.
[64] European Parliament and Council Directive (EC) 2006/24 on the retention of data generated or processed in connection with the provision of publicly available electronic communication services or of public communication networks [2006] OJ L105/54.
[65] See in particular the discussion by AG Cruz Villalón in Joined Cases C-293 and 594/12 *Digital Rights Ireland* EU:C:2013:845 paras 108-132.
[66] N 43 above, para 32. Note that the issue is not the protection of fundamental rights as such, but rather whether the rights should be protected by the EU or by the Member States/ECHR.
[67] For a similar position predating the judgment, see von Danwitz and Paraschas, n 57 above, 1401.
[68] For a particularly broad approach, see Case C-555/07 *Kücükdeveci* EU:C:2010:21 paras 23-26.
[69] N 29 above.
[70] Huber, n 21 above, argues at 328 that the case law is 'neither methodologically nor dogmatically convincing'.

interpreted broadly by the Court.[71] The same is true of Union citizenship, where 'serious inconvenience' for a free mover is sufficient to activate Article 21 TFEU.[72] As a result, the *ERT* approach represents a major extension of the EU fundamental rights jurisdiction.

In fact, the law comes close to the famous 'civis europeus sum' standard proposed by Advocate General Jacobs in *Konstantinidis*,[73] although the Court decided the case on another basis.[74] He suggested that

> In my opinion, a Community national who goes to another Member State as a worker or self-employed person … [is] entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values, in particular those laid down in the European Convention on Human Rights. In other words, he is entitled to say 'civis europeus sum' and to invoke that status in order to oppose any violation of his fundamental rights.[75]

It can be expected that in many situations the breach of the fundamental rights of a free mover amounts at the very least to a serious inconvenience for him or her.[76] As a result, it seems that a Union citizen moving to another Member State is able, in the majority of cases, to invoke his or her status to oppose such violations.

The standard explanation offered for the EU fundamental rights review in *ERT* situations is that since the derogations are creations of Union law, the matter falls within the scope of EU law, which in turn attracts the EU fundamental rights jurisdiction.[77] Unfortunately the standard explanation does not appear entirely convincing. First, it only covers the situations where Member States rely on one of the express Treaty derogations, such as public policy under Article 36, 45(3), or 52 TFEU. By contrast, in the case of unwritten mandatory or overriding requirements in the public interest that the Court has recognized at least since *Cassis de Dijon*,[78] the explanation is much weaker.[79] Since the overriding requirements do not appear in the Treaty, they must as a matter of law be aspects of defining whether the free movement rules apply at all. In other words, they are internal to the free movement provisions, such as Article 34 TFEU.[80] If the overriding requirement is accepted, this means that the national rule does not amount to a restriction in the first place. In fact, it was precisely this reason that led the Court to decline fundamental rights jurisdiction in *Cinéthèque*.[81] Yet in its more recent case law the Court has not in practice distinguished between written derogations

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[71] See generally eg J Snell, 'The Notion of Market Access: A Concept of a Slogan?' (2010) 47 CMLRev 437.
[72] See eg Case C-148/02 *Garcia Avello* EU:C:2003:539 para 36.
[73] Case C-168/91 *Konstantinidis* EU:C:1992:504.
[74] Case C-168/91 *Konstantinidis* EU:C:1993:115. A somewhat similar, although more modest, proposal was put forward by Advocate General Poiares Maduro in Case C-380/05 *Centro Europa 7* EU:C:2007:505. He argued that the Court should have the jurisdiction to scrutinize national breaches of fundamental rights in situations where there are serious and persistent violations of fundamental rights which highlight a problem of systemic nature.
[75] Para 46.
[76] Moreover, the Court demonstrated in Case C-60/00 *Carpenter* EU:C:2002:434 a willingness to push the four freedoms beyond their limits to protect fundamental rights.
[77] See eg the Opinion of AG Sharpston in Case C-390/12 *Pfleger* EU:C:2013:747 para 45.
[78] N 16 above.
[79] See also LFM Besselink, 'The Member States, the National Constitutions and the Scope of the Charter' (2001) 8 MJ 68, 76-79.
[80] Similarly Davies, n 17 above.
[81] N 13 above.

and overriding requirements, as demonstrated by its rulings in *Familiapress*[82] and *Pfleger*. In this context, any argument that fundamental rights serve to determine the scope of free movement provisions is vulnerable to the objection that Article 51(2) CFR rules out the Charter extending the field of application of EU law. For this reason the Grand Chamber of the Court in *Dereci* refused to extend the scope of application of EU citizenship on the grounds of the right to respect for private and family life.[83] In other words, the *Cinéthèque-ERT-Familiapress* saga shows that the line of cases does not flow mechanistically from the inevitable logic of the law but represents a policy decision adopted by the Court.

The reasons that justify the extension of the EU fundamental rights jurisdiction to *Wachauf* situations offer no help for derogation situations. In derogation cases the Member State is not seeking to apply EU law, instead it is trying to avoid the application of an EU free movement rule. The uniformity of EU law is not being threatened by the possibly conflicting fundamental rights standards of the Member States; rather, it is undermined by the very fact that derogations exist. In this connection, one cannot but notice how awkward the use of implementation language is in these cases: intuitively Advocate General Sharpston's conclusion in *Pfleger* that '[a] Member State must… be regarded as "implementing Union law" within the meaning of Article 51 when it puts in place a derogation from a fundamental freedom'[84] has a strange ring to it. In fact, in *Grogan* Advocate General Van Gerven remarked that it cannot be said in these kinds of cases that the national law 'implements' EU law.[85]

Further, to the extent that the system of justifications and proportionality is an exercise in detecting hidden protectionism rather than actual weighing of the merits of national policies,[86] the *ERT* principle sits uneasily with it.[87] The Court has allowed each Member State to decide which aims to pursue and to set the level of protection. Thus, a Member State is free to determine the standard of protection it wishes to afford to the public morality, the consumers, the environment, and myriad other public interests.[88] The fact that other Member States may have put in place more or less stringent rules does not mean that the national legislation under scrutiny violates the Treaty. The free movement provisions of the Treaty are only breached if the aim pursued is purely economic or if the selected means are not appropriate or necessary. The same pattern emerges in cases where a Member State invokes a fundamental right as a justification for a restriction on free movement. Again, the Member State is free to decide what values it seeks to protect. For example in *Grogan* Advocate General Van Gerven had no difficulty of finding that the protection of unborn enshrined in the Irish Constitution was a justified objective, as

> it relates to a policy choice of a moral and philosophical nature the assessment of which is a matter for the Member States…There can, in my estimation, be no doubt that values which,

[82] N 18 above.
[83] Case 256/11 *Dereci* EU:C:2011:734 para 71. See K Lenaerts, 'The Court's Outer and Inner Selves: Exploring the External and Internal Legitimacy of the European Court of Justice' in M Adams, H de Waele, J Meeusen, and G Straetmans, *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice* (Oxford: Hart Publishing, 2013) at 53.
[84] *Pfleger*, n 77 above, para 46.
[85] Case C-159/90 *Grogan* EU:C:1991:249 para 31.
[86] See for discussion J Snell, 'Who's Got the Power? Free Movement and Allocation of Competences in EC Law' (2003) 22 YEL 323, 337-345 and generally G Davies, 'The Court's Jurisprudence on Free Movement of Goods: Pragmatic Presumptions, Not Philosophical Principles' [2012] Eur J of Consumer L 25.
[87] See Weiler n 54 above 123.
[88] See eg Case C-124/97 *Läärä* EU:C:1999:435 paras 35-36

> in view of their incorporation in the Constitution, number among the fundamental values to which a nation solemnly declares that it adheres fall within the sphere in which each Member State possesses an area of discretion in accordance with its own scale of values and in the form selected by it.[89]

Similarly, in *Omega* the First Chamber of the Court held on the issue of proportionality that the Member State in question was free to decide on the level of protection it wished to afford to a fundamental right and that the fact that other Member States had adopted different systems did not render it disproportionate.[90] As a matter of logic, it is difficult to see why Member States are on the one hand given the freedom to choose which non-economic values they wish to protect and to set the level of protection, but on the other hand are simultaneously policed under the EU system of fundamental rights. The Court is saying that the merits of a national policy are for the Member State but in the next breath it is scrutinizing them.

It seems to me that the insistence on the EU fundamental rights scrutiny simply speaks of distrust towards national standards of fundamental rights protection. The Court does not trust that the relevant Member State court will carry out a sufficiently robust review under domestic or ECHR standards. It wishes to maintain the ability to disapply national rules in these situations on fundamental rights grounds itself.

Is such distrust warranted? All Member States belong to ECHR. They all have had to comply with fundamental rights to join the EU in the first place in accordance with Article 49 TEU, and Article 7 TEU gives the EU the ability to impose sanctions on countries in serious and persistent breach of fundamental rights. Further, the European Court can always remind the national court of its obligations under ECHR, as it has frequently done in cases where EU fundamental rights may have been inapplicable.[91] This would counter any fears that a national court might fail to detect a fundamental rights issue that arises on the facts.

Unfortunately, there does appear to be cause for some concern.[92] Adherence of Member States to fundamental rights is vital for the Union. Human rights are not just another policy area, but according to Articles 2 and 3 TEU one of the very founding values of the EU, which it is bound to promote. Article 10 TEU shows that the democratic legitimacy of the EU rests partially on the functioning of democracy at the national level, which in turn requires compliance with various fundamental political rights. Further, much of the practical working of the EU depends on mutual trust between the Member States, and this requires confidence in the standards of protection in every Member State. Yet the EU political process of sanctioning Member States has appeared unworkable. The sanctions are only available in extreme cases where something has gone seriously wrong with an existing Member State, and have never been used. There has been no mechanism for an early intervention in circumstances where there is some reason to worry but not yet a clear risk of a serious breach. The Commission has recognized this gap and is seeking to fill it with a 'Rule of Law Framework' launched in March 2014,[93] under which it would initiate a structured exchange with the relevant Member State in case of clear indications of a systemic threat to the rule of law.

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[89] N 85 above para 26 (internal quotation marks and footnotes omitted).
[90] Case C-36/02 *Omega* EU:C:2004:614 paras 37-39.
[91] See eg *Dereci*, n 83 above, para 72.
[92] See in this context the analysis and proposals put forward in V Bogdandy et al, 'Reverse Solange - Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49 CMLRev 489.
[93] Commission Communication, 'A New EU Framework to Strengthen the Rule of Law' COM(2014) 158 final.

However, at least until the Rule of Law Framework has proven itself, if it ever will, it appears that the flaws in the political protection of fundamental rights may justify the extension of the judicial remit.

Of course, one should not exaggerate the role of the European Court of Justice in policing Member State violations of fundamental rights. In particular, while infringement actions by the Commission under Article 258 TFEU may play a role, the Court is to a large extent reliant on national courts sending cases to it under Article 267 TFEU and then faithfully applying its judgments. If there are widespread fundamental rights concerns in a Member State, what is the likelihood that its courts are still independent and brave enough to send the right cases to Luxembourg and then put the rulings into effect?

The difficulties in justifying the EU fundamental rights jurisdiction in derogation cases suggest that it should be exercised with care.[94] Fortunately, the division of labour between the European Court of Justice that interprets EU law and national courts that apply it in Article 267 TFEU proceedings, as well as the open-ended proportionality standard that is central to free movement law, make it easy to leave matters for Member State courts if EU intrusion is not warranted. The European Court of Justice may simply draw attention to EU fundamental rights but then pass the issue to the referring court. In those circumstances, national sensitivities discussed earlier in this section are unlikely to be disturbed excessively. In fact, some national courts might view such an approach as empowering and supportive, rather than antagonistic, as it could bolster their ability to engage in a fundamental rights review in the first place. EU law serving to empower national courts is of course a familiar story in the context of European integration.[95]

**Conclusion**

The thrust of this article has been that the case law under the Charter on the use of EU fundamental rights on national measures represents a continuation of the earlier jurisprudence. The wording of Article 51(1) CFR, according to which the Charter is addressed to Member States only when they are implementing Union law, has not resulted in a general roll back of fundamental rights scrutiny. In the light of the overall aim of the Charter to showcase and consolidate, and the specific Explanations relating to Article 51 CFR, this appears justified in general. However, the Charter has focused attention on the issue, has prompted important further guidance and some streamlining of the case law, and will make it hard for the Court to push the law further.

The normative justification for the *Wachauf* type cases can be readily found and has been convincingly articulated by the Court. This does not mean that it will always be easy to decide whether the connection between the EU rules and the national measure is sufficient to count as implementation. Nevertheless, the Court has helpfully distilled and listed factors that need to be taken into account when this is decided.

By contrast, the normative justification for *ERT* type cases is more difficult to establish. This case law represents a far-going interference with national legal systems, given how broadly the notion of restriction has been interpreted by the Court. The standard explanation that since derogations are creatures of Union law, EU fundamental rights must apply fails to convince completely. In particular,

[94] See eg the cautious proposal in Weiler, n 54 above, 126.
[95] Se eg A-M Burley and W Mattli, 'Europe before the Court: A Political Theory of Legal Integration' (1993) 47 IO 41.

it cannot explain why the case law extends to situations where the national measure is being justified by unwritten overriding requirements, as these serve to take the Member State rule outside the free movement provisions. It seems that the Court's attitude can best be explained by a distrust of national systems of fundamental rights protection. Unfortunately the distrust may not be wholly unwarranted, and the political system of the EU may not be well-equipped to correct matters. As a result, the case law can be defended as a judicial remedy for the failure of the political, another familiar story in the development of the European Union law.[96]

More generally, the developments in the context of Article 51(1) CFR testify to the durability of case law. The Court is not quick to change the approach it has developed in its jurisprudence. It may interpret new provisions as a codification of case law, rather than as a new departure.[97] Further, when there is a change, the Court may limit its impact on the jurisprudence rather than embrace a radically new approach, as in the context of the changes to the *locus standi* of non-privileged applicants in Article 263(4) TFEU, where the Court refused to follow the suggestions for a major revamp of the law.[98] This is not intended as a criticism of the Court. Rather, it simply points out that if the Masters of the Treaties do wish to alter the law, they need to do so in the clearest of terms, which was not the case for Article 51(1) CFR.

[96] See eg Weiler, n 54 above, 10-101.

[97] See also eg the Court's attitude to the limitations on the free movement of capital, which it saw as confirming the earlier case law in Case C-35/98 *Verkooijen* EU:C:2000:294, discussed in J Snell, 'Free Movement of Capital: Evolution as a Non-Linear Process' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (2nd edn, Oxford: Oxford University Press, 2011) at 552.

[98] Case C-583/11 P *Inuit Tapiriit Kanatami* EU:C:2013:625. Contrast eg the Opinion of AG Wathelet in Case C-133/12 P *Stichting Woonlinie* EU:C:2013:336.