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# THE EU CHARTER OF FUNDAMENTAL RIGHTS AND THE FEDERAL QUESTION

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## 1. Introduction

Two years ago, von Bogdandy addressed in this journal the evolution of the core foundations of the European Union, by raising the central question whether the Union is or should be a human rights organization.[1] The article followed Alston and Weiler's powerful clamour, in the framework of a broader project, for an EU human rights policy,[2] a claim with which von Bogdandy took issue. Since then, the EU Charter of fundamental rights has been finalized, and its scholarly fall-out is enormous, both because the final fate of the Charter is not yet settled and because the Charter is the centrepiece of the current EU constitutionalization process. Political developments are moving at such a pace that the questions whether the EU is in need of a human rights policy or whether it is becoming a human rights organization are now overshadowed by the tall presence of the Charter. The Convention on the future of the European Union is currently looking at how the Charter could be incorporated in the EU's basic constitutional document. If such incorporation takes place, fundamental rights protection will, apparently at least, be at the core of the European integration process. What will the Charter do to that process? Past experience with bills of rights in federal States shows the strong centralizing force of such documents. It is perhaps for that reason that the Charter contains a strongly-worded horizontal provision which clearly seeks to contain any centralizing effect. Article 51 Charter provides:

> "1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and

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1. Von Bogdandy, "The European Union as a human rights organization? Human rights and the core of the European Union", 37 CML Rev., 1307–1338.

2. Alston and Weiler, "An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights", in Alston (Ed.), *The EU and Human Rights* (OUP 1999), pp. 3–66.

> 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.
> 2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties".

This essay examines the meaning of that provision in the light of the current state of EU constitutional law and attempts to foresee in which directions that meaning may develop. It employs the notion of "federal question" so as to highlight the importance of the issues at stake. As Weiler puts it, the constitutional discipline which Europe demands of its constitutional actors (the EU itself, the Member States and the European citizens) is in most respects indistinguishable from that which you would find in an advanced federal State.[3] However, that constitutional discipline does not yet extend to general respect for a federal bill of rights.

It may in fact be preferable to avoid further references to federalism, in light of the contentious and over-subscribed nature of the concept. There can be little doubt that Europe should continue its *Sonderweg*.[4] But that does not remove the underlying question of the relationship between the Charter and the Member States.

Section 2 of this article briefly discusses the current legal status of the Charter and the case law of the ECJ and CFI which refers to it. Against that background, Section 3 examines the potential effect of the Charter on Member States and in national law; Section 4 then looks at the relationship between the Charter, protection of fundamental rights and the powers of the EU. Given the profound constitutional complexity of the issues addressed, the author hopes to be forgiven for raising questions, more than supplying firm conclusions.

## 2. Effect of the Charter – Towards incorporation?

At present, the Charter is a text, solemnly proclaimed at Nice on 7 December 2000, by the European Parliament, the Council and the Commission. It was published as such in a "C" issue of the Official Journal.[5] The Member State governments did not participate in the solemn proclamation. Nor is there any reference to the Charter in the Treaty of Nice. It is therefore plain that, as things stand, the provisions of the Charter do not have founding treaty status.

3. Weiler, "Federalism and constitutionalism: Europe's *Sonderweg*", Jean Monnet Working Paper No. 10/00 (www.jeanmonnetprogram.org), 2.
4. Ibid.
5. O.J. 2000, C 364/1.

Like much else in and about the Charter, the solemn proclamation exercise was a compromise, in this case between those in favour of full integration in the Treaties – what one might term incorporation – and those opposed to making the Charter binding in any form whatsoever.

It does not follow from the mere solemn proclamation of the Charter that it is devoid of all formal legal status. The EU and EC Treaties do not provide for the adoption of charters by way of proclamation by the EP, the Council and the Commission, but that does not prevent the proclamation from having some legal effect. As the Charter is primarily aimed at strengthening the protection of fundamental rights as regards policies and acts carried out by the EU institutions,[6] the solemn proclamation clearly expresses some level of voluntary commitment which may produce some type of legal effect.[7] There are indeed other examples of texts agreed between EU institutions which, although not provided for in the Treaties, have been considered to bind those institutions.[8]

This point is not further investigated here. It is however useful to take a look at judicial statements on the Charter coming out of Luxemburg, as a background to the discussion on the relationship between the Charter and national law, and on the Charter's effect on the EU's powers.[9]

The Charter has been referred to in a number of opinions of Advocates General; these tend to mention the Charter as confirming rather than establishing particular fundamental rights.[10] The following are among the most interesting cases and statements.

6. This article generally refers to the EU institutions and to EU law as encompassing the EU and EC Treaties. It is thus based on a unitary approach towards the EU, in line with the Charter itself.

7. Judge Wathelet considers that the Charter could be characterized as an interinstitutional agreement, to which the principle of "patere legem quam ipse fecisti" could apply; see "La Charte des droits fondamentaux: un bon pas dans une course qui reste longue", (2000) CDE, 591.

8. See, in the field of external relations, Case C-25/94, *Commission* v. *Council*, [1996] ECR I-1469, paras. 49–50. As regards budgetary matters, see e.g. Case 204/86, *Greece* v. *Council*, [1988] ECR 5323. With respect to relations between the Commission and the EP, see Case T-236/00 R, *Stauner a. O.* v. *EP*, [2001] ECR II-15.

9. See Dutheil de la Rochère, "Droits de l'homme – La Charte des droits fondamentaux et au delà", Jean Monnet Working Paper No. 10/01 (www.jeanmonnetprogram.org), section I(A).

10. Case C-340/99, *TNT Traco* v. *Poste Italiane*, [2001] ECR I-4109, para 94 of the Opinion of A.G. Alber; Case C-173/99, *BECTU* v. *Secretary for State for Trade and Industry*, [2001] ECR I-4881, paras. 22–28, Opinion of A.G. Tizzano; Joined Cases C-122 & 125/99 P, *D and Sweden* v. *Council*, [2001] ECR I-4319, para 97 Opinion of A.G. Mischo; Case C-270/99 P, *Z* v. *EP*, Opinion of A.G. Jacobs of 22 March 2001, para 40, nyr; Case C-49/00, *Commission* v. *Italy*, Opinion of A.G. Stix-Hackl of 31 May 2001, footnote 11, nyr; Case C-377/98,

In *BECTU* v. *Secretary for State for Trade and Industry*, a case on the provisions of the Working Time Directive concerning paid annual leave,[11] Advocate General Tizzano placed great emphasis on the fact that the entitlement to paid annual leave is a fundamental social right. He traced references to such leave in various fundamental rights instruments, and then moved on to discuss the "even more significant . . . fact" that the right to such leave is now solemnly upheld in the EU Charter. He admitted that the Charter does not have genuine legislative scope and is not in itself binding, and declared that he did not wish to participate in the wide-ranging debate as to the effects which, in other forms and by other means, the Charter may nevertheless produce. But he did point out that the Charter appears in large measure to reaffirm rights which are enshrined in other instruments. He concluded his analysis by opining that, in proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored, and that we cannot ignore its clear purpose of serving as a substantive point of reference for all those involved – Member States, institutions, natural and legal persons – in the Community context. He accordingly considered the Charter to be the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right.[12]

In *Netherlands* v. *EP and Council*, on the lawfulness of the Biotechnology Directive,[13] Advocate General Jacobs referred to the right to human dignity,

*Netherlands* v. *EP and Council*, Opinion of A.G. Jacobs of 14 June 2001, paras. 197 and 210, nyr; Case C-413/99, *Baumbast and R* v. *Secretary for the Home Department*, Opinion of A.G. Geelhoed of 5 July 2001, paras. 59 and 110, nyr; Case C-309/99, *Wouters* v. *Algemene Raad van de Nederlandse Orde van Advocaten*, Opinion of A.G. Léger of 10 July 2001, footnote 176, nyr; Case C-353/99 P, *Council* v. *Hautala*, Opinion of A.G. Léger of 10 July 2001, para 51 et seq., nyr; Case C-313/99, *Mulligan* v. *Minister of Agriculture and Food Ireland and Attorney General*, Opinion of A.G. Geelhoed of 12 July 2001, para28, nyr; Case C-131/00, *Nilsson* v. *Länsstyrelsen i Norrbottens län*, Opinion of A.G. Stix-Hackl of 12 July 2001, footnote 9, nyr; Case C-60/00, *Carpenter* v. *Secretary of State for the Home Department*, Opinion of A.G. Stix-Hackl of 13 Sept. 2001, footnote 9, nyr; Case C-459/99, *MRAX* v. *Belgium*, Opinion of A.G. Stix-Hackl of 13 Sept. 2001, footnote 26, nyr; Joined Cases C-20 and 64/00, *Booker Aquaculture and Hydro Seafood* v. *The Scottish Ministers*, Opinion of A.G. Mischo of 20 Sept. 2001, paras. 126 ff, nyr; Case C-210/00, *Käserei Champignon Hofmeister* v. *Hauptzollamt Hamburg-Jonas*, Opinion of A.G. Stix-Hackl of 27 Nov. 2001, footnote 30, nyr; Case C-208/00, *Überseering* v. *Nordic Construction Company Baumanagement*, Opinion of A.G. Colomer of 4 Dec. 2001, para 59, nyr; Case C-224/00, *Commission* v. *Italy*, Opinion of A.G. Stix-Hackl of 6 Dec. 2001, para 58, nyr; Case C-224/98, *D'Hoop* v. *Rijksdienst voor Arbeidsvoorziening*, Opinion of A.G. Geelhoed of 21 Feb. 2001, footnote 18, nyr; Case C-126/01, *Ministre de l'économie, des finances et de l'industrie* v. *GEMO*, Opinion of A.G. Jacobs of 30 April 2002, para 124, nyr.

11. Directive 93/104/EC concerning certain aspects of the organization of working time, O.J. 1993, L 307/18.

12. Cited *supra* note 10.

13. Directive 98/44/EC on the legal protection of biotechnological inventions, O.J. 1998, L 213/13.

"now expressed" in Article 1 of the Charter, and to the right to free and informed consent in the fields of medecine and biology, "now reflected" in Article 3(2) Charter. Whilst he thus also characterized the Charter as expressing pre-existing rights, he did immediately add in forthright manner that "it must be accepted that any Community instrument infringing those rights would be unlawful".[14]

In *Hautala*, Advocate General Léger analysed the principle of access to documents, concluding that it constitutes a fundamental right, *inter alia* in view of its inclusion in the Charter (see Art. 42). On the nature and effect of the Charter the Advocate General made a number of statements. Naturally, he felt, the clearly-expressed wish of the authors of the Charter not to endow it with binding legal force should not be overlooked. However, aside from any consideration regarding its legislative scope, the nature of the rights set down in the Charter precludes it from being regarded as a mere list of purely moral principles without any consequences. He noted that those values have in common the fact of being unanimously shared by the Member States, which have chosen to make them more visible by placing them in a charter in order to increase their protection. In his view, the Charter has undeniably placed the rights which form its subject-matter at the highest level of values common to the Member States. He added that the political and moral values of a society are not all found in positive law. However, where rights, freedoms and principles are described, as in the Charter, as needing to occupy the highest level of reference values within all the Member States, it would be inexplicable not to take from it the elements which make it possible to distinguish fundamental rights from other rights. Mr Léger also added that, as the solemnity of its form and the procedure which led to its adoption would give one to assume, the Charter was intended to constitute a privileged instrument for identifying fundamental rights. It is, he concluded, a source of guidance as to the true nature of the Community rules of positive law.[15]

In *Booker Aquaculture and Hydro Seafood* v. *The Scottish Ministers*, Advocate General Mischo engaged in an in-depth analysis of the right to property, with a view to establishing whether fish farms had a right of compensation for the prescribed destruction of fish stocks because of the presence of certain diseases. His conclusion was negative, and he sought confirmation in Article 17 Charter, which distinguishes between deprivation of property (where compensation is required) and regulation of its use. On the effect of the Charter, he acknowledged that it is not legally binding, but he did consider that it is worthwhile referring to it given that it constitutes the expression, at the highest level, of a democratically established political consensus on what

14. Cited *supra* note 10, at para 197.
15. Cited *supra* note 10, at paras. 80–83.

must today be considered as the catalogue of fundamental rights guaranteed by the Community legal order.[16]

The Court of Justice did not mention the Charter in any of the judgments in the above cases. However, the Court of First Instance did for the first time base itself on the Charter, in a meaningful way, in *max.mobil Telekommunikation Service* v. *Commission*. The case concerned a challenge against a partial rejection of a competition complaint regarding fees charged by Austria to operators of GSM networks. The case raised complex issues regarding the relationship between an individual's right of complaint and the Commission's power to investigate competition law violations and to make use of its supervisory powers under Article 86(3) EC. The CFI initiated its analysis with what it called "preliminary observations", so as to define the framework within which the admissibility and the substance of this action should be appraised. Since the action was directed against a measure rejecting a complaint, it had to be emphasized at the outset that the diligent and impartial treatment of a complaint is associated with the right to sound administration which is one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States. The CFI then referred to Article 41(1) Charter as confirming that right. It was thus appropriate to consider, first of all, the nature and scope both of that right and of the administration's concomitant obligations in the specific context of the application of Community competition law to an individual case.[17] The CFI then proceeded with that examination.[18]

The most significant reference to the Charter so far is made in the CFI's *Jégo-Quéré* judgment, on the issue of *locus standi* of private parties to challenge an EC Regulation. There the CFI notably broadened such *locus standi*, on the grounds that it was required to so in order to guarantee the right to an effective remedy. As a basis for that right it referred to the constitutional traditions common to the Member States, to Articles 6 and 13 ECHR, and to Article 47 Charter, which had reaffirmed the right to an effective remedy for everyone whose rights and freedoms guaranteed by the law of the Union are violated.[19] The ECJ declined to follow that new approach in *UPA* v. *Council*, a case in which Advocate General Jacobs forcefully argued for broadening *locus standi*, also with a reference to Article 47 Charter.[20]

16. Cited *supra* note 10, at para 126.

17. Case T-54/99, *max.mobil Telekommunikation Service* v. *Commission*, judgment of 30 Jan. 2002, paras. 47–48, nyr.

18. See for a comparable reference to Art. 41(1) Charter, the Order of the President of the CFI in Case T-198/01 R, *Technische Glaswerke Ilmenau* v. *Commission*, 4 April 2002, para 85, nyr.

19. Case T-177/01, *Jégo-Quéré* v. *Commission*, judgment of 3 May 2002, paras. 41–42, nyr.

20. Case C-50/00 P, *Unión de Pequeños Agricultores* v. *Council*, Opinion of 21 March 2002, para 39, judgment of 25 July 2002, nyr.

It is difficult to gauge at this stage the potential significance of these types of application of the Charter. On one view, and to the extent that the Charter is seen as merely codifying the European courts' past approach to fundamental rights protection, the effects of the Charter may be perceived as limited. However, the Charter in at least some respects clearly goes beyond the current case law on fundamental rights as general principles of EC law.[21] An interesting exercise would be to identify the provisions of the Charter which declare rights not previously considered, expressly or impliedly, as fundamental by the European courts. Whilst this exercise is not undertaken here, there are clear examples of such rights. Indeed, the right to paid annual leave, discussed by Advocate General Tizzano, comes in this category, as do most of the other social rights which the Charter expresses. Obviously, there may be rights which the courts have simply not been able to consider for lack of relevant cases. But it is also arguable that the Charter proclaims fundamental rights which otherwise would *not* be considered fundamental by the European courts. The *BECTU* case on the Working Time Directive foreshadows what may be the effect of the Charter in such cases. The characterization of the entitlement to paid annual leave as a fundamental right leads, in the Opinion of the Advocate General, to a firmly restrictive interpretation of the limits which can be placed on such entitlement, notwithstanding vague language in the Directive.[22] It leads the Advocate General to conclude that the UK cannot subject entitlement to paid annual leave to a minimum period of employment of 13 weeks with the same employer.

The Charter may also lead to a different approach towards the legal consequences which are to be drawn from certain rights, even though those rights may have been recognized for decades. It is for example open to debate how significant a factor the Charter is in the revision of the case law on *locus standi*.

It may thus be that the effects of the Charter will be significant, even in the absence of its incorporation in the founding Treaties. At the time of writing, however, the Convention on the future of the European Union is seriously considering incorporation of the Charter in the founding treaties. From that

21. Cf. McCormick, "Problems of democracy and subsidiarity", 6 EPL (2000), 539; Besselink, "The Member States, the national constitutions and the scope of the Charter", 8 MJ (2001), 71; Pache, "Die Europäische Grundrechtscharta – ein Rückschritt für den Grundrechtsschutz in Europa?", 36 EuR (2001), 483; de Witte, "The legal status of the Charter: Vital question or non-issue?", 8 MJ (2001), 85; Grabenwarter, "Die Charta der Grundrechte für die Europäischen Union", 116 DVBL (2001), 10; Commission Communication on the legal nature of the Charter of Fundamental Rights of the European Union, COM(2000) 644 final, at 2–3.

22. Art. 7(1) of the Directive provides that Member States are to ensure that every worker is entitled to paid annual leave of at least four weeks "in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation and/or practice".

perspective, we can now approach the two central subjects which this article aims to address.

## 3. Effects on Member States and in national law

The apparent central purpose of the Charter is to codify and clarify fundamental rights protection in the setting of the EU, to list the rights of European citizens with which the EU institutions cannot interfere. From the start, emphasis was laid on the fact that the Charter is primarily addressed to the EU institutions, and that it is not in principle aimed at the Member States as such. Yet even a mere cursory reading of the Charter raises questions in this respect. If this is a Charter targeted at the EU institutions, why then is there a fairly elaborate chapter on solidarity, containing a number of social rights such as workers' rights to information and consultation; right of collective bargaining; right of access to placement services; protection in the event of unjustified dismissal; fair and just working conditions; prohibition of child labour; and family and professional life? Are those rights there purely for the sake of the EU's officials? Why is reference made to the rights of the child and the rights of the elderly? How would action by the EU institutions affect children and the elderly? Why does the Charter prohibit torture? Is there a risk that Commission officials will resort to torturing a company executive, in order to obtain a confession regarding anti-competitive practices? The examples can be multiplied. We all sense, when reading the Charter, that it is about more than mere action by the EU institutions.

Upon some further reflection, however, this is not so surprising. The exercise of authority by the EU institutions is not merely of an executive kind. Much of it is of a normative character; it consists in the laying down of general rules, either directly by way of regulations or indirectly through directives (to mention only First Pillar instruments). Also, the implementation and application of those general rules is mostly left to the Member States. This is what Weiler and Lockhart have called the agency situation: Member States' authorities act as agents of the EU.[23] This is not just one particular mode of implementation; rather, it is the standard mode of delivering EU law. It is inherited from the institutional set-up of the European Communities, in which the role of the supranational authorities was always mainly "conceptual" in terms of developing policies and rule-making. With some exceptions, such as competition policy, implementation and application have always been left largely to the Member States, even in fields as densely regulated as agri-

23. Weiler and Lockhart, "'Taking rights seriously' seriously: The European Court of Justice and its Fundamental Rights Jurisprudence", 32 CML Rev. (1995), 73.

cultural policy or commercial policy. This is one of the main reasons why EU law and national law are so intertwined and mutually integrated, a phenomenon which is as it were embodied in the directive as a legal instrument. Their relationship is the opposite of a "watertight compartments" approach, to use an expression which has been used in other federal contexts.[24] The interlinkage and mutual integration is probably stronger than in many mature federal systems, where federal and State powers are well defined, and federal and State law mostly deal with different issues.[25]

The ECJ's case law on the protection of fundamental rights as general principles of EC law reflects this. As is well known, the ECJ has held that, in their form of general principles, fundamental rights are binding on national authorities in two types of situations, broadly speaking.[26] First, where Member States implement Community rules, the leading case being *Wachauf*, where the Court scrutinized the manner in which the German authorities had implemented an agricultural regulation on discontinuance of milk production.[27] Second, where Member States are derogating from EC law requirements, particularly as regards exceptions and justifications for measures hindering free movement in the internal market. Here, the leading case is *ERT*, which concerned the Greek Government's reliance on the EC Treaty exceptions to the freedom to provide services. The Court held that the national rules in question could fall under those exceptions only if they were compatible with the fundamental rights which the Court ensures.[28]

The Charter, apparently, seeks to continue this relatively uncontroversial approach in Article 51(1), by providing that it is addressed "to the Member States only when they are implementing Union law."[29] However, there is much more to be said concerning the potential effect of the Charter on Member States and in national law. For beneath the surface of the apparently innocuous formulations of the case law and of the Charter lie crucial issues concerning the future development of both European fundamental rights protection and EU constitutional law.

The structure of this section is as follows. It first looks at the legislative history of Article 51(1) Charter, highlighting the paradox of a general fun-

24. Judicial Committee of the Privy Council, *Attorney-General for Canada* v. *Attorney-General for Ontario*, [1937] A.C. (J.C.P.C.), 326, at 351.

25. Weiler and Fries, "A human rights policy for the European Community and Union: The question of competences", in Alston (Ed.), op. cit. *supra* note 2, at p. 161.

26. See Tridimas, *The General Principles of EC Law* (OUP 1999), pp. 23–32.

27. Case 5/88, *Wachauf* v. *Bundesamt für Ernährung und Forstwirtschaft*, [1989] ECR 2609, para 19.

28. Case C-260/98, *ERT*, [1991] ECR I-2925, paras. 42–43.

29. Commissioner Vitoríno characterizes the word "only" as a stylistic precaution, see "The Charter of Fundamental Rights as a foundation for the Area of Freedom, Security and Justice", Exeter Paper in European Law No. 4 (Centre for European Legal Studies, Exeter, 2001), 17.

damental rights charter with limited scope. It then turns to a comparison between the ECJ's case law on protection of fundamental rights as general principles of EC law – the source of inspiration for Article 51(1) – and its case law on the principle of non-discrimination on grounds of nationality, which applies "within the scope of application" of the Treaty. It is argued that such a comparison reveals the two basic legal forces which are likely to act upon the Charter: the concept of European Citizenship and the principle of limited powers. The article subsequently takes a closer look at the notion of "implementation", by connecting it to various fields of EU activity where the Charter may be relevant. The section concludes with examining whether the Charter's scope extends to "derogations" (*ERT*), as this raises separate issues.

### 3.1. *The Charter's paradox*

The wording of Article 51(1) was a subject of considerable controversy and a variety of formulations were proposed.[30] Discussions took off with a note by the Secretariat of the Convention, staffed by lawyers from the Council's Legal Service. In this note, it was argued that "[t]he Charter is intended to apply to the Union's institutions and not to activities of Member States which fall outside the scope of EC or EU legislation". It was said that this would be consistent with the ECJ's case law "whereby Member States are bound to respect fundamental rights whenever they act within the scope of the Treaties for the purposes of either implementing Community (or EU) legislation or derogating from it". In the next paragraph, it was reiterated that "[t]he fact remains that the Charter cannot of itself impose obligations on Member States outside the scope of EU legislation in its broadest sense. One of the Charter's provisions should therefore make this clear".[31]

The discussions continued with a note by the Praesidium of the Convention, which featured a "horizontal" draft article,[32] according to which the Charter would be "binding on the Member States only where the latter transpose or apply the law of the Union". The attached commentary indicated that the aim was "to avoid any application to the Member States when they are acting within their own jurisdiction". It was added that the article adopted the ECJ case law as set out in *Cinéthèque*[33] and *Kremzow*.[34]

30. See also de Búrca, "The drafting of the European Union Charter of fundamental rights", 26 EL Rev. (2001), 126.
31. CHARTE 4111/00, paras. 4–5.
32. CHARTE 4123/1/00 REVI 1, 15 Feb. 2000, at 9–10.
33. Joined Cases 60-61/84, *Cinéthèque* v. *Fédération nationale des cinémas français*, [1985] ECR 2618, para 26.
34. Case C-299/95, *Kremzow*, [1997] ECR I-2629.

In subsequent versions, the language of the relevant article shifted to "the Member States when implementing Community law",[35] and to "the Member States exclusively within the framework of implementing Community law".[36] The statement of reasons for the latter version again referred to the ECJ's case law, according to which "the requirement to respect fundamental rights is also binding on the Member States when they act in the context of Community law",[37] referring, not to *Cinéthèque* or *Kremzow*, but to *Wachauf*.[38]

The draft of 16 May proposed an arguably looser formulation, by stating that the Charter was addressed "to the Member States exclusively within the scope of Union law".[39] It is not clear whether this was intended to go further than the previous formulations, since the statement of reasons was in substance identical to the previous one.[40] However, the term "scope of Union law" does appear broader than the term "implementing Community law", not just in that the former includes the Second and Third Pillar, but also in light of the ECJ's case law on the principle of non-discrimination on grounds of nationality (see below).

June drafts added a layer of complexity, by distinguishing, in the relevant Article, between the Charter generally, which was to be "addressed, with due regard for the principle of subsidiarity, to the institutions and bodies of the Union and to the Member States exclusively when they implement Union law", and the social rights and principles set out in the Charter, which were to be observed by "[t]he institutions and bodies of the Union, the Member States, exclusively within the scope of Community law, and the social partners at Community level, acting within the framework of their respective powers and in accordance with the principle of subsidiarity".[41]

By the end of July, however, the paragraph on social rights had been abandoned, and the relevant provision had reached its final formulation and was not to be further amended.[42] The attached July "explanation" was identical to the statement of reasons of the 16 May draft, referring to the ECJ's case law, in particular *Wachauf* and *Karlsson*.[43] In the final explanations, dated 11 October 2000, a further sentence was added, including regional or local

35. CHARTE 4149/00, 8 March 2000, at 2.
36. CHARTE 4235/00, 18 April 2000, at 1.
37. Idem at 2.
38. Cited *supra* note 27.
39. CHARTE 4316/00, Art. 46.
40. The statement now also referred to Case C-292/97, *Kjell Karlsson and Others*, [2000] ECR I-2737, para 37 of which restates *Wachauf*.
41. CHARTE 4373/00, 23 June 2000, Art 46, and CHARTE SN 3340/00, 29 June 2000, Art 46. See also CHARTE 4383/00 of 3 July 2000, for an overview of proposed amendments.
42. See CHARTE 4422/00, 28 July 2000, Art. 49 (Art. 51 in the final version).
43. CHARTE 4423/00, 31 July 2000, at 34–35.

bodies, and public organizations. It is worth citing this final explanation by the Convention:[44]

> "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 a Union context is only binding on the Member States when they act in the context of Community law (judgment of 13 July 1989, Case 5/88 Wachauf [1989] ECR 2609; judgment of 18 June 1991, ERT [1991] ECR I-2925). The Court of Justice recently confirmed this case law in the following terms: 'In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules . . . ' (judgment of 13 April 2000, Case C-292/97, paragraph 37 of the grounds, not yet published). Of course this principle, as enshrined in this Charter, applies to the central authorities as well as to regional or local bodies, and to public organizations, when they are implementing Union law".

In and of themselves, these varying formulations in the course of the negotiation and elaboration of the Charter could be regarded as normal products of such a complex drafting process, particularly as the underlying reasoning appears not to have changed: codification of the ECJ's case law, coupled with a desire to limit the effects of the Charter on Member States. But when one looks at the broader context, browsing through the various documents posted on the Charter's website, one can see the strong tension between keeping the brakes on, as regards scope, and the accelerator effect of drafting a general, up-to-date charter of fundamental rights. It is clear, for example, that part of civil society which made submissions to the Convention was not at all concerned with the legal niceties of limiting the scope of the Charter, and urged inclusion of certain rights on the basic assumption that the Charter would become a new, general European human rights document, not limited to EU law and policies. In some cases, one cannot see whether the groups and organizations involved simply disregarded the starting-point that the Charter be limited to the EU institutions. Thus, for example, a broad Platform of European Social NGOs and the ETUC issued a Common Statement, calling for "[a]n EU Charter, shining beacon across Europe", "[t]o address the universal character of Fundamental Rights", and asking that "[t]he Charter . . . be legally binding for all the EU institutions and the Member States", and that

44. CHARTE 4473/00, at 46. These explanations were prepared "at the instigation of the Praesidium" and were declared to "have no legal value", ibid., at 1. They are not attached to the official version of the Charter, as proclaimed, which is deplored by Liisberg, "Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?", Jean Monnet Working Paper No. 04/01 (www.jeanmonnetprogram.org), 19.

infringements be examined by the ECJ.[45] In other cases, however, there was clearly no misunderstanding, yet a broader scope for the Charter was urged. Amnesty International, for example, whilst recognizing the limited intentions of the Convention, emphasized that "a new dimension in the field of human rights protection would be to ensure that the European Charter covers Member States' action *outside* the current sphere of EC/EU law. This would enhance human rights protection through EC/EU law and would confer added value to the European Charter even if such action was only justiciable at the national level".[46]

Such calls are not surprising in light of the dynamics of the Convention's work, and they are bound to have had some effect on the Convention's members. It is noteworthy that, early on in the proceedings, one of the members, Mr Andrew Duff MEP, proposed that each draft article carry an explanatory statement containing three paragraphs, the last of which was to be concerned with "[t]he connection between the Article and the competences of the European Union; how it might affect the operation of the EU". Mr Duff pointed out that this was a complex task, which would be absorbing and challenging, but that it had to be "done and done well if the Charter is to remain focused on the European Union and all its works".[47] Apparently, however, the exercise proved too challenging. When reading the final "explanations" of the Charter,[48] one notices that references to the links with the EU's powers and policies are not at all systematic, and are generally only made where the link is straightforward. And indeed, as mentioned above, for many provisions in the Charter it is not obvious to establish such a link. Given the dynamic character of European integration, and the scope and scale of the EU's activities, it made eminent sense to take the course of not focusing too closely on current powers and policies. A Charter which had done so, would have risked becoming outdated very rapidly. Also, it was clearly awkward to leave out some fundamental rights, no matter how important, merely on the basis that there was no sufficient link with EU action. Such a Charter would have looked rather imbalanced.

Yet the result is a paradoxical Charter. Throughout the text, it makes the bold claims to be a general Charter of fundamental rights; to be effacing old distinctions between civil and political, and social, cultural and economic rights; to be responding to "changes in society, social progress and scientific and technological developments";[49] to make rights more visible to the peoples of Europe. But in Article 51(1), the Charter appears to be retreating from those

45. CHARTE 4286/00, 12 May 2000, at 3–4.
46. CHARTE 4290/00, 10 May 2000, at 6, italics in the original.
47. CHARTE 4188/00, 28 March 2000, at 3.
48. Cited *supra* note 44.
49. See the fourth paragraph of the preamble.

bold claims by stating that it is addressed to the institutions and bodies of the Union and to the Member States only when they are implementing Union law. The Charter's paradox, in short, is that it contains indivisible fundamental rights, but of strictly limited scope.

### 3.2. *Prefiguration*

Some of the key issues as to the precise meaning of Article 51(1), and the different interpretations to which it may gave rise, are prefigured in case law. The story of prefiguration sets off with a judgment by Laws J (as he then was), in *First City Trading*.[50] The case concerned an emergency aid scheme adopted by the UK Ministry of Agriculture in the context of the BSE crisis. The applicants argued that their exclusion from the scheme was a breach of the principle of equal treatment, one of the general principles of EC law. They argued that the scheme had been adopted "in a Community context" of EC measures aimed at combating the BSE crisis, even though the disputed aid scheme did not constitute implementation of any specific EC measure. The applicants referred, in support of their argument, to the ECJ's judgment in *Phil Collins and Others*, where the Court had held that discrimination on grounds of nationality as regards copyright protection was contrary to Article 7 EEC (now 12 EC), as the protection of copyright comes within the scope of application of the Treaty because of the link with the internal market.[51] The applicants' position was that the test for application of Article 7 EEC (now 12 EC) is the same as the test for the general principles of Community law.

Laws J disagreed. He took the view that the test is not the same, and that general principles of EC law have a narrower reach. Part of his reasoning was as follows:

> "These fundamental principles . . . are not provided for on the face of the Treaty of Rome. They have been developed by the ECJ . . . . They are part of what may perhaps be called the common law of the Community. That being so, it is to my mind by no means self-evident that their contextual scope must be the same as that of Treaty provisions relating to discrimination or equal treatment, which are statute law taking effect according to their express terms. There is a critical distinction to be drawn between these following situations. On the one hand, a member state may take measures solely by virtue of its domestic law. On the other, a Community institution or member state may take measures which it is authorized or

50. High Court of Justice (QBD), 29 Nov 1996, *R.* v. (1) *Ministry of Agriculture, Fisheries and Food (2) Intervention Board for Agricultural Produce ex parte First City Trading Ltd and Others*, [1997] EuLR 195.

51. Joined Cases C-92 & 326/92, [1993] ECR I-5145, para 22.

> obliged to take by force of the law of the Community. In the former situation I contemplate a measure which is neither required of the member state nor permitted to it by virtue of Community Treaty provisions. It is purely a domestic measure. Even so, it may affect the operation of the common market and, accordingly, be held to be 'within the scope of application' of the Treaty. This was the *Phil Collins* case. It is of the first importance to notice that its falling within the Treaty's scope is by no means the same thing as its being done under powers or duties conferred or imposed by Community law. The second situation primarily includes (so far as member states are concerned) measures which Community law requires, such as, for example, law which is made to give effect to a directive. It includes also an act or decision done or taken by a member state in reliance on a derogation or permission granted by Community law . . . . In the first situation, the measure is in no sense a function of the law of Europe, although its legality may be constrained by it. In the second, the measure is necessarily a creature of the law of Europe. Community law alone either demands it, or permits it".[52]

Laws J also pointed out that, as the general principles of Community law are judge-made, the ECJ could not extend them to situations where the measure in question, taken by a Member State, is not a function of Community law at all. If it did, the ECJ would be going beyond its limited jurisdiction.[53] This judgment is a good starting-point for a further comparison between the case law on Article 12 EC and the case law on protection of fundamental rights in a context of implementation of EC law (for derogations, see section 3.5).[54]

3.2.1. *Case law on Article 12 EC*

Article 12 EC complements the references to non-discrimination on grounds of nationality in more specific EC Treaty provisions, in particular those on the free movement of persons. It has thus served to broaden the principle of free movement in terms of beneficiaries, beyond the economic categories of workers and self-employed. The clearest instance is the case law on the right of students to have access to foreign education on non-discriminatory terms, which was probably the earliest manifestation of an expansive reading of "the scope of application of the Treaty". The ECJ considered that access to vocational training came within that scope on the basis that a common vocational training policy was referred to in the Treaty and that access to vocational training is likely to promote free movement of persons.[55] It was

52. At 210.
53. At 210–211.
54. See also Binder, "The European Court of Justice and the Protection of Fundamental Rights in the European Community", Jean Monnet Working Paper No. 01/95 (www.jeanmonnetprogram.org).
55. Case 293/83, *Gravier* v. *City of Liège*, [1985] ECR 593, paras. 23–24.

clearly irrelevant, in the eyes of the Court, that no EC legislation regarding access to education had been adopted, and that the Member States were therefore not required to "implement" any EC rules on the matter.

In addition to broadening the principle of free movement in terms of beneficiaries, the case law on Article 12 has also served to combat all forms of discrimination on grounds of nationality which are in some way linked to the substantive scope of EC law, particularly as regards the internal market and the free movement principles. *Phil Collins*, mentioned above, is an example.[56] But the most interesting examples, for the purpose of this inquiry, are *Cowan*, *Martínez Sala* and *Bickel and Franz*. In *Cowan* there was a very weak connection between the facts of the case and the EC Treaty. Mr Cowan, a British tourist, was assaulted at the exit of a metro station in Paris. He claimed compensation under a French scheme, but such compensation was reserved for French nationals and residents. The Court considered that, as a tourist, Mr Cowan was a recipient of services covered by EC law. It further held that when EC law guarantees a person the freedom to go to another Member State the protection of that person from harm in the State in question, on the same basis as that of nationals and persons residing there, is a corollary of that freedom of movement.[57] The more recent case of *Bickel and Franz* is similar, as it involved an Austrian lorry driver and a German tourist, both prosecuted in the Italian Province of Bolzano for criminal offences which showed no link with EC law other than that the facts occurred when the accused were enjoying free movement. Mr Bickel and Mr Franz were not allowed to use the German language in the course of the criminal proceedings, in contrast with the rights of citizens of the Province of Bolzano, where German is a constitutionally protected minority language. The Court again referred to the link with the freedom to provide services, but it now also pointed to one of the EC Treaty provisions on European citizenship, in particular Article 8a (now 18), which confers on every citizen of the European Union the right to move and reside freely within the territory of the Member States. The Court felt that "the exercise of the right to move and reside freely in another Member State is enhanced if the citizens of the Union are able to use a given language to communicate with the administrative and judicial authorities of a State on the same footing as its nationals".[58] *Martínez Sala*, lastly, is in a sense the

56. Cited *supra* note 51.

57. Case 186/87, *Cowan* v. *Trésor public*, [1989] ECR 195, paras. 15–17.

58. Case C-274/96, *Bickel and Franz*, [1998] ECR I-7637, paras. 15–16. For a different reading, arguing that the judgment also concerns fundamental rights as general principles of EC law, see Griller, "Der Anwendungsbereich der Grundrechtscharta und das Verhältnis zu sonstigen Gemeinschaftsrechten, Rechten aus der EMRK und zu verfassungsgesetzlich gewährleisteten Rechten", in Duschanek and Griller (Eds.), *Grundrechte für Europa – Die Europäische Union nach Nizza* (Springer 2002), pp. 135–144.

furthest-reaching case. Mrs Martínez Sala was a Spanish national residing in Germany, who did not obtain a child-raising allowance on the grounds that, although lawfully resident, she was unable to present a residence permit. As it was unclear whether she could be considered a migrant worker or not, the Court also examined her position under Article 12 EC. The Court decided that, as Mrs Martínez Sala was lawfully resident in Germany, she came within the scope *ratione personae* of the provisions of the Treaty on European citizenship. The Court was satisfied that this was sufficient for triggering the application of Article 12.[59]

In the recent *Grzelczyk* judgment, concerning discrimination against a foreign student as regards the granting of a minimum subsistence allowance, the Court again linked Articles 12 and 18 EC. That case had a more obvious connection with EC law, though, by virtue of EC legislation on the right of residence for students.[60]

Except for *Grzelczyk*, none of those cases involves "implementation" by a Member State of either EC legislation or specific EC Treaty provisions. The "scope of application of the Treaty" under Article 12 EC is therefore, in this sense, broader than "implementation" of EC law. The above cases exemplify that the ECJ attaches great importance to the principle of non-discrimination on grounds of nationality, and rightly so of course, since it is foundational for much of the European construct. For all practical purposes, one may deduce from the judgments that any case of discrimination on grounds of nationality involving a national of a Member State who is present, for whatever reason, on the territory of another Member State, will be caught by Article 12. The "moving" European citizen is protected from all discrimination on grounds of nationality.[61] Indeed, in *Bickel and Franz*, Advocate General Jacobs even suggested that the time may have come to sever the link with free movement.

59. Case C-85/96, *Martínez Sala* v. *Freistaat Bayern*, [1998] ECR I-2691. Other interesting cases concern security for costs in civil proceedings (see Case C-323/95, *Hayes* v. *Kronenberger*, [1997] ECR I-1711, paras. 11–17; Case C-43/95, *Data Delecta and Forsberg*, [1996] ECR 4661, para 13; see also Case C-122/96, *Saldanha*, [1997] ECR I-5325); the registration of leisure vessels, where access to leisure activities is considered a corollary to free movement (Case C-334/94, *Commission* v. *France*, [1996] ECR I-1307, paras. 20–23; Case C-151/96, *Commission* v. *Ireland*, [1997] ECR I-3327 and Case C-92/96, *Commission* v. *Greece*, [1997] ECR I-6725); and the right to form associations with legal personality (Case C-172/98, *Commission* v. *Belgium*, [1999] ECR I-3999).

60. Case C-184/99, *Rudy Grzelczyk* v. *Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, judgment of 20 Sept. 2001, nyr, annotated by Iliopoulou and Toner in 39 CML Rev., 609–620. See also, most recently, Case C-224/98 *D'Hoop* v. *Office national de l'emploi*, judgment of 11 July 2002, nyr, where the Court again connects the principle of non-discrimination on grounds of nationality with the rights of free movement and residence of European citizens.

61. Already in 1985, long before Maastricht, A.G. Lenz AG referred to a "Citizens' Europe" in a case in which Art. 7 EEC (now 12 EC) was referred to, see Case 137/84, *Ministère public* v. *Mutsch*, [1985] ECR 2681, at 2689.

He examined the question whether all criminal proceedings against a citizen of the Union fall within the scope of application of the Treaty, even where that citizen has not exercised his right to free movement. He pointed out that the notion of citizenship implies a commonality of rights and obligations uniting Union citizens by a common bond transcending Member State nationality, and that the introduction of that notion was inspired by the concern to bring the Union closer to its citizens and to give expression to its character as more than a purely economic union. Against that background, he continued, it would be difficult to explain to a citizen of the Union how, despite the language of Articles 12, 17 and 18 EC, a Member State other than his own could be permitted to discriminate against him on grounds of his nationality. In Jacobs' view, "[f]reedom from discrimination on grounds of nationality is the most fundamental right conferred by the Treaty and must be seen as a basic ingredient of Union citizenship".[62]

#### 3.2.2. *"Implementation" in the context of fundamental rights as general principles of EC law*

What about other fundamental rights? What about those fundamental rights which are protected in the legal form of general principles of EC law? The same Advocate General has famously argued, in *Konstadinidis*, a case involving a Greek citizen established in Germany, whose name had been wrongly transliterated, that a moving Community national 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".[63] But the Court did not take up that suggestion, and decided the case on the basis of the right of establishment. Nor are there any other cases where the Court examined a breach of fundamental rights as against a moving European citizen, in the absence of another, more specific link with the Treaty or with implementation of EC legislation. One must immediately add that the Court has so far not expressly excluded such a more expansive application of its fundamental rights/general principles case law either. In *Kremzow*, for example, a case which had no link with EC law whatsoever, and did not even concern a moving European citizen, the Court did point out that Mr Kremzow's situation was "not connected in any way with any of the situations contemplated by the Treaty provisions on freedom of movement for persons",[64] which leaves

62. Cited *supra* note 58, paras. 22–24 of the Opinion. Whilst the analysis concentrates on criminal proceedings, one does not see why it should not also be valid in other contexts.

63. Case C-168/91, [1993] ECR I-1191, para 46 of the Opinion.

64. Cited *supra* note 34.

scope for the argument that, if there had been a connection, the Court might have been prepared to examine a breach of fundamental rights. Yet there have been other opportunities, such as *Konstadinidis*, and the Court has not taken them up. Until now, it therefore appears that, even though the Court also regularly speaks of "the field of application of Community law" in its fundamental rights jurisprudence, it is not prepared to construe that notion as expansively as "the scope of application of the Treaty" in Article 12 EC.

So what does constitute the field of application of Community law for the purpose of applying fundamental rights as general principles of EC law?[65] Most of the cases involving action by Member States come within the notion of implementation of EC legislation. That notion, however, is in itself rather imprecise and there is a broad spectrum of possible definitions of what constitutes implementation of an EC act. The Court has not as yet attempted to produce a definition which would clarify the boundaries of implementation. It is thus necessary to analyse the relevant case law with a view to establishing those boundaries. And, as will be seen and could be expected, the result of the analysis is not a bright line, but rather a frontier area where there is some indeterminacy as to whether one is in EC law territory or not. But before taking a closer look, it is necessary to express an important assumption on which the analysis is based: the assumption that the Court does not distinguish here between fundamental rights as general principles of EC law and other general principles, such as equal treatment and legitimate expectations. That assumption appears correct, provided one excludes the principle of proportionality, which has wider significance and impact, particularly as regards the internal market freedoms.[66] Thus, cases referred to hereafter may also concern general principles other than fundamental rights (at least in formal terms).

Let us first take the broadest and, potentially at least, furthest reaching judicial statements. In a few cases involving EC customs legislation the Court pointed out that whilst, in the absence of harmonization, the Member States are competent to set such penalties for violations as they deem appropriate, they are none the less "when making use of that competence, required to comply with Community law and its general principles".[67] However, the Court did not go further in any of those cases, other than to refer to the principle of proportionality, which, as was mentioned, the Court may be giving broader

65. See also Tridimas, op. cit. *supra* note 26, at 25–29.

66. See however Jacobs, "Human rights in the EU: The role of the Court of Justice", 26 EL Rev. (2001), 331, at 337, where he argues that "the time may have come to recognize the diverse character and scope of the different general principles".

67. Case C-210/91, *Commission* v. *Greece*, [1992] ECR I-6735, para 19; Case C-36/94, *Siesse* v. *Director de Alfândega de Alcântara*, [1995] ECR I-3573, para 21; Case C-213/99, *de Andrade*, [2000] ECR I-11083, para 21.

reach than other general principles. Yet the basic statement is general in scope, and with the constant increase of EC legislation in many walks of economic and social life, it is not difficult to see the potential ramifications of the Court's holding: all domestic law penalizations of EC legislation, be they criminal in character or not, could be made subject to the test of compliance with fundamental rights as general principles of EC law. But in the absence of cases actually performing that test, it is important to stress the term potential, for it remains to be seen how far the Court would be willing to travel in this respect.[68]

A second category of cases are those in which the Court expressly accepts and confirms, on the facts, that the general principles are binding on the Member States when implementing EC acts, and examines national measures in the light of those principles. It is remarkable that nearly all the cases here concern agricultural policy – and indeed most of them the particular issue of milk quotas. The Court's involvement took off with *Klensch*, a case concerning the choice of reference year by Luxembourg for the purpose of allocating milk quotas. The Court held that the Member States, in choosing that year, are bound by the general principle of non-discrimination, expressed in Article 40(3) EEC (now 34(4) EC).[69] Then came the illustrious *Wachauf*, again concerning milk quotas. Mr Wachauf was a tenant farmer who, upon the expiry of his lease, did not receive compensation for the discontinuance of milk production, as the reference quantity returned to the lessor of the farm. It appeared that the relevant EC legislation was largely silent on the respective interests of the landlord and tenant, leaving it to the Member States to strike the necessary balance.[70] The Court made reference to the protection of fundamental rights as general principles of EC law, and observed that Community rules which, upon the expiry of the lease, had the effect of depriving the lessee, without compensation, of the fruits of his labour and of his investments in the tenanted holding would be incompatible with those fundamental rights. It then made its famous statement that, "[s]ince those requirements are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply those rules in accordance with those requirements".[71] The implied message – though not the express instruction – was that the German authorities needed to provide for some level of compensation for Mr Wachauf.

68. See also, in the context of VAT, Case C-85/97, *SFI* v. *Belgian State*, [1998] ECR I-7421.

69. Joined Cases 201 & 202/85, *Klensch*, [1986] ECR 3477, paras. 8–9; confirmed by Joined Cases 196–198/88, *Cornée and Others* v. *Copall and Others*, [1989] ECR 2309 and Case C-16/89, *Spronk*, [1990] ECR I-3185.

70. Cited *supra* note 27, para 22 of Opinion of A.G. Jacobs.

71. At para 19.

In *Bostock*, Advocate General Gulmann appeared to attempt to reverse *Wachauf*. The case again concerned a tenant seeking compensation for discontinuance of milk production, this time at the occasion of voluntary termination of the tenancy agreement. Mr Gulmann suggested that the two cases were to be distinguished, but it is respectfully submitted that the differences between them were immaterial as regards the implementing character of the relevant national provisions and the room for discretion on the part of national authorities. The Advocate General took as a starting-point that legal problems which have arisen as a result of the adoption of Community rules can and should be resolved within the framework of the national legal systems in accordance with the solutions which apply in the Member States to corresponding problems that have arisen on the basis of national legislation. The most natural solution, in the eyes of the Advocate General, is that individuals have their rights protected within the framework of the respective national legal system, and there is no reason to believe that the Member States' legal systems cannot perform that task adequately. The Advocate General moreover pointed out that, as the fundamental rights applying in the EC legal order are based on the constitutional traditions of the Member States, that may make them less suited for application in cases where they are merely to serve to assess the legality of rules adopted by individual Member States.[72] The Court, however, applied the principle established in *Wachauf*, and examined whether the relevant UK legislation was in breach of fundamental rights. It thus did not take up the Advocate General's plea for a more cautious approach, even though, in its substantive analysis of the scope and meaning of the fundamental rights in issue, it did appear to be more restrained than in *Wachauf*.[73]

Currently, the Court is examining an alleged violation of the right to property in *Booker Aquaculture and Hydro Seafood* v. *The Scottish Ministers*. The case concerns the implementation by the United Kingdom of two directives for the control of fish diseases. The UK approach is, for particular types of fish disease, to adopt stricter measures than those required by the Community rules (i.e. immediate slaughter and no authorization to fatten the fish to commercial size); however, those rules did expressly permit the Member States to adopt stricter provisions. When two Scottish fish farms were obliged to destroy a large number of fish they claimed compensation, arguing that the right to property, as a general principle of EC law, placed on the United Kingdom an obligation to provide for compensation, notwithstanding the fact that the directives themselves did not in any way refer to this. Advocate General Mischo referred to the *Wachauf* line of cases, and noted that they

72. Case C-2/92, *Bostock*, [1994] ECR I-955, para 33 Opinion of A.G. Gulmann.

73. At paras. 11–27. See also Case C-351/92, *Graff*, [1994] ECR I-3361; *Karllson and Others*, cited *supra* note 40; and Case C-369/98, *The Queen* v. *MAFF, ex parte Fisher*, [2000] ECR I-6751.

were confined to "the question of measures adopted by the Member States in order to *apply* regulations". He therefore examined whether the same case law applies "where national measures are adopted in order to *implement* a directive".[74] The Advocate General felt that the *Wachauf* rationale extends to directives. He referred to the principle that the specific duties imposed by a directive should be read in the light of the general principles of Community law, and considered that the choice of form and methods left to the States according to Article 249 EC does not include the choice whether or not to violate fundamental rights, and vice versa, that respect for fundamental rights is an implicit part of the result to be achieved under the directive. His last argument was that the directive in issue, whilst allowing Member States to adopt stricter provisions, provides that in doing so they must act "subject to the general rules of the Treaty" . This point alone seemed to him to preclude a Member State from claiming that, as long as it faithfully transposes the rules laid down by the directive, without adding anything, it is, required to respect fundamental rights (in common with the Community legislature, the author of the directive), but that as soon as it supplements the measures it is required to adopt with other measures, which seem to it to be appropriate for fully achieving the aim – sought by the directive – of eradicating fish diseases, it can disregard fundamental rights. A directive intrudes into the internal legal order, but it does not do so alone; it is inseparable from the norms to which it must, itself, conform, including, obviously, the general principles of Community law.[75]

A third category of case law on the protection of fundamental rights in a context of implementation of EC acts concerns the effect of directives as such. In *Kolpinghuis Nijmegen* the Court stated that the obligation on national courts to refer to the content of a directive when interpreting the relevant rules of national law is not unlimited, particularly where such interpretation would have the effect, on the basis of the directive and independently of legislation adopted for its implementation, of determining or aggravating the liability in criminal law of persons who act in contravention of its provisions.[76] In *X*, the Court expanded on that principle, drawing on fundamental rights. It held that in a case which concerns the extent of liability in criminal law arising under legislation adopted for the purpose of implementing a directive, the principle that a provision of the criminal law may not be applied extensively to the detriment of the defendant, which is the corollary of the principle of legality in relation to crime and punishment and more generally of the principle of

74. Cited *supra* note 10, at para 50 (italics in original).
75. At paras. 51–58.
76. Case 80/86, *Kolpinghuis Nijmegen*, [1987] ECR 3969, para 13.

legal certainty, precludes bringing criminal proceedings in respect of conduct not clearly identified as culpable by law.

These categories of cases can be contrasted with judgments in which the Court declines to examine fundamental rights violations, for lack of a sufficient link with EC legislation.

In *Demirel* the question arose whether Mrs Demirel, the spouse of a Turkish worker resident in Germany, could rely on the EEC-Turkey Association Agreement as against an order to leave the country. As is well known, the Court decided that the relevant provisions did not have direct effect, and therefore could not be relied on. In the final paragraph of its reasoning the Court examined whether Article 8 ECHR had any relevance, but pointed out that, as there was at the time no provision of Community law defining the conditions in which Member States must permit the family reunification of Turkish workers, the national rules at issue did not have to implement a provision of Community law. The Court therefore did not have jurisdiction to determine whether the national rules at issue were compatible with the principles enshrined in Article 8 ECHR.[77]

*Maurin* concerned criminal proceedings in France against a person alleged to have sold food products after the expiry of their use-by date. Mr Maurin attempted to rely on general principles of EC law, but the Court did not regard the French legislation in issue as implementing EC legislation. An EC directive on labelling, even though requiring indication of the use-by date, did not regulate the sale of foodstuffs complying with its requirements and did not therefore impose any obligation on Member States where, as in that case, there was a sale of products which complied with the directive but whose use-by date had expired. Thus, the national legislation in issue fell outside the scope of Community law and the Court did not have jurisdiction.[78]

*Annibaldi* concerned a challenge to a refusal by Italian local and regional authorities to grant permission to plant an orchard of 3 hectares within the perimeter of a regional park. The Court took the view that the national legislation in issue, which established a nature and archaeological park in order to protect and enhance the value of the environment and the cultural heritage of the area concerned, did not fall within the scope of Community law: there was nothing in the case to suggest that the legislation was intended to implement a provision of Community law either in the sphere of agriculture or in that of the environment or culture. Even if the legislation was capable of affecting indirectly the operation of a common organization of the agricultural markets, it was not in dispute that the legislation pursued objectives other than

77. Case 12/86, *Demirel*, [1987] ECR 3719, para 28. But see the critique by Weiler and Lockhart, op. cit. *supra* note 23, p. 619.

78. Case C-144/95, *Maurin*, [1996] ECR I-2909.

those covered by the common agricultural policy, or that the legislation was general in character. Finally, the Court added, given the absence of specific Community rules on expropriation and the fact that the measures relating to common market organizations have no effect on systems of agricultural property ownership, it followed from the wording of Article 222 (now 295) EC that the legislation concerned an area which falls within the purview of the Member States.[79]

*Kremzow*, which was touched upon above, concerned a retired judge of Austrian nationality, who had confessed to the murder in Austria of an Austrian lawyer. After protracted proceedings before the competent domestic courts, resulting in imprisonment, and before the ECtHR, where he obtained a judgment in his favour, Mr Kremzow convinced the Oberster Gerichtshof to refer the case to the ECJ so as to ask whether national courts were bound by the provisions of the ECHR. The case did not however in any way relate to EC law. The Court recalled that it has no jurisdiction with regard to national legislation lying outside the scope of Community law. It pointed out that Mr Kremzow was an Austrian national whose situation was not connected in any way with any of the situations contemplated by the Treaty provisions on freedom of movement of persons. Whilst any deprivation of liberty could impede the person concerned from exercising his right to free movement, the Court held that a purely hypothetical prospect of exercising that right did not establish a sufficient connection with Community law to justify the application of Community provisions.[80] This was the Court's reply to Mr Kremzow's argument that his allegedly unlawful imprisonment violated his right of movement as a European citizen. The Court also indicated that Mr Kremzow had been sentenced under provisions of national law which were not designed to secure compliance with rules of Community law.[81] It followed that the national legislation in issue related to a situation which did not fall within the field of application of Community law.[82]

In *Idéal Tourisme* v. *Belgian State* questions were raised regarding the fact that Belgian legislation on value-added tax exempted international passenger transport by air, but that there was no such exemption for international passenger transport by coach. Idéal Tourisme, a coach operator, argued that the unequal treatment came within the scope of Community law because the exemption for transport was authorized under the relevant provisions of Community VAT legislation, as an exemption predating that legislation. The Court accepted that it follows from *Klensch*[83] that when Member States trans-

79. Case C-309/96, *Annibaldi*, [1997] ECR I-7493.
80. See Case 180/83, *Moser*, [1984] ECR 2539, para 18.
81. Here the Court referred to *Maurin*, cited *supra* note 78.
82. Cited *supra* note 34, paras. 13–18.
83. Cited *supra* note 69.

pose directives into their national law they must comply with the principle of equal treatment. However, the Community system of VAT was the result of a gradual harmonization of national laws, which was still only partial. The Court accepted the Belgian Government's argument that the harmonization envisaged had not yet been achieved insofar as the Community legislation unreservedly authorized the Member States to retain certain provisions predating that legislation. Consequently, a Member State was in this respect not transposing the Community directive and thus did not infringe either that directive or the general Community law principles which Member States must comply with when implementing Community legislation.[84]

The above case law clearly shows that the scope and reach of general principles of EC law is indeed more limited than that of the principle of non-discrimination on grounds of nationality. There is no precedent for applying those principles in cases involving a moving European citizen, and the notion of implementation of EC legislation is rather strictly defined. That notion does not encompass all type of linkage with EC legislation, as is exemplified by *Demirel*, *Maurin* and *Idéal Tourisme*. On the basis of the case law so far, it would however be difficult to construct a firm theory on what constitutes implementation for the purpose of triggering EU fundamental rights protection.

### 3.3. *Back to the Charter: Citizenship versus limited powers*

The above case law enables us to identify the opposing forces which are likely to attract the Charter and pull it within their orbit. The principle of non-discrimination on grounds of nationality, applicable as it is within the scope of the EC Treaty, is clearly developing into a core component of European Union citizenship. The moving European citizen is protected from all nationality-based discrimination, whatever the motive for moving. Indeed, the factual situations of Mr Cowan, Mrs Martinez Sala, Mr Bickel, Mr Franz and Mr Grzelczyk include different types of movement and it is difficult if not impossible to envisage circumstances where the moving European citizen would not be regarded as coming within the scope of the Treaty. In the case of Mrs Martinez Sala the entitlement to residence did not even stem directly from EC law, as it was sufficient that she was lawfully resident in Germany on grounds of a combination of international and domestic law. The other cases involved tourists, a lorry driver and a student. It is true that in both *Martinez Sala* and *Bickel and Franz* the Court considered that the subject-matter of the putatively discriminatory rules also came within the scope of the Treaty ("*ratione materiae*"): the child allowances to which Mrs Martinez Sala laid

84. Case C-36/99, *Idéal Tourisme* v. *Belgian State*, [2000] ECR I-6049, paras. 35–38.

claim were covered by the EC social security regulation[85] and the rules on the use of a language in administrative and judicial proceedings were significant in a context of exercising free movement rights.[86] Yet, again, those links are fairly weak, and one may expect that nearly any national rule or measure which is discriminatory on grounds of nationality would be considered to involve a relevant disadvantage for the moving European citizen. Thus, for all intents and purposes the moving European citizen is protected from discrimination on grounds of nationality.

This concept of EU citizenship, and its underlying rationale, will no doubt pull at the Charter, and there will be pressure to confer all the Charter rights on the moving European citizen.[87] The following types of arguments are likely to be developed by those seeking such an expansion of the Charter.

First, the simple question is bound to be raised: are not the rights in the Charter of equal importance to the right to non-discrimination on grounds of nationality? Why should Mr Bickel and Mr Franz be able to rely on the latter and not, for example, on the right to a fair hearing? One may try to justify this difference by pointing out the link between non-discrimination on grounds of nationality and the free movement principle, the former clearly being the corollary of the latter. However, the above case law has, by weakening that link, significantly undermined that justification. One may see that Mr Bickel and Mr Franz, as nationals of other Member States who are criminally prosecuted in connection with acts that occurred when they were benefiting from free movement, may wish to use German on the same terms as the citizens of Bolzano. But why should they not equally have an entitlement under EC law to a fair hearing, even if there is no suggestion that there is

85. Cited *supra* note 59, at para 57. See Regulation 1408/71, O.J. 1971, L 149/2. It is not however clear on what grounds the child allowances in question could be considered to come within the scope of EC law if, as was the hypothesis which the Court examined, Mrs Martinez Sala was not protected by the Regulation.

86. Cited *supra* note 58, at para 16.

87. In her Opinion in *Commission* v. *Italy* (cited *supra* note 10, para 58), a case on discrimination on grounds of nationality in the context of highway code offences, Stix-Hackl AG refers in passing to the right to be heard as contained in Art. 41 Charter. This may well be the first judicial move towards conferring the Charter rights on the moving European citizen. The Court itself does not refer to either the right to be heard or the Charter (judgment of 19 March 2002, nyr). Most recently, in Case C-60/00 *Mary Carpenter* v. *Secretary of State for the Home Department*, judgment of 11 July 2002, nyr, the Court established a link between the exercise of the freedom to provide services, a form of free movement, and fundamental rights. Mrs Carpenter, a third country national who enables her husband to exercise his profession by taking care of his children, was threatened with a deportation order. The Court accepted the argument that such deportation would unduly interfere with Mr Carpenter's right to provide services in other Member States, and that it would constitute an unjustified interference with his fundamental right to family life. The decision to deport Mrs Carpenter did not strike a fair balance between the competing interests of respect for family life and maintenance of public order and safety.

any form of discrimination? Surely, the moving European citizen needs a fair hearing just as much as non-discrimination as regards the use of a language. There is, it can be argued, no more of an inherent link between the issue of language in *Bickel and Franz* and the fact that the accused were non-nationals, than between the right to a fair hearing and their nationality.

Second, the citizen is one of the main rationales for the Charter. It was so as to render the rights of the citizen under EU law more visible that the Charter was negotiated and adopted in the first place.[88] It is well known that the notion of EU citizenship lacks substance, and that since Maastricht the EU is desperately attempting to connect with the citizen. It may perhaps be possible to explain to the citizen that the rights under the Charter cannot be relied upon in a purely domestic context. But how to explain this where the citizen makes use of the very movement rights which the citizenship status confers, through Article 18 EC? The Charter is an ideal means for giving further substance to the citizen concept, and one important avenue is clearly to enable the moving European citizen to invoke the Charter rights.

Third, there is the often recalled critique of excessive focus on economic freedoms and of promotion of the "market citizen" to the detriment of other forms of citizenship.[89] Similarly, there is the desire, gradually transformed into a policy, to develop the social dimension of market integration. The Charter very much confirms that development, through its solidarity chapter, and conferring all Charter rights on the moving EU citizen would surely be of benefit in this respect.

If these may be some of the reasons for extending the Charter rights to the moving European citizen, and thus effectively to take up the approach suggested by Advocate General Jacobs in *Konstadinidis*,[90] one should not underestimate the potential consequences of such extension. The effects on the scope and reach of the Charter may well be radical. To start with, European citizens do increasingly move, and the mere arithmetic of this increase, coupled with the broad substantive scope of the Charter, will promote its expansion. But there is more. If the moving European citizen may invoke the Charter, simply on the basis of moving or having moved across borders, many of the fundamental rights issues that would arise would have a weak link with the movement factor. Movement would simply become a trigger for activating the Charter. An EU citizen residing in another Member State could, for example,

88. According to the preamble of the Charter, the EU "places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice."

89. Everson, "The legacy of the market citizen", in Shaw and More (Eds), *New Legal Dynamics of European Union* (OUP, 1995), pp. 73–90; Douglas-Scott, "In search of Union citizenship", 18 YEL (1998), 29–65.

90. Cited *supra* note 63.

rely on the right to physical and mental integrity (Art. 3); on the right to respect for private and family life (Art. 7); on freedom of thought, conscience and religion (Art. 10); on academic freedom (Art. 13); on workers' right to information and consultation (Art. 27); on protection against unjustified dismissal (Art. 30); on the right of access to preventive health care (Art. 35); on the right to good administration (Art. 41); or on the right to an effective remedy and to a fair trial (Art. 47). These are largely random examples. However, they illustrate the weakness of the link with movement, and, inevitably, the further question would be raised: why only the *moving* European citizen? Why should only my neighbour, who happens to come from another Member State, have these rights and, perhaps more importantly, be able to set in motion the full European law machinery of direct effect, supremacy and preliminary reference so as to enforce them? It would seem unavoidable that, if the Charter protected the moving citizen, there would in turn be pressure to sever the link with movement so as to combat reverse discrimination. Of course the immediate reaction is that, with the current Charter, this cannot be done, that this was never intended, and that it would be wholly unworkable and improper for the EU to become a general human rights organization and for the European Court of Justice to assume jurisdiction over all human rights issues. Yet where there is pressure, there are bound to be lawyers looking for new routes.

One of the routes may be the following. There is already today a tendency in some Member States to avoid reverse discrimination by applying a constitutional principle of non-discrimination so as to extend rights under European law, particularly free movement rights, to purely internal situations. This tendency is accepted by the ECJ, which does not decline preliminary-rulings jurisdiction in purely internal situations, precisely in light of domestic non-discrimination standards.[91] If such an approach to the Court's jurisdiction to interpret EC law applies in the context of free movement, it would be difficult for the Court to refuse to extend it to fundamental rights. If a national court comes along, argues that under its constitution nationals are entitled to the same rights as non-nationals, and requests an interpretation of the Charter because non-nationals have rights under it which must be extended to nationals, can the Court decline jurisdiction if in a free movement context it adopts the above approach? The argument is in particular likely to be made where it has become clear that the Charter offers more extensive protection than the laws of a particular Member State (and there must surely be such cases, for otherwise the Charter would constitute the lowest common denominator of

91. See, most recently, Joined Cases C-515, 519–524 and 526–540/99, *Hans Reisch and Others*, judgment of 5 March 2002, paras. 25–27. See also the Opinion of A.G. Geelhoed, and Joined Cases C-321 to 324/94, *Pistre and Others*, [1997] ECR I-2343, para 44 and Case C-448/98, *Guimont*, [2000] ECR I-10663, paras. 20–24.

fundamental rights protection in the Member States). It may in practice be raised in cases where it has previously become clear that a Member State is in breach of the Charter as against a moving European citizen, much like *Reisch* followed *Konle*,[92] where the Court had looked at the free movement of capital in a case brought by a national from another Member State.

This route, if it were ever followed, would enable the ECJ to maintain that it was not unduly extending the scope of EU law, since the application of the Charter would be based on national law. It is also convenient for countering charges that EC law does not address reverse discrimination.[93]

If the concept of European citizenship is likely to pull the Charter in the direction of an ever-expanding field of application, and to turn it into a Charter not merely directed towards the EU institutions but containing rights on which European citizens can more generally rely, the principle of limited EU powers is likely to pull in the opposite direction. It is of course well known that this principle of limited, or conferred, powers is one of the constitutional foundations of EU law. Already in *Van Gend en Loos* the Court spoke of a transfer of sovereign powers, "albeit in limited fields".[94] Many of the Member States' constitutions contain provisions expressly referring to this principle in one way or other,[95] and it is critical in the case law of e.g. the *Bundesverfassungsgericht*.[96] The Court of Justice emphasized it in the constitutionally ground-breaking *Tobacco Advertising Directive* case, where it formed the very basis for the annulment of the directive.[97] The European Council has since Nice focused on the demarcation of EU and national competences, clearly also out of concern over the perceived expansion of the EU's powers. Such demarcation is one of the four subjects which the European Council mentions in its Nice conclusions as constituting the agenda of the next IGC, and the Laeken Declaration, too, devotes considerable space to this issue.[98]

In relation to the Charter the following may be some of the arguments, centred around the principle of limited powers, for keeping its field of application in check.

92. Case C-302/97, *Konle*, [1999] ECR I-3099.

93. See Poiares Maduro, "The scope of European remedies: The case of purely internal situations and reverse discrimination", in Kilpatrick, Novitz and Skidmore, *The Future of Remedies in Europe* (Hart Publishing, 2000), pp. 117–140. For another case showing the pressure of the reverse discrimination issue see *Carpenter*, cited *supra* note 10.

94. Case 26/62, [1963] ECR 1.

95. Austria, Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and Sweden.

96. See the Maastricht judgment, *Manfred Brunner et al.* v. *the European Union Treaty*, 89 BVerfGE 155, at 188, and [1994] 1 CMLR 57, at 89.

97. Case C-376/98, *Germany* v. *EP and Council*, [2000] ECR I-8419, para 83.

98. Laeken Declaration on the Future of the European Union, available at european-convention.eu.int/pdf/LKNEN.pdf

Article 51(2) of the Charter itself states that it "does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties". It thereby confirms the principle of limited powers, and clearly seeks to establish that the Charter is not intended to effect a transfer of general power over human rights matters to the EU. Article 51(2) will no doubt be relied upon to resist judicial moves towards applying the Charter in factual and legal settings which do not clearly come within the terms of Article 51(1) – in other words, moves towards linking the Charter with European citizenship in the directions identified above.

Substantively, the limited-powers argument can be developed by transposing to the Charter the reasoning by Laws referred to above,[99] particularly where he argues that a critical distinction needs to be drawn between measures which a Member State may take solely by virtue of domestic law, and measures which a Community institution or Member State may take which it is authorized or obliged to take by force of EC law.[100] Under such an approach, the Charter rights can only apply within the sphere of EU law; those rights are a mere function of EU law and do not exist autonomously. A claim based on those rights can therefore only be entertained when it is made in a factual and legal setting coming within EU law. Outside such a setting, EU law is unable to impose obligations on the Member States.

The limited-powers argument can also be addressed to the judiciary. The ECJ (and, insofar as relevant, the CFI) is not a general human rights court, and it does not have jurisdiction to establish violations of fundamental rights in cases which have no link with EU law. It can only review whether Member States fulfil their EU law obligations, and those obligations do not extend to protecting fundamental rights as such.[101] The role of the Court has never been and should not be to resolve human rights issues, other than in a context where such resolution is necessary for exercising the jurisdiction conferred on the Court by virtue of the Treaties. The Court's human rights jurisdiction is, as it were, secondary to, and dependent on its primary jurisdiction.

What would no doubt feed these juridical limited-powers arguments as regards the protection of fundamental rights are concerns over the potentially divisive nature of an expanded EU jurisdiction, in light of the different conceptions of fundamental rights in the various Member States, reflecting the differences in underlying fundamental values as they are perceived and accommodated in the various polities. In other words, the limited-powers argument is to some extent co-terminous with the fundamental boundaries

99. See text at note 52.

100. Besselink, op. cit. *supra* note 21, at 78, calls this "the attributive function of EC law towards the Member States".

101. But see Arts. 6 and 7 TEU.

character of nation-based fundamental rights protection.[102] It is here that the limited-powers argument connects with issues of democracy and legitimacy. Insofar as the domestic fundamental rights calculus results from what are regarded as democratic decision-making processes, EU interference with such protection beyond its functional fields of action risks being accused of lacking all legitimacy. To use an example based on the famous *Grogan* case on abortion,[103] how could the ECJ legitimately review the conflict between the right to life, as protected under the Irish Constitution, and the freedom of expression, unless it cannot avoid doing so for deciding an issue of EU law?

It is of course not possible to predict which force, citizenship or limited powers, will pull most strongly at the Charter. Nonetheless, it may perhaps be pointed out that the limited-powers arguments appear to have some defects. They critically depend on how the scope of EU law is defined. Thus, the extension of the Charter to the moving European citizen can easily be brought within this scope, if one accepts the argument that the Member States are by definition implementing EU law in cases involving such a person. Also, as noted above, EU law and national law are much intertwined and integrated, and there can often be considerable argument about the exact scope and reach of EU law and about the precise delimitation of the EU's powers, thereby undermining the force of the limited-powers argument.

Moreover, in light of the very nature of the Charter, which is presented as an up-to-date catalogue of rights which are not novel but were already recognized in the constitutional traditions of the Member States and in international human rights instruments, the argument that the Charter rights are a mere function of EU law appears to be rather formal. It can be countered by emphasizing that the Charter is an expression of a common law of European fundamental rights protection, which makes it deserving of at least contemplation, if not application as such, also in areas not coming within EU law.[104]

### 3.4. *Variation in "implementation"?*

Leaving aside the pulling force of citizenship in particular, and assuming that the field of application of the Charter is not extended to the moving European citizen, there still remains considerable uncertainty as to how deep the Charter may cut in domestic legal tissue. The Charter applies to the Member States "only when they are implementing Union law". As the *Wachauf*-type case

102. Weiler, "Fundamental rights and fundamental boundaries", ch. 3 of *The Constitution of Europe* (CUP, 1999).
103. Case C-159/90, *Society for the Protection of Unborn Children Ireland*, [1991] ECR I-4685.
104. Art. 37 Charter is referred to in the separate opinion of Judge Costa, ECtHR, *Hatton and Others* v. *UK* (Heathrow night flights), judgment of 2 Oct. 2001, nyr.

law, analysed above, reveals, the implementation concept is open to varying interpretations. This case law is itself of rather limited scope so far. However, the broad range of Charter rights, combined with the expansion of EU activities, particularly in areas which are sensitive from a human rights perspective, will give rise to many more questions and uncertainties as to what constitutes "implementation", and as to when Member States' authorities are to be considered agents of EU law. The question how far "implementation" extends in areas where the EU is not attempting to regulate in detail, such as agriculture, but aims only to harmonize, through directives or Third Pillar framework decisions, some basic elements of national laws, will be vital. Such an approach generally applies in relation to the internal market, where human rights issues are not prevalent, but it is also increasingly adopted for the establishment of the area of freedom, security and justice. For example, the legislative programme on asylum aims to harmonize the basic components of Member States' asylum laws.[105] Once that process is completed, it may become arguable that all asylum applications have a sufficient connection with implementing Union law so as to trigger the application of the Charter, meaning that all fundamental rights issues in asylum cases would be Charter issues.

Asylum is but an example,[106] and when browsing through the EU's legislative activity one can easily see the many different types of instruments used and the many different types of connections with domestic law. This may give rise to considerable variation in the interpretation of the concept of implementation. One factor in such variation may be the extent and nature of the link between the Charter and the EU's legislative activity in a particular field. That link seems particularly strong in the sphere of social policy, where the Charter contains a number of social rights which could easily become core components of the EU's legislative activity in this field. The Opinion of Advocate General Tizzano in *BECTU*, discussed above,[107] foreshadows the role which the Charter may play in this context: rights in a social policy directive earn the epithet "fundamental", with all its ramifications, by also being listed in the Charter. Through colouring the interpretation of such rights, this may affect and limit the scope for action by national authorities, for example as regards the exceptions to such rights. It is thus clear that the type of link

105. The Tampere European Council conclusions speak of a "Common European Asylum System", which is to include a clear and workable determination of the State responsible for the examination of an asylum application; common standards for a fair and efficient asylum procedure; common minimum conditions of reception; and the approximation of rules on the recognition and content of the refugee status (available at ue.eu.int/en/Info/eurocouncil/index.htm).

106. Commissioner Vitoríno considers that the protection of fundamental rights, and thus the Charter, is the very foundation of the Area of Freedom, Security and Justice, op. cit. *supra* note 29, at 8.

107. Cited *supra* note 10.

between particular Charter rights and EU policies will be an important factor for determining the Charter's incursions in national law territory.

### 3.5. *Derogations*

There remains a last issue to consider as regards the effect of the Charter in national law. Up to now, the ECJ's case law on applying fundamental rights as general principles of EC law also extends to cases where Member States are derogating from EC law requirements, particularly as regards exceptions and justifications for measures hindering free movement in the internal market (*ERT*).[108] The Charter, however, does not expressly refer to this type of application, and the negotiation documents do not reveal whether this is a deliberate omission or not. The explanation of Article 51(1) by the Praesidium, cited above,[109] does refer to the *ERT* judgment, but does not otherwise address the derogation-type application.[110] It speaks generally of "the Member States when they act in the context of Community law", which may be interpreted as encompassing both agency-type implementation and derogations. However, the text itself of Article 51(1) refers only to implementation of Union law. It is unsatisfactory that this important issue is so unclear.

The derogation-type extension to the Member States of EU fundamental rights protection is not undisputed. Recently, Advocate General Jacobs argued against the derogation approach, extrajudicially. In his view, once the ECJ has held that a particular derogation is in principle applicable, it should not address the further question whether the derogation is applied with respect for human rights. That, he argues, is not a question of EC law. Nor is the ECJ well placed to lay down, in such cases, the appropriate standard of fundamental rights protection. He finds some confirmation of his views in the fact that the Charter does not refer to derogations.[111]

With respect, it is questionable whether the case which the Advocate General makes is entirely persuasive.[112] One can only have sympathy for the basic argument, which is that EU law should not be all-pervasive, and that the ECJ is not, and should not be, a general human rights court. But if the EU is to take fundamental rights seriously, as the Charter suggests, they should be all pervasive in EU law. That must mean that, where a Member State relies on an EU law derogation, the scope and contours of such a derogation have to be determined in line with the protection of fundamental rights. In some

108. Cited *supra* note 28.
109. Text at note 44.
110. Besselink, op. cit. *supra* note 21, at 77, calls this a "very interesting concoction of formulations".
111. Jacobs, op. cit. *supra* note 66, at 336–339.
112. See also Weiler and Fries, op. cit. *supra* note 25, at 162–165.

contexts, this is so obvious that it is not always clearly identified. For example, much of the case law on the public policy exception to the free movement of workers is concerned with fundamental rights type issues, such as the right to effective remedies, or the principle that sanctions be based on personal conduct.[113] In fact, attention and respect for the protection of fundamental rights in derogation cases should be seen as a mere instance of the principle that the Treaties need to be interpreted and applied in light of fundamental rights requirements. The derogations and exceptions which the Treaties embody cannot be correctly applied if such application involves a violation of fundamental rights.[114] If that were accepted, one would effectively accept that the relevant Treaty provisions can be interpreted in a way which tolerates such a violation. It is therefore submitted that the Court should not leave fundamental rights issues in derogation cases undressed. The *Grogan* case is particularly illustrative in that respect.[115] Suppose the Court had held that there was indeed an issue of free movement of services; the facts of the case could have been such that the Court would have been unable to say that the link with services was too tenuous. The Court would then have found a restriction on the freedom to receive services, and would have had to consider the Irish Republic's defence based on the right to life. How could that be done without considering fundamental rights? Of course, the appropriate human rights dose will differ depending on the type of derogation, and Advocate General Jacobs is surely right to warn against consideration of fundamental rights in cases which do not properly call for that. Where there is no clear link between the restriction on cross-border movement and possible fundamental rights issues connected with the derogation or exception relied upon, it may not be appropriate for the ECJ to engage in full-scale review and impose a particular human rights standard. Conversely, however, where the fundamental rights issues are indeed more closely connected with the restriction on cross-border movement, the ECJ should arguably not shy away from in-depth consideration of the fundamental rights issues.

Weiler has argued, before there was the Charter, that in the derogation context the ECJ should adopt a more deferential standard of review, in the sense that it should only scrutinize whether the national measure complies with the ECHR, and that it should not impose EC law fundamental rights

113. See *inter alia* Case 41/74, *Van Duyn* v. *Home Office*, [1974] ECR 1337; Case 36/75, *Rutili* v. *Minister for the Interior*, [1975] ECR 1219; Case 30/77, *Regina* v. *Bouchereau*, [1977] ECR 1999; Joined Cases 115 and 116/81, *Adoui and Cornuaille* v. *Belgium*, [1982] ECR 1665; Case C-348/96, *Calfa*, [1999] ECR I-11.

114. This rationale includes both express exceptions and the *Cassis de Dijon* rule-of-reason, contrary to the distinction suggested by Besselink, op. cit. *supra* note 21, at 78–79.

115. Cited *supra* note 103.

which go beyond the core European Convention rights.[116] The difference in his view with the agency-type situation is that in a derogation context the Member State measure constitutes an application of a Member State policy, and not of a Community policy. Whatever its merits, however, this view appears difficult to maintain in light of the unitary character of the Charter, which does not distinguish between core ECHR rights and other fundamental rights.

In any event, given the lack of express reference in the Charter to derogations, there is little doubt that this type of extension of EU fundamental rights protection to the Member States will continue to be disputed.

## 4. Fundamental rights and EU powers

Article 51(2) Charter provides that the Charter "does not establish any power or task for the Community or the Union, or modify powers and tasks defined by the Treaties". It is a strong statement. This section aims to deal with the question of powers whilst concentrating on the relationship between the Charter and the various EU policies – in particular insofar as the latter lead to some type of legislative action. In line with the general subject of this article, the focus is on the definition and exercise of EU powers as they may affect the political and legislative powers of the Member States, and as they may affect human rights protection at national level. In practice, though, this focus is evidently also on the effect of the Charter in national law, and there is an indissociable link between the two paragraphs of Article 51, where scope and powers are rightly juxtaposed. This section does not however look at the EU's external human rights policy, as that policy does not directly affect the internal division of powers. Nor does it address Articles 6 and 7 TEU, which raise issues which are arguably different from the EU's human rights powers in day-to-day policy-making.[117]

The aim of this section is to investigate, and even question, the statement in Article 51(2). Is it correct that the Charter does not establish any new power or task and does not modify powers and tasks defined in the Treaty? That question may seem odd, given that the provision is clearly prescriptive and not merely declaratory. From that angle, the matter is simply one of ensuring that Article 51(2) is observed and respected. But the question must none the less be addressed, for a number of reasons.

116. Weiler, op. cit. *supra* note 102, at 126 and Weiler and Fries, op. cit. *supra* note 25.
117. Cf. von Bogdandy, op. cit. *supra* note 1, at 1318–1320, where he argues for three different human rights standards.

One set of such reasons is generally concerned with the precise meaning of Article 51(2). Already at face value, there is a tension between the statement on powers and one of the clear objectives of the Charter, namely to strengthen fundamental rights protection at EU level. This objective is partly expressed in the last sentence of Article 51(1), where the EU institutions and the Member States (insofar as the Charter applies to them) are instructed to "respect the rights, observe the principles and promote the application thereof in accordance with their respective powers". Thus, the rights in the Charter need to be promoted, yet does that not modify, at least to some extent, the "powers" and "tasks" of the institutions involved?[118] To deny any such modification one has to take the view that the Charter is purely documentary, an absolutely neutral record of existing fundamental rights, all previously identified and enforced, a record merely for the enlightenment of the citizen and in no way modifying substance, process or practice of fundamental rights protection in the setting of the EU. However, few if any observers take such a view, so in any event the question stands as to how to interpret Article 51(2), and how to deal with the tension between promoting the Charter – innovative as it is to at least some degree – and the instruction that it must not add powers or modify existing ones.

The second set of reasons concerns the connections between the Charter and the powers and tasks which are conferred on the EU by the Treaties. The Charter as such may not add new powers, or significantly modify existing powers, but to what extent are there any such existing powers, independent from the Charter, which are relevant for the protection of fundamental rights? What are the present human rights powers of the EU, and how do they relate to the Charter? Such questions are particularly worth addressing as the Charter did not come about in isolation, but is accompanied by recent extensions of EU power which are plainly connected with human rights protection. The most obvious instance is Article 13 EC, on the basis of which there are now two important directives on non-discrimination,[119] and whose substantive content is copied in Article 21 Charter.[120] The statement in Article 51(2) must thus be questioned from the perspective of the EU's powers in the field of human rights over and above the Charter. What are the human rights powers of the

118. De Búrca, "Human rights: The Charter and beyond", Jean Monnet Working Paper No. 10/01 (www.jeanmonnetprogram.org), 11–12.

119. Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, O.J. 2000, L 180/22 and Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, O.J. 2000, L 303/16. For a discussion see Waddington and Bell, "More equal than others: distinguishing European Union equality directives", 38 CML Rev., 587–611.

120. As to the relationship between those provisions, see Lenaerts and de Smijter, "A 'bill of rights' for the European Union", 38 CML Rev., 283–287.

EU and how are they evolving in light of the existence and presence of the Charter?

The tension, described above, between the Charter's objective of strengthening EU fundamental rights protection and its statement that it does not confer any new powers, is not a new phenomenon. Ever since Maastricht the EU has been characterized by a near schizophrenic constitutional attitude towards the expansion of European powers.[121] The negotiation of the Maastricht Treaty itself was a delicate balancing act between expansion and limitation (or even contraction), in particular as regards amendments to the EC Treaty: subsidiarity was introduced, and many of the provisions on so-called new competences in effect merely codified existing practice and aimed to ringfence that by excluding harmonization of laws.[122] The Amsterdam Treaty attempted to strengthen subsidiarity through the Protocol on Subsidiarity and Proportionality. And the current constitutional Convention may partly be seen as an attempt to cure the schizophrenia by producing a more lasting constitutional settlement, particularly as regards the division of competences between the EU and the Member States. From that perspective, too, it is worth exploring the relationship between the Charter and the powers of the EU, as the Convention may need to take this into account in its work.

### 4.1. *Opinion 2/94: Some reverse engineering*

How to approach the investigation into the meaning of Article 51(2)? One should first analyse the powers of the EU in the human rights field, independently of the Charter. We can be short here, as there is the superb dissection by Weiler and Fries, with which this author largely concurs.[123] There may none the less be some benefit to an alternative, even if not different, formulation.

A good starting-point is Opinion 2/94, where the Court of Justice ruled that the EC lacked competence to adhere to the ECHR. The Court's reasoning is worth revisiting. It starts its analysis by referring to the principle of conferred powers, as described in Article 3b (now 5) EC. That principle must be respected in both the internal and international action of the Community. The Court then describes the principle of implied powers. It subsequently points out that no Treaty provision "confers on the Community institutions any general

121. Cf. de Búrca, op. cit. *supra* note 30, at 126–128 and "Setting Constitutional Limits to EU Competence", *Francisco Lucas Pires Working Papers Series on European Constitutionalism, Working Paper 2001/02*. She speaks of an attitude of ambivalence, but this expression may in fact be too weak.

122. Cf. de Búrca, op. cit. *supra* note 121; Timmermans, "Redactionele Signalen", 40 SEW (1992), 609; Lane, "New Community competences under the Maastricht Treaty", 30 CML Rev. (1993), 939.

123. Op. cit. *supra* note 25.

power to enact rules on human rights or to conclude international conventions in this field". The Court then turns to Article 235 (now 308) EC, which is designed to fill the gap where no provisions of the Treaty confer on the Community institutions express or implied powers to act. This provision cannot however serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole, in particular those that define the tasks and activities of the Community; and on any view, the Article cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty. The Court then points out that respect for human rights is a condition of the lawfulness of Community acts. However, accession to the ECHR would entail a substantial change in the present system in that it would involve the entry of the Community into a distinct international institutional system as well as integration of all the ECHR provisions into the Community legal order. Such a modification, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and could only be brought about by way of Treaty amendment.[124]

The Opinion is not convincing. In essence, one does not see in what way the ECJ, which is the supreme court within the EU legal system, would be in a different position from that of highest courts, particularly constitutional courts, at national level. Such highest courts are effectively subject to supervision by the ECtHR, and there are no fundamental reasons why that should not also be the case for the ECJ. As the ECHR sets only minimum standards, nothing would preclude further development of home-grown EU fundamental rights protection, in the form of general principles of EC law or otherwise. The ECJ's argument about lack of competence is difficult to understand, particularly in the light of the distinction which the Court made between competence and compatibility. As Zanghí acutely observed, the Court's essential argument about lack of competence – i.e. that entry into the Convention system would have profound institutional implications and would thus be of constitutional significance[125] – appears to speak to the issue of compatibility rather than to that of competence.[126]

But even if one agrees with the Court's analysis, it would be wrong to conclude from the Opinion that the Community (or Union) institutions have no powers as regards fundamental rights protection. That is not the basis for the Court's decision. The Court does refer to the fact that no Treaty provision confers on the Community a general power to enact rules on human rights, as

124. Opinion 2/94 re Accession to the ECHR, [1996] ECR I-1759, paras. 23–35.
125. See paras. 34–35.
126. Zanghí, "Un'altra critica al parere 2/94 della Corte sull'adesione della Comunità alla convenzione europea dei diritti dell'uomo", in *Scritti in onore di Giuseppe Federico Mancini – Volume II – Diritto dell'Unione europea* (Giuffrè, Milan, 1998), pp. 1101–1120.

is of course correct, but that is only the starting-point of the analysis. Decisive are rather the, in the Court's view, constitutional-type consequences of joining the ECHR. The Court does not in fact dwell on any, more limited, human rights powers which the institutions may have. The Opinion lends support to the view that there may be some such powers, for otherwise the Court could simply have based its analysis on the lack of any human rights power whatsoever. By contrast, the tenor of the Opinion is clearly that accession to the ECHR was simply one bridge too far.

If one takes the view that human rights law is not autonomous, but embedded in and an organic part of legal systems generally,[127] then it logically follows from the current system of protecting fundamental rights as general principles of EC law that the institutions must have some measure of rule-making power in this field, too. If not, they would be in a Catch-22 position. Consider the following example. The EC adopts a new basic regulation on anti-dumping. It is clear from the ECJ's and CFI's case law that the institutions, when adopting anti-dumping measures, must respect rights of defence and the right to good administration.[128] Those are clearly fundamental rights, and they imply, for example, that companies involved have a right to be heard. However, if one were to deny the institutions all rule-making power in the field of human rights, one would effectively deny them the capacity to include in the regulation provisions on the right to be heard. If they did, they would be legislating on fundamental rights. But if they did not, the regulation could be declared unlawful, for, as the Court stated in Opinion 2/94, respect for fundamental rights is a condition for the lawfulness of Community acts. This cannot be the correct legal position. Thus, the requirement of respect for fundamental rights implies that the institutions may at least provide for rules, in specific acts adopted under the powers vested in them by the Treaties, so as to ensure that fundamental rights are respected. This is not an autonomous power to legislate on human rights, as it is strictly a function of the other, non-human-rights powers which are conferred on the institutions. It is none the less a power, and indeed a duty, to the extent that protection of fundamental rights requires further rule-making and cannot simply be left to the devices of judicial protection.[129]

127. Cf. McCrudden, "The Future of the EU Charter of Fundamental Rights", *UACES Online Reflection Papers*, No. 1, Feb. 2002 (www.uaces.org) and Jean Monnet Working Paper No. 10/01 (www.jeanmonnetprogram.org), 25.

128. See e.g. Case C-49/88, *Al-Jubail Fertilizer* v. *Council*, [1991] ECR I-3187; Case C-16/90, *Nölle*, [1991] ECR I-5163; Case T-167/94, *Nölle* v. *Council and Commission*, [1995] ECR II-2589.

129. Cf. the Simitis Report, *Affirming Fundamental Rights in the European Union– Time to Act*, Commission, 1999, at 12.

4.2. *Functional rule-making powers*

This type of power may have an effect on fundamental rights protection at national level, and thus affect national law. This will particularly be the case in the agency situation, where authorities at Member State level are the agents of the Community rules. National authorities are here bound by the functional exercise of human rights powers. Turning to the Charter, it is obvious that Article 51(2) Charter cannot be interpreted as denying the institutions this type of power. Such an interpretation would run contrary to the last sentence of Article 51(1), providing for the duty of promotion. And even if there were not this sentence, the Charter would be a nonsense if the EU institutions did not have the power to ensure, through appropriate rule-making, that human rights are respected in the process of applying the acts which they adopt. Indeed, it is already now firm practice of the Commission to accompany each legislative proposal with comments on fundamental rights protection, based on the Charter.[130]

This functional human rights power may affect human rights protection at Member State level, and national law, in different ways. The above example of anti-dumping may not be terribly exciting from a human rights angle, and does not go beyond raising fairly standard issues of judicial protection, appropriate remedies and rights of defence. We are used to EU law having an impact on that, and the legal systems of the Member States have themselves a long history of ensuring those types of fundamental rights protection. But one may consider other areas. EU action to establish the area of freedom, security and justice, in fields such as asylum, immigration, and criminal law cooperation, raises a host of fundamental rights issues, which will need to be looked at intensely in the process of formulating and implementing EU policies. As regards asylum for example, there is, in light of the state of crisis which Member State policies have reached, a compelling case for EU harmonization to take a strong stance on fundamental rights protection, and to aim to ensure that a number of basic standards are respected throughout the EU. The Charter would be the basis for such action. Again, this is a purely functional power to lay down rules on human rights. In practice, however, it may be most meaningful.

An illustration is the, at the time of writing agreed, outline of a directive on minimum reception standards for asylum seekers. The directive establishes minimum standards of reception conditions of applicants for asylum in the EU which are deemed sufficient to ensure them a dignified standard of living; it contains specific provisions on residence and freedom of movement, family unity, schooling and the education of minors, employment and access to

130. Sec(2001)380/3, cited by Vitoríno, op. cit. *supra* note 29, at 16.

vocational training.[131] Whether or not this directive refers to the Charter, whether or not it even mentions fundamental rights, it is obvious that it is in essence a human rights instrument. It would be all too stark if Article 51(2) of the Charter were read as in some way limiting or confining the EC's power to adopt such a directive. Nor should this provision lead to concealing the human rights dimension of this type of act.

The effective scope and impact of this functional human rights power may also vary according to the types of connection between the provisions of the Charter and the specific powers conferred on the EU. In this respect one thinks particularly of the social rights in the Charter (under the heading of Solidarity). Many of those rights could be furthered through EC action in the framework of the EC Treaty's social policy provisions. Thus the Charter will be used in debates and arguments on the appropriate social policy agenda, and may be significant in steering that agenda towards certain subjects.

These functional powers as regards human rights are bound up with the substantive powers conferred on the EU. But there are arguably further powers, of a horizontal kind. If respect for human rights is a condition for the lawfulness of EU acts, there may be a need in some areas to legislate on fundamental rights protection in a manner which cuts across various EU policies. That may be so in light of the fact that some of the Charter rights cannot be so easily connected with specific EU policies. A clear example is access to documents. There is now a general regulation on this subject, which applies to all documents held by the EU institutions, and thus to all policies.[132] Admittedly, this regulation is not so relevant from the perspective of the division of powers between the EU and the Member States. It none the less also affects national authorities,[133] and may influence national approaches on access to documents.

It is less straightforward to locate in the Charter those rights which may give rise to such horizontal action, particularly of a kind so as to affect human rights protection at national level. One such horizontal power is obvious however, as it is provided for in the EC Treaty: the power to legislate so as to prohibit various forms of discrimination, as provided for in Article 13 EC. This is a particularly important, express competence to engage in rule-making on human rights protection. It thus needs to be considered a little further here.[134]

131. Council Meeting Justice, Home Affairs and Civil Protection, 26–26 April 2002, 7991/02 (Presse 104).

132. Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents, O.J. 2001, L 145/43.

133. See Art. 5 of the Regulation, as regards EU institution documents in the possession of national authorities.

134. See also de Búrca, op. cit. *supra* note 121.

### 4.3. *Power to prohibit discrimination*

Article 13 EC is yet another manifestation of the schizophrenic attitude towards the EU's powers. It allows for action (including legislation) to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, but only "within the limits of the powers conferred by [the Treaty] upon the Community". This limitation is awkward, particularly as regards those forms of discrimination which have no obvious connection with the various fields of action of the EU or the current state of EU law. Of course the listed forms of discrimination are all in one way or other relevant in the sphere of employment, and one may consider that under the EC Treaty's social policy provisions the institutions have powers over this sphere. Yet even there those powers are not unlimited, and the Treaty clearly identifies the type of measures the institutions may adopt. In times of the *Tobacco Advertising Directive* case[135] a judgment finding limits to the EC's powers in the sphere of employment would hardly be surprising. Beyond employment, however, it is not easy to see what meaningful action the EC could take so as to combat discrimination on grounds of e.g. religion.

The legislation so far adopted under Article 13 also incorporates this tension. Two directives have been adopted, one on racial discrimination and one on the other forms of discrimination ("general framework") mentioned in Article 13 (but not sex).[136] The Race Directive is the most interesting one, as its scope is more broadly defined than that of the general framework directive, which applies only to employment and occupation. Article 3(1) Race Directive provides that it applies, "within the limits of the powers conferred upon the Community", to access to employment, self-employment and occupation; vocational training; employment and working conditions; membership of professional organizations; social protection, including social security and healthcare; social advantages; education; and goods and services which are available to the public, including housing. Some of those matters come within EC competences which are weak in character (e.g. education), and with respect to some others it is difficult to see any link at all with the Community's powers. Take, in particular, the last item, "access to and supply of goods and services which are available to the public, including housing". Outside the context of prohibiting discrimination by virtue of Article 13 EC, one does not readily see which powers are conferred on the Community in this field. On the basis of which Treaty provisions would the Community have competence to regulate e.g. access to housing in the Member States? The only link appears to be with free movement. In the context of free movement of

135. Cited *supra* note 97.
136. Cited *supra* note 119.

persons, it may be accepted that the EC has competence to ensure that there is no discrimination as regards access to housing to the detriment of nationals of other Member States. Indeed there is legislation which aims to achieve that.[137] However, the Community's competence clearly does not go beyond ensuring non-discrimination on grounds of nationality and access to housing for non-nationals. Any EC legislation on access to housing which does exceed that limitation would arguably be contrary to the principle of conferred powers, *ultra vires*, and null and void. Even the argument that, under Article 13 EC, the power to prohibit race discrimination as regards access to housing is confined to access by nationals of other Member States could be considered incorrect. One cannot create one type of functional power on the grounds of a different functional power. If, in other words, the EC's power over access to housing is limited to ensuring non-discrimination on grounds of nationality, then it does not extend to ensuring non-discrimination on grounds of race or ethnic origin.[138]

If one takes a slightly more relaxed approach, and considers that, so as to be effective, the power to prohibit race discrimination must extend to situations involving non-nationals, one ends up with reverse discrimination issues similar to those we looked at above in the context of citizenship. The non-moving European citizen (not to speak of third-country nationals!) will have difficulty in understanding and accepting that only the moving citizen may rely on the Race Directive.

Take another area covered by the Race Directive, namely healthcare. Under Article 152 EC the Community does have certain powers as regards public health, but they do not extend to harmonization of the laws and regulations of the Member States (see Article 152(4)(c)). Yet the Race Directive does involve such harmonization: insofar as it extends to healthcare, it clearly harmonizes the laws and regulations of the Member States with respect to prohibiting race discrimination. Again it can be argued that, strictly interpreted, Article 13 EC cannot form the legal basis for such harmonization. If that is so, then in relation to healthcare one comes back to the link with free movement, and the above considerations with respect to housing would *mutatis mutandis* apply.

Does this mean that the Race Directive risks sharing the fate of the Tobacco Advertising Directive? This would be the truly hard case for the ECJ, in which the principle of limited powers would be pitted against the noblest of legislative acts ever to have been produced by the EU. There would however be grounds for accepting that the Race Directive does not transgress the conferred powers boundary. Its legal basis, Article 13 EC, is fundamentally

137. Art. 9 of Regulation 1612/68 on freedom of movement for workers within theCommunity, O.J. 1968, L 257/2.

138. Note that the Race Directive distinguishes the two, see Art. 3(2).

ambivalent about its precise scope, and the principle of effective Treaty interpretation supports the case for a broader rather than narrower scope of the EC's legislative power in this field. Further, Article 3(1) of the Directive takes care to spell out that its scope is in any event limited to those areas which come within the Community's powers. It is also worth pointing out that, even if some aspect of the Directive's scope were unlawful, it does not automatically follow that the implementing legislation by Member States would be affected by this.[139] Member States may in any event take the opportunity of an EC directive to legislate more broadly on a particular topic.

The latter point is worth considering a little further. In practice, exercise of some type of EU legislative competence as regards fundamental rights may well lead to further modification and adaptation of fundamental rights protection at national level, beyond the precise requirements imposed by EU law. Insofar as such competence displays links with the Charter (as does Article 13 EC), the Charter may itself in the end have a harmonizing effect, through the inspiration which it offers rather than through the accretion of any formal powers.

### 4.4. *The Charter and a human rights policy*

One cannot leave aside in a discussion of the relationship between the Charter and the EU's competences the powerful argument made by Alston and Weiler (in the context of a broader project) for an EU human rights policy. Part of their argument is that human rights policy within the Community continues to rely far too heavily on the premise that equipping individuals to pursue existing legal remedies is an effective mechanism to guarantee that rights will not be violated. In their view, too much faith is placed in the power of legal prohibitions and judicial enforcement. To pretend that human rights and dignity can be guaranteed to all those, especially the weakest in our society, who need them by simply affirming the principle of respect or even by rendering EU measures which are incompatible with human rights putatively illegal if challenged before Community courts, is a position which, at best, is overly complacent.[140] In an editorial on the Charter, Weiler has again argued that the real problem of the Community is the absence of a human rights policy. Far more important, in his view, than any Charter for the effective vindication of human rights would be a simple Treaty amendment which

139. Though it may be affected, for example because of the particular legislative procedure followed, which may be different for implementation of directives and for "autonomous" national legislation. Thus in the UK, directives may be implemented through secondary legislation, see the European Communities Act.

140. Alston and Weiler, op. cit. *supra* note 2, at pp. 12–13.

made the active protection of human rights within the sphere of application of Community law one of the policies of the Community alongside other policies and objectives in Article 3, and a commitment to take all measures to give teeth to such a policy expeditiously.[141]

This view is not uncontested, and von Bogdandy has mounted an impressive critique.[142] It is obvious that, on its face, Article 51(2) Charter does not directly support the human rights policy claim. Leaving this aside, though, it is worth further exploring the relationship between the Charter and a human rights policy.

Alston and Weiler are no doubt right to be critical of pure lawyers' debates on fundamental rights, and of the actual effectiveness of judicial protection. Their merit is to point out that, in itself, a coherent architecture of judicial protection is insufficient. And they may be right that the EU is in need of a human rights policy with teeth. But the presence of a binding, incorporated Charter would surely contribute to the development of such a policy. It may even be a precondition. Judicial protection, though not sufficient, is clearly indispensable for any meaningful human rights policy, including a proactive one. The same is true for adequately formulated human rights standards. What is more, effective judicial protection and adequately formulated fundamental rights standards are more indispensable for an effective human rights policy in the EU context than in any other national (constitutional) or international (treaty) context. As Weiler also has shown,[143] meaningful protection of fundamental rights in the EU is not a straightforward exercise, because the Member States, even if they are all bound by the ECHR, have different conceptions of fundamental rights, reflecting the differences in underlying fundamental values as they are perceived and accommodated in the various polities. The example may sound banal, but for the Germans freedom to import bananas appears to be a fundamental rights issue,[144] whereas in other Member States one does not notice any meaningful bananas/human rights debate. This is more problematic in the context of the EU than in any other, national or international, setting, because of the very character of European integration. The EU develops policies and makes law. It has adopted its own policy on bananas which, by definition, must be uniformly implemented throughout the EU. Yet it adopted this policy without having its own constitutional document setting out fundamental rights. This is different from a national setting, where constitutions would typically embody the applicable standard, and where, in

141. Weiler, "Editorial: Does the European Union truly need a Charter of Rights", 6 ELJ 2 (2000), 96–97.

142. Op. cit. *supra* note 1, at 1309–1320.

143. Op. cit. *supra* note 102, at 104–105.

144. See Everling, "Will Europe slip on bananas? The Bananas Judgment of the Court of Justice and national courts", 33 CML Rev., 401–437.

any event, there is likely to be more agreement on the underlying fundamental values. And it is different from an international human rights treaty setting, such as the ECHR, which is in fact the opposite of that of the EU: an international human rights instrument is an agreement on some level of common standards, to be reflected in a national context, but which is not applied to any substantive policies at international level which come anywhere near the EU's policies, in terms of scope, depth and impact. Thus, if the EU is to develop a meaningful human rights policy, if it is to ensure that human rights protection becomes more of a proactive, horizontal policy permeating all other EU policies, a sufficiently clear and enforceable basic human rights document is indispensable. It is also difficult to see how such a policy could be effective in the absence of a judicial authority with power to decide in case of conflict between varying "national" fundamental rights, and the exercise of such judicial authority is more legitimate when it is based on a written charter. As to the institutional dimension, if there is to be a human rights directorate in the Commission, it will find it easier to justify its actions and interference, which would more often than not need to be of a challenging character, in the presence of an incorporated charter. Again, this is more so in an EU context than in a national context. In the absence of a generally-elected legislature,[145] in the absence of a government operating as and at the centre of policy-making and political discourse, and given that the EU operates under a system of limited powers, the text of the founding Treaties is so much more determinative and legitimizing for the various institutional actors than is any constitution at a national level. The legitimacy of EU public action is so dependent on the founding Treaties, which provide the agenda for such action; that is partly why their formulation is so often revised and is so much subject to political contestation. A meaningful human rights policy is therefore more likely to come about once the Charter is incorporated in the Treaties.

Lastly, on this point, an effective human rights policy will not be built on the sole ground of institutional commitment, particularly in light of the subversive character of fundamental rights for any system of government. There will need to be pressure from civil society, and civil society will be aided by a binding Charter. Consider, for example, the battle which is currently being fought for greater transparency – a battle which, judicially, is concentrating on access to documents. The European courts are building up a nice body of case law in this area, which is increasingly critical of the EU institutions' practices regarding public access.[146] As Article 42 of the Charter confirms that access

145. The European Parliament is of course generally elected, but is only a co-legislator.

146. See for a good overview Tomkins, "Transparency and the emergence of a European administrative law", 19 YEL (1999/2000), 219–234.

to documents is a fundamental right, to have the Charter incorporated and made enforceable will surely assist those seeking greater access. The Charter contains other provisions, too, on good and transparent administration, such as Article 41. Taken together, these provisions could greatly enhance the quest for better and more open EU government.

However, in the absence of Treaty amendments which extend the EU's powers as regards human rights, the clamour for a human rights policy does at some point hit the boundaries of the EU's limited powers. Weiler and Fries rightly point out that:[147]

> "In the legal order, respect for the jurisdictional limits of the Community is an important dimension of the rule of law and of democracy. A Community and Union which transgress such limits not only breach an important constitutional principle but also contribute to a continuous aggregation of power in the centre compromising an important aspect of democracy".

It is respectfully submitted that there is significant tension between this principle, foundational to the analysis by Weiler and Fries of the EU's existing powers in human rights matters, and the grand design of the human rights policy pictured by Alston and Weiler.[148]

## 5. Conclusions

This article has sought to identify and discuss, from the angle of the federal question, some of the basic forces which may act on the Charter and determine its evolution as well as its impact on the evolution of the EU. Will the Charter turn the EU into a human rights organization? Will it become the nucleus of a federal-type constitution, where the federal fundamental rights constitute the highest norm? Only time can supply some form of reply to those questions, and scholarship can do little more than make an attempt to conceptualize and clarify.

Conclusions at this stage therefore need to be modest. There may none the less be some further observations worth making. Some readers may feel attracted to the opportunities which the Charter offers for inflating European citizenship, and others may be more sceptical towards attempts to expand the Charter's remit beyond the EU institutions. However, particularly for the latter group it is worth raising the most basic question of all: what really is the relevance of the Charter if its scope needs to be scrupulously limited to action by the EU institutions? Perhaps the readers who live in the EU

147. Op. cit. *supra* note 25, at 152.
148. Op. cit. *supra* note 2.

can look next door, and try to identify what the Charter would mean for their neighbours (literally) in their real life contacts with the EU institutions. The percentage of European citizens for whom the Charter would have any significance at all in this respect is likely to be most limited. For the citizen, the Charter can only be meaningful insofar as it influences the EU's normative action – and thus affects the exercise of government at both European and Member State level. The Charter may well state that it is binding on the Member States "only" when implementing EU law, but this exception-style formulation in fact conceals that this is the real importance of the Charter, from the perspective of the European citizen, subject of the new legal order which is becoming of age.

Fears and apprehensions for an expansive reading of the scope of the Charter may also be fed by institutional considerations. Do we wish this already strong European Court of Justice to become even stronger through interpreting fundamental rights and imposing a particular level of protection on Member States? Do we wish EU lawyers and institutions, forceful as they are, to meddle in those types of affairs, too? Such questioning connects with the status and role of the ECHR and of the European Court of Human Rights, which this article did not consider. But perhaps those fears and apprehensions can be laid to rest by emphasizing and developing the notion of constitutional pluralism,[149] also in relation to the Charter. The Charter is indeed but some form of codification of existing fundamental rights, as they are protected in national constitutions and international instruments, a codification of the general principles of EC law which the Court did not invent but only discovered. Interpretation and application of the Charter should therefore be guided by the idea that, materially speaking, the Charter is not self-standing, but rather represents a common law of fundamental rights protection in the European Union and its Member States. A common law which builds upon the foundations of the ECHR and national constitutions, and which the Charter in fact merely records. Similarly, if the Charter were incorporated and subsequently applied by the Court of Justice in the doctrinal framework of EC law (or EU law) supremacy, the Court should none the less continue to engage, as it has always done, in a judicial dialogue with both the ECtHR and with national, especially constitutional, courts.

The Charter could thus become a force for some degree of harmonization of human rights law in the European Union, complementing the essential standards approach of the ECHR. In that respect it is worth noting that the EU may currently be a more effective vehicle for expanding human rights

149. McCormick, *Questioning sovereignty* (OUP, 1999), ch. 7; compare with Weiler's constitutional principle of tolerance, op. cit. *supra* note 3.

law territory than the Council of Europe.[150] That does not however mean that the road towards harmonization will always be smooth. If the process continues, there will inevitably come a time of hard cases, particularly where certain rights are conflicting. In such cases it will not be possible to iron out differences by referring to higher standards of protection. The constitution of a Member State may protect a right and the Charter may protect a different right, and the relationship between those rights may be such that the Charter protection interferes with the domestic constitutional protection. Effective harmonization no doubt requires the existence and resolution of such hard cases, too.

To return to matters discussed in the previous sections, if the Charter is to be meaningful Article 51 should not be interpreted restrictively. The Charter's application to the Member States, when "implementing" EU law, should extend to all cases and contexts where there is a material link with EU law. The Charter should not be construed as extending the powers of the EU, but the EU's existing powers should definitely be construed and put to use with the Charter in mind. However, if this article advocates such a non-restrictive interpretation, it should not be read as advocating a loose legal approach towards questions of European constitutionalism. Even in matters as difficult as the division of powers between the EU and its Member States there is a strong need for a hard constitutional law to complement institutional design and political culture.[151] To refer again to Weiler and Fries, the rule of law and democracy require respect for the jurisdictional limits of the EU, and such respect cannot be achieved in the absence of hard law. The further legitimation of the European Union, where sovereignty is shared between States rather than merged, very much requires a clear constitutional document which is judicially enforceable. That, too, is a matter of protecting the rights of citizens.

If that is the case, then there is much to be said for creating more precision as to the meaning of Article 51 Charter. The current constitutional convention offers a window of opportunity for this. It could, for example, further specify what "implementing EU law" means: whether or not it includes the moving European citizen, and whether it extends to derogation cases. It could also define the jurisdiction of the EU courts to interpret the Charter. To the extent that there is particular concern as to that jurisdiction, it could even contemplate dissociating jurisdiction from scope: the scope of the Charter as regards the Member States could be defined more broadly, bearing in mind the duty of

150. See e.g. the difficulties associated with obtaining ratifications of Protocol 12 to the ECHR, an instrument whose provisions are very similar, even if their scope is broader, to those of the Race and General Framework Directives discussed above. The Directives, by contrast, came about very swiftly, and will benefit, as of the end of the transposition period, from EC law direct effect and supremacy.

151. *Contra* de Búrca, op. cit. *supra* note 121.

promoting the rights in the Charter, than the actual jurisdiction of the EU courts, e.g. under the preliminary rulings procedure. As regards the EU's powers in the human rights field, there could also be further clarification of their link with the Charter. And the scope of Article 13 EC could also be specified, for example by expressly indicating those areas in which non-discrimination legislation may be adopted.