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ARTICLE

The Diagonal Application of the EU Charter of Fundamental Rights: From "Displacement" through "Agency" to "Scope" and Beyond

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Abstract

The application of the EU Charter of Fundamental Rights to the Member States has given rise both to a controversial phraseology and a controversial case-law. This paper offers a reconstruction of the constitutional intent and proposes a conceptualization in conformity with the structural function and the constitutional contemplation of the *pouvoir constituent*. As to the phraseological debate, it demonstrates that the Charter's application to the Member States may occur by reason of either "implementation" or "interpretation" of EU law and the two strands are embraced but not synthetized by "scope" as a collective term. As to the substantive debate, it demonstrates that the CJEU's case-law on "implementation" is not only amorphous but also inconsistent with the Charter's constitutional mandate. The paper proposes a novel approach based on the notion that the application to the Member States is accessory to the supremacy of EU law. The paper's argument is presented in the following steps. First, the paper presents the pristine rationale and constitutional function of the application to the Member State through its emergence and historical context. Second, it provides a taxonomy and critical overview of the CJEU's amorphous case-law and presents the Court's futile attempt to create a coherent doctrine that faithfully reproduces the constitutional contemplation behind the diagonal application and that reflects the division of competences between the EU and its Member States. Third, it sets out the proposed doctrine of "displacement."

Keywords: CJEU; competence creep; conferral of powers; constitutional identity; EU charter of fundamental rights; implementation of EU law; member states; primacy of EU law; solange; scope of EU law; supremacy of EU law; ultra vires

Article 51 of the EU Charter of Fundamental Rights[1] contains the trigger of the Charter's application to the Member States. This makes it probably the most frequent battlefield of the European rule-of-law debates as Charter-based litigation against a Member State turns on the construction of this provision.[2] Article 51 provides that EU institutions always come under the scope of the Charter but "the Member States only when they are implementing Union law." This rule of scope (and competence) is one of the oldest EU law doctrines, which has already been

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[1]In this paper, the terms "human rights" and "fundamental rights" are used interchangeably. Although the latter may also embrace rights that are considered fundamental but not human rights in nature (e.g., free movement rights guaranteed by the EU internal market), for the purposes of this analysis, fundamental rights will be used in the sense of human rights.

[2]In this paper, for the sake of simplicity, constitutionalism and the rule of law will be used in a sense that also embraces fundamental rights (human rights).

featured in the EU Book of Genesis. The purview of the general rules of law that were the original bearers of EU fundamental rights are subject to the same limitation.

Article 51 has given rise to controversial phraseology and case law. First, it has been debated whether the Charter applies only to cases where the Member States implement EU law as the EU's agent or applies to all matters that come under the scope of EU law. Second, this strand of the debate has been a symptom of a substantive debate about the purview of Article 51, where the concept of implementation represents a conservative notion; by contrast, the concept of scope has a broader meaning. This paper aims to contribute to these strands of the debate by offering a reconstruction of the intended meaning and proposing a conceptualization in conformity with the structural function of Article 51 and the constitutional contemplation of the *pouvoir constituent*.

As to the phraseological debate, the paper demonstrates that the Charter's application to the Member States may occur by reason of either "implementation" or "interpretation" of EU law, and the two strands are embraced but not synthesized by "scope" as a collective term. The substantive debate demonstrates that the CJEU's case law on "implementation" is amorphous and inconsistent with the Charter's constitutional mandate. Over the years, the Court replaced its pristine conception of implementation with an approach that goes against the founders' constitutional contemplation and significantly beyond what the Member States ceded regarding sovereign power. The paper proposes a novel approach for this strand of application (termed the doctrine of "displacement") based on the notion that the diagonal application of the Charter is accessory to the supremacy of EU law: its purpose is to ensure the complete supremacy of EU law by obviating the need to apply national bills of rights. This implies that the Charter's diagonal application is warranted only in cases where EU law creates a constitutional vacuum by expelling ("displacing") the Charter's national counterpart. Whether a specific provision or a general requirement of effectiveness, EU law has supremacy over national law, including national constitutions. The Charter comes into play if and to what extent a provision of EU law disapplies a national bill of rights. Suppose EU law applies but does not exclude national human rights provisions. In that case, there is no constitutional vacuum and no reason to apply the Charter, and the question remains under national constitutional law. The proposed doctrine calls for a "rule-by-rule" examination. Applying the Charter by interpretation has given rise to significant case law in the wake of *ERT*.[3] In practice, the Charter is more often applied to the Member States through this avenue than by reasons of implementation of EU law. However, this strand of case law is not dealt with in detail in this paper, given that it turns on the application of a concept (restriction of free movement) extraneous to and developed independently of the Charter.

This paper's argument is presented as follows. Section 2 presents the pristine rationale and constitutional function of the application to the Member States through its emergence and historical context. Section 3 provides a taxonomy and critical overview of the CJEU's amorphous case law on the Charter's application by implementation and presents the Court's futile attempt to create a coherent doctrine that faithfully reproduces the constitutional contemplation behind the diagonal application that reflects the division of competences between the EU and its Member States. Section 4 sets out the proposed doctrine of "displacement." Section 5 contains the article's conclusions.

A. The Pristine Rationale and the Constitutional Function of the Diagonal Application

By way of terminology, the application of EU human rights to EU institutions is termed in this article as "horizontal" or "straight." By contrast, the application to the Member States is termed "diagonal" because it embraces cases where EU-level standards are applied to national-level actors. "Apparent diagonal application" refers to cases where EU human rights are applied to a Member State on account of its acting on behalf of the EU ("implementing Union law"[4]). This diagonal application is only apparent; EU human rights only apply because the national action is imputed

[3]C-260/89 ERT [1991] ECR I-02925, ECLI:EU:C:1991:254.

[4]Article 51 of the Charter.

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to the EU. In reality, however, it is horizontal and is based on the same rationale: no public power can exist without human rights limits; when Member States conferred power on the EU, they conferred it with concomitant constitutional limits. It appears diagonal because the EU does not act directly but through its agents, the Member States. On the other hand, "genuine diagonal application" refers to cases where Member States do not implement measures they empowered the EU to adopt but act under their original powers. Here, a EU human rights norm is applied to a Member State acting in a domestic matter.[5] The diagonal application is distinguished from "vertical application," where the federal bill of rights effectively replaces state bills of rights, thus virtually federalizing human rights protection.[6] This pattern is unknown in the EU's pluralistic constitutional architecture.[7] Notwithstanding the above conceptual distinctions, as a matter of practice, the apparent diagonal application may have very significant "spill-over effects" on domestic cases. It is an effective tool for EU institutions to enforce human rights in Member States, even in cases where they pursue domestic policies.[8]

The diagonal application of EU human rights emerged through two different avenues, which have remained conceptually isolated.[9] The genuine diagonal application (represented predominantly by Articles 2 and 7 TEU[10]) emerged recently and has remained rudimentary.[11] Article 2 TEU enounces that human rights (and other fundamental values) have to be respected but fails to specify this requirement in any meaningful way and attaches no effective enforcement mechanism.[12] Although the author of this paper proposed a limited application of the Charter to the Member States through Article 2 TEU by way of incorporation, this provision has never been applied on an independent legal basis.[13] Article 7 TEU provides for the suspension of membership rights in response to the eventual systematic violation of Article 2 TEU, but the requirement of

[5]By way of example, Article 157 TFEU provides for the principle of equal pay for men and women. This provision also applies when Member States are otherwise not implementing EU law.

[6]For proposals that the Charter should have a vertical scope, *see* Nora Chronowski, *Enhancing the Scope of the Charter of Fundamental Rights?*, 1 JURA 13 (2014); András Jakab, The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States, *in* REINFORCING RULE OF LAW OVERSIGHT IN THE EUROPEAN UNION 187 (C. Closa & D. Kochenov eds., Cambridge University Press, 2016); András Jakab, Application of the EU CFR by National Courts in Purely Domestic Cases, *in* THE ENFORCEMENT OF EU LAW AND VALUES 252, 255–60 (András Jakab & Dimitry Kochenov, eds., Oxford University Press, 2017); Aida Torres Pérez, Rights and Powers in the European Union: Towards a Charter that is Fully Applicable to the Member States?, 22 CAMBRIDGE YEARBOOK OF EUROPEAN LEGAL STUDIES 279 (2020).

[7]*See* NW Barber, *Legal Pluralism and the European Union* (2006) 12 ELJ 306; G Davies and M Avbelj (eds), RESEARCH HANDBOOK ON LEGAL PLURALISM AND EU LAW (Elgar, 2018); G Halmai, *Conclusive Remarks* (2018) 10(2) ITALIAN JPL 477. For an alternative term, *see* D Halberstam, Constitutional Heterarchy, *in* JL DUNOFF & JP TRACHTMAN (eds), RULING THE WORLD?: CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE) 326, 351–53.

[8]Csongor István Nagy, *The Diagonality Problem of the EU Rule of Law and Human Rights: Proposal for* an incorporation À L'Européenne (2019), 21(5) GERMAN L.J. 838, 840–41 (2020).

[9]In paras 36 and 44 of the ruling in Repubblika, C-896/19, ECLI:EU:C:2021:311, the CJEU suggested, in the context of Article 19 TEU, that Article 51 of the Charter is not relevant to fundamental rights protection as guaranteed by the TEU.

[10]Article 2 TEU simply enounces that the Member States must generally respect human rights (and other fundamental values).

[11]It was introduced by the Treaty of Amsterdam in 1999, inserted in Article 6 of the then-effective TEU, *see* Jan Wouters, Revisiting Art. 2: A true Union of values, 5(1) EUROPEAN PAPERS 255–77 (2020), and reformulated by the Treaty of Nice in 2001 and the Treaty of Lisbon in 2007, in response to the "Haider affair". Gráinne de Búrca, *Beyond the Charter: How enlargement has enlarged the human rights policy of the European Union,* 27 FORDHAM INTERNATIONAL LAW JOURNAL 679, 680 and 695–99 (2004); Per Cramér and Pål Wrang, The Haider Affair, Law and European Integration (2001), Faculty of Law, Stockholm University Research Paper No. 19. These provisions may reflect political tokenism: Article 2 TFEU has never been relied on as an independent legal basis (though it has an interpretative role), and Article 7 TEU has never been successfully applied. There are pending procedures against Hungary and Poland. However, these are stuck in the Council, where the initiative has not been put to vote for many years, presumably because of the lack of unanimity.

[12]See Jan Wouters, *Revisiting Art. 2 TEU: A True Union of Values?*, 5(1) EUROPEAN PAPERS 255 (2020) ("[T]here is a striking asymmetry between the proclamation of the values in Art. 2 and the Union's competences to act upon these values.")

[13]The CJEU has never used Article 2 TEU alone but only in combination with another legal basis, which could stand alone. In this practice, Article 2 TEU serves merely as an interpretive role.

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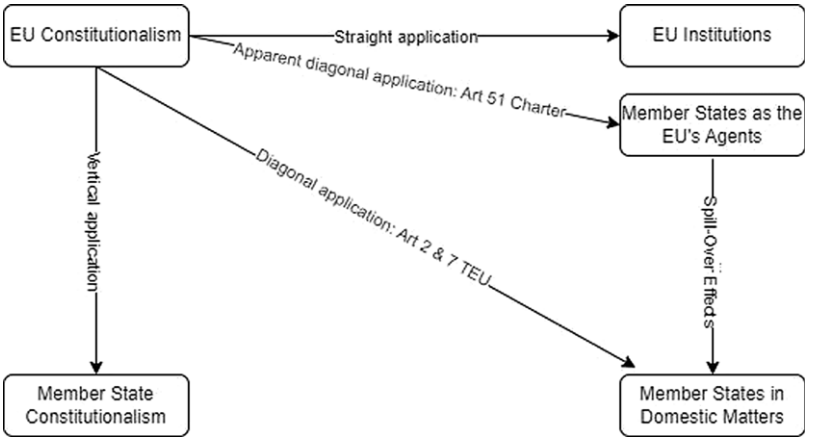
unanimity stifles the mechanism's political feasibility.[14] Article 7 TEU has never been successfully applied:[15] it creates the impression that it was set up with the animus that it would never be applied at all. On the contrary, the apparent diagonal application of EU human rights emerged very early (initially as "general principles of law," then turned into the Charter in 2000), evolving into a cornerstone of European constitutional architecture. Its function was never to limit Member States but to curb the EU.[16] It was an extension of the horizontal application to Member States because they acted as the EU's "agents"; their actions were attributable to the EU.[17]



The emergence and historical trajectory of the apparent diagonal application demonstrate that its pristine function and rationale was to secure that national courts, including national constitutional courts, would accept the supremacy of EU law. Quite obviously, the CJEU could not reasonably expect national courts to abstain from reviewing EU law under the national constitution without ensuring that EU law secured the same level of constitutional protection.[18] As part of this process, the Court first established that the EU's operations were subject to constitutional requirements. The recognition that, in reality, the chief administrators and enforcers of EU law were not the EU institutions but national authorities entailed, in the second step, the extension of these EU requirements to the Member States acting in place of the EU. The apparent diagonal application was ancillary to and concomitant with EU law's supremacy.

The implementation of EU law is not the only reason why the Charter has and should continue to have a role with Member States. The Charter is the gold standard of EU human rights law. It should be

[14]See Koen Lenaerta's *Fundamental rights in the European Union*, 25(6) ELR 575, 586–88 (2000).

[15]There are pending procedures against Hungary and Poland. However, these are stuck in the Council, where the initiative has not been put to the vote for many years, presumably because of the lack of unanimity.

[16]*Cf.* C-617/10 *Åkerberg Fransson*, ECLI:EU:C:2012:340, para. 37 ("The effect is that the assumption by the Union of responsibility for guaranteeing fundamental rights when Member States exercise public authority in those cases must be examined in terms of a transfer, in the sense that the original responsibility of the Member States is passed to the Union as far as that guarantee is concerned."); Koen Lenaerta's *Exploring the Limits of the EU Charter of Fundamental Rights* (2012), 8(3) EUROPEAN CONSITUTIONAL LAW REVIEW 375, 377 (The fact that the Charter is legally binding does not imply that "the EU has become a 'human rights organisation' or that the ECJ has become 'a second European Court on Human Rights' (ECtHR)."

[17]*See* Daniel Denman, *The Charter of Fundamental Rights*, (4) EUROPEAN LAW RIGHTS REVIEW 349, 351 (2010); Filippo Fontanelli, *Implementation of EU law through domestic measures after Fransson: the Court of Justice buys time and "non-preclusion" troubles loom large*, 39(5) EUROPEAN LAW REVIEW 682, 683 (2014).

[18]*See* G. Federico Mancini, *A Constitution for Europe*, 26 COMMON MARKET LAW REVIEW 595, 611 (1989) ("Reading an unwritten Bill of Rights into Community law … was forced on the Court from the outside, by the German and, later, the Italian Constitutional Courts.") *See also* Thomas von Danwitz, *The Charter of Fundamental Rights of the European Union between Political Symbolism and Legal Realism*, 29 DENVER JOURNAL OF INTERNATIONAL LAW AND POLICY 289, 300–302 (2001); Daniel Sarmiento, *Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe*, 50 COMMON MARKET LAW REVIEW 1267, 1268–69 (2013).

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applied and has been applied by the CJEU by reason of interpretation as an emanation of intertextuality. EU legal instruments to be applied by Member States may set out rights, procedural safeguards, and protective rules with explicit or implicit reference to the Charter. Article 2 TEU, which defines the founding values of the EU, and Article 7 TEU, which attaches a procedure to these, have an intertextual relation to the Charter.[19] The most notable example is the idea established in *Elliniki Radiophonia Tiléorassi — Anonimi Etairia* (*ERT*) that the exceptions to the four freedoms "must be interpreted in the light of the general principles of law and in particular of fundamental rights."[20] In these cases, however, the Charter is not applied by reason of implementation. Conceptually, it is not even *applied* but is used as a *source of systematic interpretation* to define and conceptualize rules of EU law; hence, it does not feature in the above chart. This application has a different rationale and is not termed a "diagonal application" but an application by reason of interpretation.

I. The Charter's Horizontal (Straight) Application

In the first three decades of European integration, the question of whether human rights requirements applied to the EU and erecting such requirements against the Member States was out of the question. The original text of the founding treaties contained no reference to the rule of law or human rights whatsoever, and the CJEU, in 1959, when first confronting the question in *Stork*,[21] quite logically refused to read such requirements into EU law. It ruled out the application of the constitutional principles of German law but provided no EU law surrogate. A decade later, however, the Court had a "Pauline moment." In *Stauder*,[22] the CJEU held that EU law encompasses a set of general principles of law that are part of EU law, although not provided for explicitly, and fundamental rights were part of these. The CJEU sensed that the recognition of human rights (and the rule of law more generally) was, as a precondition of EU law's supremacy, a constitutional necessity.[23]

Although the Court's reasoning at the time was fundamentally styled after the *Cour de cassation*, which resulted in laconic, underexplained judgments,[24] the Court was probably driven by two considerations.

First, it is a fundamental principle of political philosophy that no public power may exist without constitutional limits. Before the Enlightenment, it was accepted that public power was not limitless.[25] Since then, it has generally been accepted that a limit is a citizen's inalienable (fundamental) right.[26] The idea of a social contract purports to define the hypothetical agreement that people would have concluded if they had been more conscious when creating the state. An important element of this theory is that citizens, in exchange for the benefits the state would provide, ceded their rights to the state, but some of these were so fundamental that they considered them inalienable and, hence, kept them. Member States have no unlimited public power; their

[19]Csongor István Nagy, *The Diagonality Problem of EU Rule of Law and Human Rights: Proposal for an Incorporation À L'Européenne* (2019), 21(5) GERMAN LAW JOURNAL 838 (2020).

[20]Para. 43. This notion has been part of the case law since then. See e.g., Case C-390/12, *Pfleger*, ECLI:EU:C:2014:281, paras 31–36. It is noteworthy that, when first encountering the question in *Cinéthèque*, in Joined Cases 60-61/84, ECLI:EU:C:1985:329, the CJEU refused to incorporate fundamental rights protection into the exceptions to free movement. See paras 25–26.

[21]Case 1/58 *Stork*, ECLI:EU:C:1959:4. The CJEU applied the ECSC Treaty.

[22]Case 29/69 *Stauder*, ECLI:EU:C:1969:57.

[23]*See* Tomasz Jurczyk, The role of the Court of Justice of the European Union in setting European Union standards of protection of fundamental rights, *in Międzynarodowa ochrona praw człowieka – współczesne problemy na świecie* 141, 142–44 (Mariusza Jabłońskiego, Tomasza Jurczyka, Patryka Gutierreza ed., Wrocław, 2015).

[24]*See* MITCHEL LASSER, JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY 103–41 (Oxford University Press, 2004).

[25]*See,* e.g., Camilla St. Thomas Aquinas, *Summa Theologiae* 1–2, q. 96, a. 5 (Alfred J. Freddoso trans., University of Notre Dame) (1485) (Reply to objection 2). *See also* Gábor Hamza, Jogösszehasonlítás és természetjog, 40(8) Jogtudományi Közlöny 447 (1985).

[26]*See*, e.g., Jean-Jacques Rousseau, *Le contrat social ou principes du droit politique* (1762); John Locke, *Two Treatises of Government* I, paragraph 63 (1823).

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power is confined by constitutionalism. Since Member States could not confer more power on the EU than they already had, they could only confer sovereign power within its concomitant limits. Under international law, a state may enter into a treaty that breaches its constitutional provisions and "may not invoke the provisions of its internal law as justification for its failure to perform."[27] Nonetheless, by signing the founding treaties, the Member States did not simply enter into a "contractual commitment" but conferred sovereign powers (parts of their sovereignty) on the EU and, accordingly, vested the EU with sovereign powers. The more polity-like (and less international organization-like) the EU is, the more compelling this argument is. The idea that citizens have inalienable rights is so obvious that it is inconceivable for the EU to have public power without being subject to constitutional requirements.

Second, the CJEU also had a clear, practical (strategic) reason to read constitutionalism into EU law (closely linked to the above philosophy). It would have been difficult, if not impossible, for national courts, including constitutional courts, to accept the transfer of sovereign prerogatives if the EU did not guarantee respect for human rights and the rule of law.[28] In this sense, the supremacy of EU law was conditioned by the EU's subjection to the requirement of constitutionalism. The CJEU could not expect national judiciaries to put up with losing their power to review EU actions based on their national constitution if it could not guarantee that EU law contained similar provisions. In 1969, when the judgment in *Stauder* was handed down, the supremacy of EU law was not a well-settled principle; it was merely emerging. The ruling in *van Gend & Loos*,[29] the *Marbury v. Madison*[30] of European integration, was handed down in 1963, but it did not clarify the hierarchy between EU law and national constitutions. It was only in 1970 that the CJEU pronounced the supremacy of EU law over national constitutions in *Internationale Handelsgesellschaft*,[31] one year after reading constitutionalism into EU law in *Stauder*. Theoretically and practically, it would have been impossible for the Court to put aside national constitutions if it had not introduced EU constitutionalism in the first place. It would have created a tyranny (public power without any constitutional limit), and national courts would not have accepted the doctrine. The term "constitutional traditions common to the Member States" implies that the CJEU promises to ensure that the EU's actions meet national constitutional requirements, so there is no need for national courts to deal with this. The CJEU's judgment in *Internationale Handelsgesellschaft* links supremacy issues over national constitutions and EU constitutionalism.[32]

The CJEU's strategy was successful: the constitutional trade-off worked out.[33] After the CJEU's preliminary ruling in *Internationale Handelsgesellschaft*, the German administrative court also referred the question to the *Bundesverfassungsgericht*, which handed down its famous *Solange I*[34] judgment. However, this was followed by *Solange II*[35], where the *Bundesverfassungsgericht* accepted the CJEU's outstretched hand and held that as long as EU law provides for a sufficiently high level of human rights protection, the German Constitutional Court would refrain from reviewing EU legal acts under the *Grundgesetz*.[36] This also implies that the purpose of this strand

[27]Article 27 of the 1969 Vienna Convention on the Law of Treaties.

[28]Leonard F.M. Besselink, *The Member States, the National Constitutions and the Scope of the Charter*, 8(1) MAASTRICT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 68, 69 (2001) ("[T]he Court only took this stance following the threat of a revolt by national courts.")

[29]Case 26/62 *van Gend & Loos*, ECLI:EU:C:1963:1.

[30]5 U.S. (1 Cranch) 137 (1803).

[31]Case 11/70 *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114.

[32]Paras 3–4.

[33]*See* Matthias Mahlmann, *1789 Renewed? Prospects of the protection of human rights in Europe*, 11 CARDOZO JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 903, 905–09 (2004).

[34]37 BVerfGE 271 (1974).

[35]73 BVerfGE 339 (1986).

[36]*See* Steven A. Bibas, *The European Court of Justice and the U.S. Supreme Court: Parallels in fundamental rights jurisprudence*, 15 HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW 253, 260–67 (1992).

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of EU constitutionalism was not to limit national actions in any sense but to ensure that EU actions remain within the confines of constitutionalism.

II. Extension to the Member States: Apparent Diagonal Application

It is a special trait of the EU that its "federal" institutional capacity does not even compare to its lawmaking powers. The EU's convoluted constitutional architecture is a natural consequence of the EU's idiosyncratic institutional structure and mirrors the fact that the EU is a legal giant but an institutional dwarf. The idea of "integration through law" implies that EU law is centralized, but its enforcement is not. The Member States conferred broad legislative powers on the EU but were quite hard-fisted when it came to financing institution-building.[37] This resulted in an arrangement whereby the EU heavily relies on national authorities and courts to enforce EU law. In fact, Member States apply EU law more often than the EU itself. This is reinforced by the proliferation of legal harmonization through directives, which are not meant to be applied directly to flesh-and-blood cases but to create a framework for national measures.[38] The EU rules on customs, VAT, and unfair commercial practices are predominantly applied by national authorities. Even in EU competition law, which is an emblematic field of EU law, national competition authorities carry the day in terms of the number of proceedings. Although the Commission investigates major cases, the majority of EU competition cases are handled by national competition authorities.[39]

The term "integration through law"[40] is a euphemism for this asymmetric architecture. EU law succeeds because it is accepted as "the supreme law of the land" and is applied by national authorities and courts. This architecture is in stark contrast with most federal polities where the federal government has a prominent or predominant (though not exclusive) role in enforcing federal law.[41] In the US, the scope of the US Bill of Rights was extended diagonally by way of incorporation.[42] However, this was not the result of an administrative-institutional necessity but an effort to incorporate fundamental rights against the states. This is why the US Bill of Rights has never had apparent diagonal application but gradually acquired genuine diagonality.[43]

It follows from the above architecture that the Charter, even though set up by the Member States to limit the federal government and not the other way around, should have a "long-arm scope" and apply to the Member States when they act instead of the EU.[44] For the CJEU, it took

[37]*See* Roger Daniel Kelemen, Regulatory Federalism: The European Union in Comparative Perspective (Dissertation, Stanford University, 1998).

[38]*See Mads Andenas & Camilla Baasch Andersen* (eds.), THEORY AND PRACTICE OF HARMONIZATION (Edward Elgar, 2012); ISIDORA MALETIĆ, THE LAW AND POLICY OF HARMONIZATION IN EUROPE'S INTERNAL MARKET (Edward Elgar, 2013).

[39]Commission Notice on cooperation within the Network of Competition Authorities, [2004] OJ C 101/43.

[40]*See* Mauro Cappelletti, Monica Seccombe & Joseph H. H. Weiler, Integration Through Law: Europe and the American Federal Experience. A General Introduction, *in* INTEGRATION THROUGH LAW. BOOK 1: A POLITICAL, LEGAL AND ECONOMIC OVERVIEW 3 (De Gruyter, 1986); Loïc Azoulai, "Integration through law" and us, 14(2) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 449 (2016).

[41]*See*, e.g., Margaret H. Lemos, *State Enforcement of Federal Law*, 86 NEW YORK UNIVERSITY LAW REVIEW 698–765 (2011).

[42]*See*, e.g., G. C. Rodríguez Iglesias, *The protection of fundamental rights in the case law of the Court of Justice of the European Communities*, 1 COLUMBIA JOURNAL OF EUROPEAN LAW 169, 176 (1995).

[43]Koen Lenaerta's *Fundamental rights in the European Union*, 25(6) EUROPEAN LAW REVIEW 575, 591–92 (2000); Csongor István Nagy, *The Diagonality Problem of EU Rule of Law and Human Rights: Proposal for an Incorporation À L'Européenne*, 21(5) GERMAN LAW JOURNAL 838, 850–55 (2020). *Cf.* ROBERTA SCHITZE, EUROPEAN FUNDAMENTAL RIGHTS AND THE MEMBER STATES: FROM SELECTIVE TO TOTAL INCORPORATION, 14 Cambridge Yearbook of European Legal Studies 337, 338–39 (2012) ("[US law] makes incorporation dependent on the *type of fundamental right* at issue, the European incorporation doctrine makes the application of federal fundamental rights to the States dependent on the *type of State action* involved.").

[44]*See* Bernhard Schima, *EU fundamental rights and Member State action after Lisbon: Putting the ECJ's case law in its context*, 38 FORDHAM INTERNATIONAL LAW JOURNAL 1097, 1100 (2015); Mirjam de Mol, *Article 51 of the Charter in*

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three decades to establish this prong of horizontal application. Thirty years after *Stauder*, in *Wachauf*,[45] the CJEU held that the Member States have to respect the general principles of law when implementing EU law. The case featured a contradiction similar to *Stauder*. The German authorities were required to apply EU law, which, in their reading, breached fundamental rights under the *Grundgesetz*. Denying fundamental rights protection in this case was inconceivable. In the same vein, subjecting German authorities to the requirements of German constitutional law would have gone counter to the doctrine of supremacy since that would have subverted EU law to German constitutional law. The only possible way out was to immunize the national application of EU law from German constitutional requirements and to subject it to the corresponding EU requirements.

It appears that the CJEU could do neither more nor less. There was no legal basis for a broader scope and no normative warrant for it being narrower. Not extending the general principles of law would have undermined the supremacy of EU law in the same way as *Stauder*, but even more significantly. However, it is important that this rationale also limits the purview of the apparent diagonal application: this is warranted only to the extent that horizontal application is justified. This rationale gave rise to the "agency" theory: the reason why the general principles of law apply to the Member States is that, in certain cases, their actions are attributable to the EU itself and, as an emanation of the *respondeat superior* principle, agents cannot be allowed to transgress limits their principal cannot do.[46]

The above thinking features in the Charter were likewise meant to check EU institutions.[47] Although its explanatory note mentions this term,[48] Article 51 of the Charter makes no reference to the "scope" of EU law whatsoever and binds its application to the implementation of EU law. The various language versions differ slightly, but most refer to implementation in terms of application or enforcement of (and not mere coverage by) EU law.[49]

It should be noted that, notwithstanding the above conceptual distinctions, the apparent diagonal application may have significant spill-over effects, and this may make it an effective tool for EU institutions to enforce matters of human rights on Member States, even in cases where they pursue domestic policies. This phenomenon is an unexpected boomerang: the rule-of-law requirements that the Member States were initially set up to curb the EU are now applied by the EU to curb its Member States. The spill-over effects of the apparent diagonal application are highly significant. If it is impossible to split the matter between EU and national law, the Charter will embrace the whole matter, including elements of national law. This happened, for

the Legislative Processes of the Member States, 23 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW, 640, 646–47 (2016).

[45]Case 5/88 *Wachauf*, ECLI:EU:C:1989:321.

[46]*See* J.H.H. Weiler & Nicolas J.S. Lockhart, *"Taking rights seriously" seriously: The European Court and its fundamental rights jurisprudence – part I*, 32 COMMON MARKET LAW REVIEW 51, 63–64 and 73–74 (1995); Nicolas J.S. Lockhart and Joseph H.H. Weiler, *"Taking rights seriously" seriously: The European Court and its fundamental rights jurisprudence – part II*, 32(2) COMMON MARKET LAW REVIEW 579, 605–08 (1995).

[47]*See* Filippo Fontanelli, *The Implementation of European Union law by Member States under Article 51(1) of the Charter of Fundamental Rights*, 20(2) COLUMBIA JOURNAL OF EUROPEAN LAW 193, 197–98 (2014).

[48]Explanations relating to the Charter of Fundamental Rights, [2007] OJ C 303/17.

[49]In the English Version: "they are implementing Union law"; in the French version: "ils mettent en œuvre le droit de l'Union"; in the German version: "bei der Durchführung des Rechts der Union"; in the Italian version: "nell'attuazione del diritto dell'Unione; in the Hungarian version: "az Unió jogát hajtják végre." At the same time, for instance, the Spanish version uses a vaguer language: "cuando apliquen el Derecho de la Unión," the same as the Romanian version: "pun în aplicare dreptul Uniunii". For an analysis of the application of the Charter by the Hungarian Constitutional Court, see Márton Sulyok & Lilla Nóra Kiss, *In Unchartered Waters? The Place and Position of EU law and the Charter of Fundamental Rights in the jurisprudence of the Hungarian Constitutional Court*, 7 Hungarian Yearbook of International Law and European Law 395 (2021); Ondrej Hamuľák, Márton Sulyok & Lilla Nóra Kiss, *Measuring the 'EU'clidean distance between EU law and the Hungarian Constitutional Court – focusing on the position of the EU Charter of Fundamental Rights*, 10 Czech Yearbook of Public and Private International Law 130 (2019).

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instance, in *Åkerberg Fransson*.[50] Sweden established a general tax offense. The CJEU found the Charter applicable to the VAT strand of the tax offense as this came under the scope of EU law, and, as this could not be separated from the other strands, the Charter applied to tax offenses at large, including non-VAT violations. A similar logic can be perceived in relation to the independence of the judiciary (which has been addressed by the CJEU under Article 19 and not the Charter).[51] EU law requires Member State courts be independent when applying EU law, and it arguably erects no requirements against them when applying national law. Nonetheless, the EU law requirement spills over: the same courts apply both EU and national law, and splitting them along this line is impossible. As a corollary, the requirement of independence set out with respect to the application of EU law applies equally to national courts when applying national law. The result of the lockstep effect is that the requirement of judicial independence will, in effect, apply in general.

III. The Charter's Intertextual Application

As explained above, the Charter may be applied not only by reason of implementation but also by reason of interpretation. A significant example is the *ERT* case law, where the CJEU read the general principles of law, including EU human rights, into the requirements Member States need to meet to rely on an exception to free movement. This strand of case law made it clear that EU fundamental rights do not apply by reason of implementation but by interpretation. In *ERT*, the CJEU did not refer to reliance on a derogation as implementation of EU law; it simply ruled that the exceptions to free movement "must be *interpreted in the light of* the general principles of law and in particular of fundamental rights."[52] A long line of subsequent case law has endorsed this.[53]

This conceptualization was embroiled when the fundamental rights embedded in the general principles of law were converted into the Charter. Article 51 and the attached explanatory note create a triangular construction made up of "implementation," "interpretation," and "scope," but Article 51 refers solely to "implementation." As a result, neither scope nor interpretation has a textual link to the Charter; hence, the verbatim meaning embraces application in the sense of *Wachauf* but not *ERT*. However, the explanatory note refers to all three terms. It conflates the application by reason of implementation and the application by reason of interpretation under the overarching term of "scope" ("when they act in the scope of Union law.") This can give rise to diverging interpretations. It may be argued that the drafters intended to extend the scope of the Charter by replacing implementation with scope, which, arguably, is supposed to have a broader meaning. The problem with this argument is that the language of Article 51 makes no reference to scope whatsoever, and the explanatory note makes it clear that the intention was nothing more and nothing less than converting the then-existing case law into Article 51. It may be argued that the language indicating a broader purview could not meet the Member States' political approval; hence, this

[50]Case C-617/10 *Åkerberg Fransson*, ECLI:EU:C:2013:105

[51]*See* Case C-64/16 *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas,* ECLI:EU:C:2018:117 and Case C-619/18 *Commission v. Poland*, ECLI:EU:C:2019:531 for an in-depth analysis of the ruling, *see* Laurent Pech & Sébastien Platon, Court of Justice Judicial Independence under Threat: The Court of Justice to the Rescue in the *ASJP* Case, 55(6) *Common Market Law Review* 1,827 (2018); Case C-791/19 *Commission v Poland*, ECLI:EU:C:2021:596; Case C-896/19 *Repubblika v Il-Prim Ministru*, ECLI:EU:C:2021:311. For a general overview of the case law, *see* Laurent Pech & Dimitry Kochenov, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case*, SIEPS 2021:3, available at https://www.sieps.se/globalassets/publikationer/2021/sieps-2021_3-eng-web.pdf? (Accessed January 1, 2024).

[52]Para. 43. (Emphasis added). See also Case C-299/95 *Kremzow*, EU:C:1997:254, para. 14 ("[M]easures are not acceptable in the Community which are incompatible with observance of the human rights thus recognized and guaranteed.").

[53]Case C-368/95 *Familiapress*, ECLI:EU:C:1997:325, para. 24; Joined Cases C-482, and 493/01 *Orfanopoulos*, EU:C:2004:262, para. 97; Case C-145/09 *Tsakouridis*, EU:C:2010:708, para. 52; Joined Cases C-422/09, C-425/09, and C-426/09 *Vandorou*, ECLI:EU:C:2010:732, para. 65.

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was hidden in the explanatory note. This, however, would indirectly confirm that the intention of the *pouvoir constituent* has a narrow meaning.

Although one may sense more principled considerations behind the text, it is submitted that the apparently conflicting terminology can be traced back to technical reasons. Very probably, there is a disappointingly simple explanation for why the text was drafted as it was. Namely, this was probably the easiest way to put the Court's case law into codified language. At that time, no generally accepted collective noun could jointly refer to *Wachauf* and *ERT*, let alone terminological shorthand for the latter. *Wachauf* could be referred to as "implementation," but referring to *ERT* as "interpretation" was not settled language. The drafters filled this gap by creating a collective term: "scope." Nonetheless, for political reasons, Article 51 had to use conservative language. Putting a new term into the statutory text could have appeared suggestive of a departure from the case law, for which there was no political intent. At the same time, for linguistic reasons, a collective noun had to be coined that enabled a convenient shorthand reference to both *Wachauf* and *ERT*. Hence, Article 51 uses implementation, but the explanatory note clarifies this as *pars pro toto*. At the same time, the explanatory note uses scope to refer to both cases. This is probably the only way to explain the terminological triangle, taking into account the fact that the explanatory note leaves no ambiguity that constitutional intent put an equality sign between Article 51 and the then-existing case law. To argue that Article 51 extended the purview of EU human rights law is just as unreasonable as arguing that Article 51 invalidated *ERT* by referring solely to implementation.[54]

Not surprisingly, the first encounters with the inconsistently presented terminology caused confusion in judicial practice. In *Pfleger*,[55] the CJEU used the three terms in a single paragraph.[56] The Court reiterated the standard language of *ERT*, indicating an interpretive role "must be interpreted in the light of."[57] It held that when a Member State justifies a restriction to free movement, it acts under the scope of EU law and, therefore, must be regarded as "implementing Union law."[58] The ruling featured the Court's effort to conceptualize the contradictory terminology of the Charter, and the explanatory note showed that implementation and interpretation were not conflated. In the same vein, the ruling in *Berlington*,[59] adopted a year later, simply provides that reliance on an exception to free movement is governed by the Charter by reason of interpretation.[60] However, the implementation usage prevailed, and the language of *ERT* was replaced with a language suggesting that this strand of application was also based on implementation.[61] Accordingly, "scope" means "implementation" and "interpretation," but in the language of Article 51, "implementation" means both "implementation" and "interpretation."

In reality, the Court had little choice. Article 51 refers to implementation, and the explanatory note indicates that Article 51 applies to both implementation and interpretation and refers to them as scope. This terminological inconsistency could not be overcome other than by using implementation in the broader sense to refer to implementation and interpretation in the narrower sense simultaneously. The Court has no power to replace the statutory language with a better phraseology. Nonetheless, referring to interpretation as a form of implementation within the meaning of Article 51 did not mean that the application of the Charter to the Member States was extended.

[54]See Opinion of AG Bot in Case C-108/10 *Scattolon*, paras 116–18.

[55]Case C-390/12 *Pfleger*, ECLI:EU:C:2014:281.

[56]Para. 36.

[57]Para. 35.

[58]Para. 36.

[59]Case C-98/14 *Berlington* ECLI:EU:C:2015:386.

[60]Para. 74 ("such justification must also be interpreted in the light of the general principles of EU law, in particular the fundamental rights now guaranteed by the Charter").

[61]See, e.g., C-201/15 *AGET Iraklis*, EU:C:2016:972, paras 64; C-235/17 *Commission v Hungary (Rights of usufruct over agricultural land)*, EU:C:2019:432, paras 64–65; Case C-78/18, *Commission v Hungary (Transparency of Associations)*, EU:C:2020:476, para. 101.

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B. The CJEU's Case Law on the Diagonal Scope of Article 51

The scholarship and the case law have made various attempts to create a consistent doctrine for diagonal application. The most extreme position is "verticalization," which would make the Charter fully applicable to the Member States, including domestic matters.[62] AG Jacobs advocated a more limited but quite extensive application in *Konstantinidis v Stadt Altensteig* with respect to the Charter's predecessor, the general principles of law. He argued that EU citizens exercising their right to free movement should fully enjoy the benefits of the Charter.[63] In *Centro Europa*,[64] AG Maduro made a congener proposal based on European citizenship and free movement but limited the diagonal application to the "serious and persistent breach of fundamental rights" and cases where "the protection of fundamental rights in a Member State is ... gravely inadequate."[65] AG Sharpston proposed a similarly extensive scope in *Zambrano*, who put forward that the Charter should be applicable in all areas where the EU has legislative competence (whether exclusive or shared and whether it has been exercised or not).[66] On the other hand, AG Cruz Villalón argued for a narrower (and less utopian) conception of diagonality in *Åkerberg Fransson*,[67] though the Court apparently rejected his conception. AG Cruz Villalón distinguished between situations where EU law is the "*causa*" and where it is merely an "*occasio*"[68] and proposed a case-by-case approach.[69] He argued that the Charter's application is warranted in cases where "Union law ... [has] a presence at the origin of the exercise of public authority"[70] and "the lawfulness of public authority in the Union may be at stake, and there must be an adequate response to that situation."[71] The diagonal application of the Charter is warranted only where EU law has "a presence at the origin of the exercise of public authority,"[72] and the EU has a "specific interest ... in ensuring that that exercise of public authority accords with the interpretation of the fundamental rights by the Union."[73]

Although the CJEU has refused to "verticalize" the Charter, its case law has been highly expansive and detached from the rationale that justifies the very existence of diagonality. The Court developed a case-by-case analysis without creating a holistic guiding principle. This may be explained by its failure to identify the constitutional function and the rationale of the diagonal application.[74]

The key notion of the Court's jurisprudence is that there needs to be a genuine link between the matter and EU law for the diagonal application of the Charter. The case law showcases that this notion is inadequate by implying an unpredictable case-by-case analysis based on a misconception about the function of the Charter's diagonal application. The Charter's diagonal vector is not the

[62]See, e.g., Nóra Chronowski, Enhancing the Scope of the Charter of Fundamental Rights?, 2014 JURA 13 (2014); András Jakab, Application of the EU CFR by National Courts in Purely Domestic Cases, in The Enforcement of EU Law and Values 252, 255–60 (András Jakab & Dimitry Kochenov (eds.), OUP 2017).

[63]Opinion of AG Jacobs in Case C-168/91 Christos Konstantinidis v Stadt Altensteig - Standesamt and Landratsamt Calw – Ordnungsamt, ECLI:EU:C:1992:504, para. 46 ("In my opinion, a Community national who goes to another Member State as a worker or self-employed person ... is entitled not just to pursue his trade or profession and to enjoy the same living and working conditions as nationals of the host State; he is in addition 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 of 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.")

[64]Opinion of AG Maduro in Case C-380/05 *Centro Europa*, ECLI:EU:C:2007:505, paras 20–22.

[65]Paras 21–22.

[66]Opinion of AG Sharpston in Case C-34/09, Gerardo Ruiz Zambrano, ECLI:EU:C:2011:124, paras 163–70.

[67]C-617/10 Åkerberg Fransson, ECLI:EU:C:2012:340.

[68]Para. 61.

[69]Para. 45.

[70]Para. 33.

[71]Para. 41.

[72]Para. 33.

[73]Para. 40.

[74]Cf. AG Cruz Villalón's opinion in C-617/10 Åkerberg Fransson, ECLI:EU:C:2012:340, para. 39. ("now is the time for the Union judicature to make an additional effort to rationalise the basic but indeterminate view that the Member States are subject to the Charter 'when they are implementing Union law.'")

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result of a constitutional shift of power but an accessory of the doctrine of supremacy. Contrary to Articles 2 and 7 TEU, by adopting the Charter, the Member States conferred no human rights power on the EU.

The CJEU's case law has conceived the diagonal scope of the Charter very widely, way beyond the structural function and constitutional contemplation. At times, this conception has been staggering and given rise to the suspicion that end-driven motivations might influence it. The pristine understanding of the Charter's diagonal scope had in view cases where the application of the national constitution impaired the supremacy of EU law.[75] The language of the Charter reconfirms this when referring to the "implementation" of EU law.[76] Nonetheless, the Court replaced this approach with the notion of a thematic division of competences between the EU and Member States.

The case law is presented through the following taxonomy.[77] First, the general legal test is set forth, which turns on the "degree of connection" to EU law and the existence of a "specific obligation." Second, how the CJEU has coped with EU mechanisms ancillary to national law is demonstrated. Third, it is demonstrated that the Court has followed a purely thematic approach in "European matters." Fourth, it adopted a similarly assertive approach regarding sanctions imposed when enforcing a transposed directive (national implementing measures). Fifth, the Court's attitude has changed concerning "opt-ups" in minimum harmonization directives is presented. Sixth, it demonstrates the difference between opt-ups and inadvertent over-implementation and why the Charter governs the latter. Seventh, the overstretching of diagonality entails the cumulation of EU and national standards, demonstrating that this cumulation is diagnostic of incongruence with the rationale of diagonality.

I. The General Doctrine

The CJEU has consistently refused to explicitly attribute genuine diagonal applicability to the Charter,[78] no matter how striking the divergence from the Charter's substantive provisions was,[79]

[75]*See* Michael Dougan, *Judicial review of Member State action under the general principles and the Charter: Defining the "scope of Union law,"* 52(5) COMMON MARKET LAW REVIEW 1201, 1243–44 (2015).

[76]*See supra*, 1210–11 (The Court's 'classic case-law' under the general principles of law "looks for the existence of some concrete Union norm applicable to the situation at the national level; then seeks to identify some direct relationship between that concrete Union norm and the disputed domestic act.")

[77]For alternative taxonomies, *see* Daniel Sarmiento, *Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe*, 50 COMMON MARKET LAW REVIEW 1267, 1279–85 (2013); Mirjam de Mol, *Article 51 of the Charter in the Legislative Processes of the Member States*, 23 MAASTRICT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 640, 647–50 (2016); Benedikt Pirker, *Mapping the Scope of Application of EU Fundamental Rights: A Typology*, 3(1) EUROPEAN PAPERS 133 (2018).

[78]*See*, e.g., *see also,* Case C-457/09 *Chartry* ECLI:EU:C:2011:101 (income tax dispute); Case C-40/11 *Yoshikazu Iida*, ECLI:EU:C:2012:691; Cases C-483/11 and C-484/11 *Boncea*, EU:C:2011:832, para. 29 (compensation for political prisoners under the Communist regime); Case C-87/12 *Ymeraga*, ECLI:EU:C:2013:291; Case C-134/12 *Corpul Național al Polițiștilor*, paras 12–13 (reduction of the salary of policemen); Case C-483/12 *Pelckmans Turnhout*, EU:C:2014:304 (Belgian Sunday closing law), para. 22; Case C-498/12 *Pedone*, paras 13–14 (legal aid); Case C-499/12 *Gentile*, paras 13–14 (settlement of attorney's fees); Case C-73/13 *T*, para. 13; Case C-333/13 *Dano*, ECLI:EU:C:2014:2358; Case C-789/18, and C-790/18 *Corte dei Conti*, EU:C:2019:417; Case C-14/13 *Cholakova* ECLI:EU:C:2013:374 (arrest by the police for refusing to present an identity card); C-395/15 *Daouidi*, EU:C:2016:917, para. 64 (The CJEU held that temporary incapacity did not come under the scope of Directive 2000/78 since it did not amount to a "disability," hence, the Charter did not apply.); Case C-80/18 to C-83/18 *UNESA*, EU:C:2019:934), paras 37–38 and 53; Case C-818/19 & C-878/19 *Marvik Pastrogor and Rodes*, EU:C:2020:314, paras 52 and 57. *See* Michael Dougan, Judicial review of Member State action under the general principles and the Charter: Defining the "scope of Union law," 52(5) COMMON MARKET LAW REVIEW 1201, 1217–19 (2015); Elias Deutscher & Sabine Mair, National Constitutional Courts in the European Constitutional Democracy: A Reply to Jan Komarek, 15 INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 801 (2017).

[79]For instance, in 2010, Hungary adopted a law that permitted the dismissal of civil servants without justification. Although Article 30 of the Charter provides that "[e]very worker has the right to protection against unjustified dismissal," the CJEU found the Charter inapplicable in Joined Cases C-488/12 to C-491/12, and C-526/12 *Sándor Nagy*, EU:C:2013:703; Joined Cases C-614/12 and C-10/13 *Dutka and Sajtos* EU:C:2014:30, paras 14–15; Case C-332/13 *Weigl*, EU:C:2014:31, paras 12–14.

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and held that, for the Charter to apply, there needs to be a genuine link to EU law.[80] The Court expressed this through the requirement that the application of the Charter is conditioned on a "degree of connection," which exists if EU law establishes a "specific obligation." A weak and remote connection to EU law, manifested by some frivolously general requirement without any specific or detailed obligation, does not justify the application of the Charter. A contrary approach would overstretch the diagonal scope and make the Charter generally applicable since Member States could always be regarded as pursuing the aims listed in Article 3 TEU and turning the values listed in Article 2 TEU into reality. The CJEU rejected this absurd conception very early. In *Currà v Germany*,[81] a number of Italian nationals sued Germany in Italy for compensation for the harm suffered because of their deportation during World War II.[82] Germany referred to its sovereign immunity, and the plaintiffs argued that this was contrary to the elusive provisions included in Articles 3 TEU, 4(3) TEU, 6 TEU, and 340 TFEU, hence, the Charter applied.[83] The Court found that the case did not come under the scope of EU law.[84] In the same vein, in *Sociedade Agrícola e Imobiliária*,[85] the Court made it clear that the Charter has no general application to the national rules on the grant of legal aid to legal persons, although legal aid may be relevant in cross-border litigation and in cases involving EU law.[86]

This vocabulary first appeared explicitly in *Siragusa*.[87] The Italian authorities refused to grant Mr. Siragusa retrospective planning permission and ordered the site's restoration to its former state. Mr. Siragusa argued that Italy violated his right to property under Article 17 of the Charter. The CJEU found the Charter inapplicable.

The Court held that the implementation of Union law "requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other."[88] Such a degree of connection exists if "specific obligations" devolve upon the Member States.[89] The Court reiterated the "purpose, nature and specificity" test already set out in the case law.[90] Accordingly, in this analysis, the relevant factors include the purpose of the legislation ("whether that legislation is intended to implement a provision of EU law ... and whether it pursues objectives other than those covered by EU law"), its "nature" (whatever this may mean) and "whether there are *specific* rules of EU law on the matter or capable of affecting it."[91] The Court stressed that it is not sufficient if the national measure "is capable of indirectly affecting EU law."[92] The ruling appears to equate the rationales of the horizontal and the apparent diagonal application: the Charter should be applied to Member States where non-application would "undermine the unity, primacy and effectiveness of EU law."[93] The Member States conferred power on the EU within its concomitant human rights confines. National courts cannot

[80]*Cf.* Volker Röben, *Constitutionalism of the European Union after the Draft Constitutional Treaty: How much hierarchy*? 10 COLUMBIA JOURNAL OF EUROPEAN LAW 339, 370–71 (2004); Thomas von Danwitz & Katherina Paraschas, *A fresh start for the Charter: fundamental questions on the application of the European Charter of Fundamental Rights*, 35 FORDHAM INTERNATIONAL LAW JOURNAL 1396, 1408–09 (2012) ("National measures determined by obligations under Union law will fall within the Charter's scope.").

[81]Case C-466/11 *Currà*, ECLI:EU:C:2012:465.

[82]Para. 2.

[83]Para. 13.

[84]Para. 19.

[85]Case C-258/13 *Sociedade Agrícola e Imobiliária da Quinta de S. Paio*, EU:C:2013:810.

[86]Paras 20–21 and 23.

[87]C-206/13 *Siragusa*, ECLI:EU:C:2014:126.

[88]Para. 24.

[89]Para. 27.

[90]Case C-309/96 *Annibaldi*, EU:C:1997:631, paras 21–23; Case C-40/11 *Iida*, EU:C:2012:691, para. 79; Case C-87/12 *Ymeraga*, EU:C:2013:291, para. 41.

[91]Para. 25 (emphasis added).

[92]Para. 25.

[93]Para. 32.

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be expected to apply EU law without these limits. The Charter's function is to obviate the risk posed to "the unity, primacy and effectiveness of EU law." Absent such a danger, there is no warrant for the Charter's application.

In *Demarchi Gino*,[94] the Court applied the "purpose, nature and specificity" test to an issue indirectly related to an EU private international law instrument and found the Charter wholly inapplicable. The Italian court advanced, in its reference, that applying the Italian rules on compensation for excessively protracted legal proceedings came under the scope of EU law because it ensured "the proper working of the Union area of justice" and enhanced "the mutual recognition of judgments."[95] The Italian court also pointed out that the matter concerned bankruptcy proceedings subject to several EU law instruments, including Regulation 2015/848, which regulates their private international law aspects.[96] In essence, the Court found the Charter inapplicable for two reasons. First, the applicable EU rules "impose[d] no specific obligations" as regards compensation for the excessive duration of insolvency proceedings.[97] Second, the Italian law relied upon by the plaintiffs was "general in nature" and was not "intended to implement" EU law, even though it had an indirect impact on it, and "pursue[d] objectives other than those covered" by the EU law instruments adopted in the field of insolvency proceedings.[98]

A controversial element of the case law is the treatment of "transposing discretion," where EU substantive law vests Member States with the discretion to choose between different regulatory options. The exercise of this discretion comes under the scope of the Charter. Nonetheless, despite the requirement of "specific obligation," the CJEU has been quite radical in extending this notion to cases where national measures were adopted to attain some general targets while being subject merely to soft and unspecified requirements.

In *Florescu*,[99] Romania adopted austerity measures to meet the targets of an EU financial assistance program. The measures to be adopted by Romania were not specified; EU law merely provided that the budgetary cuts should be made, among others, by reducing the public sector wage bill and reforming the key parameters of the pension system. To meet these targets, Romania adopted a number of measures, including a provision that restricted the combination of the net pension with income from activities carried out at public institutions. The plaintiffs were retired judges who had to either suspend their pensions or terminate their university teaching positions.

The CJEU found that the Charter covered the austerity measures. However, the only link to EU law was Romania's commitment to cut expenses by reducing the public sector wage bill and reforming the pension system.[100] Surprisingly, the Court disregarded the fact that the EU law framing of the national measures lacked any specificity and described these commitments as "leav[ing] Romania *some* discretion";[101] hence, it found that Romania "adopt[ed] measures in the exercise of the discretion conferred upon it by an act of EU law."[102] The Court concluded that the bare requirement to reduce the public sector wage bill and reform the pension system was, in itself, "sufficiently detailed and precise" to bring the above national measure under the Charter.[103]

This judgment is a good example of how the Court overstretches the diagonal scope and applies the Charter in matters where this is clearly not justified by the constitutional function of

[94]Case C-177/17 & C-178/17 *Demarchi Gino*, EU:C:2017:656.

[95]Para. 23.

[96]Para. 24.

[97]Para. 25.

[98]Para. 26.

[99]C-258/14 *Florescu*, EU:C:2017:448. *See* Menelaos Markakis & Paul Dermine, *Bailouts, the Legal Status of Memoranda of Understanding, and the Scope of Application of the EU Charter: Florescu* 55(2) COMMON MARKET LAW REVIEW 643 (2018).

[100]Paras 46–47.

[101]Para. 48 (emphasis added).

[102]Para. 48.

[103]Para. 48.

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diagonality. In this case, it is evident that EU law did not displace the Romanian constitution; there was no constitutional vacuum to fill, and the plaintiffs' human rights could be perfectly judged under the Romanian rules.

An extreme and arguably end-driven example of the Charter's diagonal application was the odd ruling in *Commission v. Hungary (Central European University)*.[104] The case was presented as a trade dispute but was, in fact, about fundamental rights. In this case, Hungary imposed novel requirements on non-EU universities, the purpose of which was to expel the Central European University. This breached academic freedom. As the CEU was a US-registered higher education institution, the internal market rules did not apply. The CJEU established the Charter's applicability through the General Agreement on Trade in Services (GATS). It held that the GATS was EU law, and the Charter applied as Hungarian law breached the GATS. This was the first case where the CJEU applied WTO law not just as a tool of interpretation but as purely internal EU law in at least one way. At the same time, in terms of standing, the Court limited this to infringement procedures launched by the Commission. Unfortunately, the Court was most laconic and provided a two-sentence explanation about why the GATS's confined invocability entailed the Charter's application:

> *213 [T]he GATS forms part of EU law. It follows that, when the Member States are performing their obligations under that agreement, including the obligation imposed in Article XVII(1) thereof, they must be considered to be implementing EU law, within the meaning of Article 51(1) of the Charter.*

The Court's approach raised serious issues and gave rise to the suspicion that it was influenced by the end-driven motivation to protect academic freedom. First, it has been a central part of the Court's jurisprudence that, for the Charter to apply, the mere application of an EU norm is not sufficient; there needs to be a "degree of connection," and the EU norm needs to be "specific." This requirement was hardly met here; the Court did not even claim that a "degree of connection" existed. Second, the rationale of the apparent diagonal application (supremacy of EU law, as well as uniformity and efficacy) did not warrant the application of the Charter, the relevant question being whether a Member State complies with the international obligations assumed by the EU. Third, the CJEU even tilted the balance of mutual treaty concessions to the unilateral detriment of the EU. By pronouncing the Charter applicable, the CJEU subjected Member States to extra burdens, which were neither provided for nor contemplated by WTO law and are, as a consequence, not borne by the other members of the WTO. Finally, as to the practical outcome of the case, the application of the Charter was redundant. Hungarian law had already been pronounced inapplicable by the application of the GATS. Still, the Court also applied the Charter and condemned the law by virtue of an additional legal basis.

II. EU Mechanisms Ancillary to National Law

EU law employs various procedures, recognition mechanisms and references that are ancillary to national procedures and rules, and, hence, has a split nature. While the national procedure or rule may not come under the scope of the Charter, the operation of the EU mechanism complies with the Charter only if the underlying national procedure or rule is Charter-compliant. In these cases, the CJEU did not apply the Charter to the underlying national procedure or rule but blocked the EU mechanism if the national procedure or rule did not comply with the Charter. EU law must not be complicit in any infringement of human rights; hence, ancillary EU law mechanisms are blocked by the underlying national procedure's violation of the Charter, although the national procedure itself is not governed by it.

[104]Case C-66/18 *Commission v. Hungary*, EU:C:2020:792.

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The above approach may lead to seemingly contradictory statements. In *J. McB. v L. E.*,[105] the Court established that the Charter did not apply to the incriminated national provisions and then substantively reviewed them under the Charter. In essence, the referring Irish court invited the CJEU to apply the Charter to Irish substantive rules on child custody on account of the Brussels II Regulation's reference to it. According to the Regulation, the removal of a child is wrongful if it is illegal "under the law of the Member State where the child was habitually resident immediately before the removal or retention."[106] Under Irish law, while the mother automatically acquires custody rights, such rights only devolve to the natural father by means of an agreement between the parents or a court judgment. The plaintiff argued that this breached the father's fundamental rights under the Charter.

The CJEU found the Charter inapplicable to Irish child custody law and then assessed Irish child custody law on the basis of the Charter to judge the Brussels II Regulation's reference. On the one hand, it stressed that the Charter did not apply to the Irish rules on custody but "should be taken into consideration solely for the purposes of interpreting [the Brussels II] Regulation ..., and there should be no assessment of national law as such."[107] On the other hand, it held that the Regulation's reference to national law, which makes the wrongfulness of the child's removal "entirely dependent on the existence of rights of custody" under national law,[108] comes under the Charter, and it reviewed Irish substantive law to judge the Regulation's reference to it.[109]

In *AB*,[110] the Slovak court envisaged issuing a European arrest warrant in a criminal procedure launched against persons whose amnesty was revoked by the Slovak parliament.[111] The retrial of the case raised fair trial and *ne bis in idem* (double jeopardy) issues, and it was questionable whether the Charter ruled out the issuance of a European arrest warrant in this case. It was clear that the underlying criminal procedure did not come under the scope of the Charter,[112] while the issuance of the European arrest warrant did.[113] The question was whether the human rights issues concerning the underlying criminal procedure affected the issuance of the European arrest warrant.[114] The CJEU answered the question in the affirmative. As a result, the Charter does not apply to an underlying criminal procedure; nonetheless, if the procedure is non-compliant with the Charter, that does affect the issuance of a European arrest warrant.[115] The Charter does not prevent national procedures from violating human rights but prevents EU law from being complicit in the violation of human rights.

III. National Acts in "European Matters"

The Court has been quick to apply the Charter in fields where substantive law has been predominantly or exhaustively regulated by EU law.[116] These matters have a strong "thematic

[105]Case C-400/10 PPU *J. McB. v L. E.*, ECLI:EU:C:2010:582.

[106]Article 2(11) of the Brussels II Regulation.

[107]Para. 52.

[108]Para. 52.

[109]Paras 54–63.

[110]Case C-203/20 *AB*, ECLI:EU:C:2021:1016.

[111]The CJEU also examined if the Charter was applicable under Directive 2012/13/EU on the right to information in criminal proceedings, [2012] OJ L 142/1, but finally found the Directive inapplicable to revocation of amnesty. Paras 69–71.

[112]Para. 40.

[113]Para. 52.

[114]Para. 41.

[115]Para. 53.

[116]*See* Michael Dougan, *Judicial review of Member State action under the general principles and the Charter: Defining the "scope of Union law,"* 52(5) COMMON MARKET LAW REVIEW 1201 and 1213 (2015) ("[T]he notion of implementation embraces the entire system for the decentralized enforcement of Union law.").

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connection" recognized by the constitutional function of diagonality; hence, the existence of a specific obligation is not required.

In *DEB*,[117] the plaintiff applied for legal aid in order to bring an action to establish Germany's liability for the delayed transposition of Directive 98/30/EC.[118] The CJEU pronounced the Charter applicable without any substantive analysis, suggesting that the Charter's applicability was obvious.[119] The Court apparently conflated the Charter's applicability and EU law's effectiveness. It defined the reference as "the interpretation of the principle of effectiveness." Still, it applied the Charter, although, as a general principle, Member States have procedural autonomy when applying EU law, and this autonomy is framed merely by the requirements of effectiveness and non-discrimination. A measure may be effective even if it is not Charter-compliant.

The ruling is in contrast with the CJEU's judgments in cases involving legal aid and procedural fees in proceedings where EU rules were present but played no central role. In *Sociedade Agrícola e Imobiliária*,[120] the Court made it clear that the Charter has no general application to the national requirements on legal aid.[121] In *Torralbo Marcos*,[122] the dispute concerned "certain fees connected with the administration of justice."[123] The CJEU found the Charter inapplicable as these general fees were "not intended to implement provisions of European Union law," which did "not contain any specific rules in that area or any which are likely to affect that national legislation."[124] The Court found it insufficient to apply the Charter, where the plaintiff sought to obtain a declaration of insolvency so as to benefit from the guarantee scheme established by Directive 2008/94.[125] Arguably, what distinguishes these matters, particularly *Torralbo Marcos*, from *DEB* is that liability for breach of EU law is a "European matter."

In *Delvigne*,[126] the debate emerged from Delvigne's removal from the electoral roll because of an earlier conviction, preventing him from voting in the elections to the European Parliament.[127] Although the electoral procedure is governed by national law,[128] it is unquestionable that the substantive regulation of European parliamentary elections, including the right to vote, is a "European matter," and national law plays a role by way of re-delegation.[129] The CJEU found the Charter applicable.[130]

IV. Sanctions Imposed in the Course of Enforcing an Implemented Directive

The CJEU appears to treat the sanctions imposed while enforcing EU law as coming under EU law *per se*.[131] This special approach features the notion that these sanctions amount to implementation in a procedural sense, even if EU law establishes no meaningful requirement in this regard. This implies that if a Member State applies EU substantive law, the sanctions imposed will be governed

[117]Case C-279/09 *DEB*, EU:C:2010:811.
[118]Paras 14–15.
[119]Para. 30.
[120]Case C-258/13 *Sociedade Agrícola e Imobiliária da Quinta de S. Paio*, EU:C:2013:810.
[121]Paras 20–21 and 23.
[122]Case C-265/13 *Torralbo Marcos*, ECLI:EU:C:2014:187.
[123]Para. 32.
[124]Para. 32.
[125]Para. 40.
[126]C-650/13 *Delvigne*, EU:C:2015:648.
[127]Para. 28.
[128]Para. 29.
[129]*Cf.* Paras 30–32.
[130]Para. 33.
[131]*See* Michael Dougan, *Judicial review of Member State action under the general principles and the Charter: Defining the "scope of Union law,"* 52(5) COMMON MARKET LAW REVIEW 1,201, 1,213 (2015); Bernhard Schima, *EU fundamental rights and Member State action after Lisbon: Putting the ECJ's case law in its context*, 38 *Fordham International Law Journal* 1097, 1109–10 (2015).

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by the Charter, even though the EU law requirements concerning the sanctions themselves are unspecified and frivolous. The Court had no scruples about applying the Charter, even if EU law merely required that national law provide for "appropriate" sanctions. Unfortunately, the Court failed to explain why sanctions should be treated differently from substantive provisions. The Court's approach is especially questionable in light of the Member States' procedural autonomy and goes against the very function of the Charter's diagonal application.

Åkerberg Fransson[132] is the first major milestone in the Court's Article 51 case law. The ruling conceived the implementation of EU law broadly and showcased the significance of the spill-over effects of the apparent diagonal application. After receiving tax fines, Mr. Fransson was prosecuted for tax fraud regarding income tax and VAT. He claimed this violated the principle of *ne bis in idem*. The question was whether general tax sanctions could be assessed on the basis of the Charter. The Court encountered an interesting dilemma. On the one hand, EU law has a meaningful role in VAT law, which is subject to various directives, and a small part of national VAT goes to the EU budget. On the other hand, tax law is essentially national and is overwhelmingly made up of national rules. Tax sanctions are mostly of general application; they apply to taxation at large and not to VAT specifically. Put another way, while, as a matter of theory, tax sanctions further compliance with both EU and national rules, as a matter of practice, they are part of a field that is overwhelmingly (though not exclusively) national. The CJEU held that the Charter applied. The sanctions were "connected in part to breaches" of VAT law,[133] which, in turn, concerns the "financial interests of the European Union."[134] Although EU law did not set out any specific requirement, the CJEU considered national tax sanctions to qualify as the implementation[135] of the general expectation to take all "measures *appropriate* for ensuring" the collection of VAT.[136]

If looking into the measures that, in the Court's view, Sweden actually "implemented," it can be seen that these were frivolously general. Article 325 TFEU requires Member States to "counter fraud and any other illegal activities affecting the financial interests of the Union" and establishes a concomitant EU legislative power. Article 2 of Directive 2006/112 defines the taxable transactions. Article 250(1) establishes the duty to submit a VAT return without prescribing any consequences or sanctions. Article 273 is an opt-up provision that merely acknowledges Member States' pre-existing national power to "impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion."[137] Even if reading these provisions in conjunction with the principle of sincere cooperation embedded in Article 4(3) TEU, the most that can be extracted is a general requirement to provide for sanctions framed by the principles of effectiveness and non-discrimination.

In *Berlioz*,[138] the plaintiff, a Luxembourgish company, was fined by the Luxembourgish tax authority for its refusal to respond to a request for information. The call was made at the request of the French tax authority. Still, the company argued that the Charter applied, as the fine was imposed in the implementation of Directive 2011/16/EU on administrative cooperation in the field of taxation. The Directive sets out obligations of cooperation and information in the field of

[132]Case C-617/10 *Åkerberg Fransson*, ECLI:EU:C:2013:105. For a comprehensive analysis, *see* Emily Hancox, *The Meaning of "Implementing" EU Law Under Article 51(1) of the Charter*: Åkerberg Fransson, 50 COMMON MARKET LAW REVIEW 1411 (2013); Filippo Fontanelli, Hic sunt nationes: The elusive limits of the EU Charter and the German constitutional watchdog, 9(2) EUROPEAN CONSTITUTIONAL LAW REVIEW 315 (2013); Bas van Bockel & Peter Wattel, *New wine into old wineskins: The scope of the Charter of Fundamental Rights of the EU after Akerberg Fransson*, 38(6) EUROPEAN LAW REVIEW (2013).

[133]Para. 24.

[134]Para. 26.

[135]Paras 27–8.

[136]Ibid. Para. 25 (emphasis added).

[137]Paras 25–27.

[138]Case C-682/15 *Berlioz*, EU:C:2017:373.

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taxation. It provides that when a national tax authority collects information upon the request of another Member State, it shall carry this out strictly in accordance with its national rules.[139] In the same vein, the Directive contains no provision on the sanctions to be applied when collecting information for other Member States' tax authorities, apart from the general duty to "take all *necessary* measures to ensure the smooth operation of the administrative cooperation arrangements."[140] Of course, this provision may be considered redundant, given that, due to the principle of effectiveness and loyalty, Member States are subject to such a general duty anyway.

The CJEU found that the administrative penalty qualified as implementation of EU law.[141] The lack of a "specific obligation" and the express provision that tax authorities are not expected to go in any sense beyond what national law allows did not impede the application of the Charter,[142] the same as the fact that national rules on fines were "not adopted in order to transpose [the] Directive."[143]

V. Opt-Ups and Regulatory Authority

The CJEU's jurisprudence on regulatory opt-ups features a remarkable U-turn. Initially, the Court treated opt-ups in minimum-harmonization directives as re-delegations of power, the exercise of which comes under the Charter. Recently, however, the Court apparently overruled this case law and conceived opt-ups as limitations on the scope of the EU legal act that recognizes Member States' pre-existing regulatory power.

In *N.S.*,[144] the question was whether a Member State's discretion to take over an application for asylum instead of directing it to the Member State responsible under Regulation 343/2003 (Dublin II Regulation) was governed by the Charter. Article 3(2) of the Regulation allowed Member States to examine applications for asylum, even if they did not qualify as the Member State responsible under the Regulation. If they did so, they became the responsible Member State and subject to the pertinent obligations.

The Court held that a Member State's Article 3(2) decision was framed by the Charter,[145] so even though the Regulation itself did not limit this discretion, the Charter did. The Court based this conclusion on two arguments. First, it conceived Article 3(2) as not limiting the scope of the Directive but as conferring a discretionary power on the Member States (re-delegating the power conferred on the EU).[146] Second, the Member State's decision "[gave] rise to the specific consequences provided for by" the Directive, since this Member State became "the Member State responsible."[147] In the end, the Court held that the Charter prevented the transfer of an asylum seeker if there were "substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision."[148]

The Court's conceptualization of Article 3(2) as a re-delegation of power is quite odd and is difficult to reconcile with the constitutional function of diagonality. While the existence of an exception could be subject to the Charter, it is difficult to comprehend why a national act that is subject to no specific obligation (in fact, to no obligation at all) can be conceived as an implementation of EU law, or how it displaces national human rights in a way that calls for the application of the Charter. It is probably a more convincing explanation for the ruling. An

[139]Articles 17–18.
[140]Article 22(1)(c) (emphasis added).
[141]Para. 41.
[142]Para. 39.
[143]Para. 40.
[144]C-411/10 & C-493/10 *N.S.*, EU:C:2011:865.
[145]Paras 68–69.
[146]Para. 65.
[147]Para. 67.
[148]Para. 106.

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opposite decision would have admitted the serious defects of the system and the fact that the EU cannot secure, in a field almost exhaustively regulated by EU law, that the Member State in charge will treat asylum seekers in compliance with the Charter. The Court shifted the duty of the responsible Member State to all the other Member States because it could not ensure that the former would fulfill this duty.

The ruling was similarly alarming if approached from the angle of the principle of conferral. The adoption of the Dublin II Regulation required unanimity in the Council.[149] This implies that the Member States conferred this legislative power on the EU with a reservation of a veto right. They clearly allocated the pertinent duties when they unanimously adopted the Regulation. The Court's ruling interfered with this constitutional contemplation by failing to reproduce the constitutional understanding faithfully.

In *Alemo-Herron v Parkwood*,[150] the CJEU followed a similar approach. Article 3 of Directive 2001/23/EC[151] provides that if an undertaking is transferred, the transferee is bound by the transferor's collective agreements effective at the time of the transfer. Nonetheless, Article 8 expressly recognizes Member States' right to adopt measures more favorable to employees. The implementing UK legislation made use of this and went beyond Article 3 by subjecting the transferee to subsequent amendments. The plaintiff relied on UK law's dynamic approach in respect of a sectoral collective agreement the transferee was not party to.

The CJEU held that, when adopting measures more favorable to employees, Member States implement EU law and found that the UK breached the transferee's rights under the Charter. In other words, it was not the Directive but the Charter that prevented the UK from providing extra employee benefits; the Charter applied because the Directive applied. Technically, the CJEU applied the Charter by reading it into Article 3 of the Directive. According to the Court's conceptualization, Article 3 was to be interpreted in light of the Charter,[152] and it was this re-construction of Article 3 that prevented the UK, despite the express authorization of Article 8, from adopting measures more beneficial to the employees.[153]

The Court's ruling raises very serious constitutional questions. How can a recognized regulatory freedom that falls outside a directive's scope come under that very Directive? What can EU legislators do to avoid the staggering situation where the CJEU turns a rule of minimum harmonization into maximum harmonization? Probably the only way to reasonably conceptualize the CJEU's approach is that, despite minimum harmonization, the Directive created the national power to legislate. In this conception, the Member State was, in fact, exercising this mandate when making use of the overhang between the regulatory floor established by the Directive and the regulatory ceiling desired by the local electorate. The ruling's language confirms this when providing that the Directive "cannot be interpreted as *entitling* the Member States to take measures which . . . ."[154] Nonetheless, this line of reasoning cannot be reconciled with the fundamental constitutional principle of conferral,[155] which is in stark contrast with the clear fact that, outside the Directive's purview, Member States have a pre-existing and unimpaired right to act as they please. Article 3, which sets out some minimum standards for the protection of employees, neither entitles nor bans Member States from adopting other measures. Article 8

[149]Articles 63 and 67 of the EC Treaty.

[150]Case C-426/11 *Alemo-Herron v Parkwood*, ECLI:EU:C:2013:521. For an analysis, *see* Stephen Weatherill, *Use and Abuse of the EU's Charter of Fundamental Rights: On the improper veneration of 'freedom of contract*,' 10(1) EUROPEAN REVIEW OF CONTRACT LAW 167 (2014); Marija Bartl & Candida Leone, *Minimum harmonisation after Alemo-Herron: The Janus face of EU fundamental rights review*, 11(1) EUROPEAN CONSTITUTIONAL LAW REVIEW 140 (2015).

[151][2001] OJ L 82/16.

[152]Most importantly, the freedom to conduct a business is embedded in Article 16 of the Charter, which embraced freedom of contract.

[153]Paras 30–37.

[154]Para. 36 (emphasis added).

[155]Article 5 TEU.

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makes it clear that measures not envisaged by Article 3 simply fall out of the scope of the Directive and remain under the Member States' regulatory competence.

Although the Court's argument provides no reasonable explanation as to why the Court should have the authorization to strike a balance between two competing rights where a Member State acts outside the scope of the Directive, the conclusion was not necessarily indefensible. The Court's major concern might have been that the Directive entailed the British legislation, and there was no clear indication that the British legislator really envisaged going beyond the standards of the Directive. Perhaps the Court sensed that the national law was adopted with a view to, and in the belief of, implementing the Directive, and this may justify the assertion that it has to be construed in conformity with the Directive itself, which, in turn, has to be interpreted in light of the Charter. In this conceptualization, Member States have the power to go beyond the standards of the Directive if they do this consciously. Nonetheless, suppose a Member State adopts a provision in the belief that it has to do that to implement the Directive, particularly if it is uncertain what the Directive requires. In that case, the source of the provision is the Directive. In such a case, using the wording of AG Cruz Villalón in *Åkerberg Fransson*, EU law has "a presence at the origin of the exercise of public authority";[156] hence, the application of the Charter is warranted. Be that as it may, unfortunately, the Court did not take this path and based its conclusion on the fact that the minimum harmonization clause amounts to a delegation of power in terms of authorization to legislate.

In *Hernández*,[157] the CJEU examined the applicability of the Charter to a Spanish scheme that provided compensation for protracted employment proceedings. This entitled the employer to request remuneration, but the employee could claim it directly if the employer became insolvent. The scheme applied to unfair dismissals but not to dismissals that were invalid. It was argued that this distinction breached equality before the law under Article 20 of the Charter. The link to EU law was claimed to be Directive 2008/94/EC, which, through the creation of guarantee institutions, aims to ensure the payment of the employees' outstanding claims in the event of bankruptcy. The Spanish scheme, which compensated for the protraction of judicial proceedings, and the Directive-based guarantee scheme, which helped the employees in case of bankruptcy, operated in parallel to one other. The plaintiffs received compensation from the guarantee fund under the implementing measures and claimed compensation under the above Spanish scheme, which covered a longer time span but did not apply to invalid dismissals.

The CJEU found the Charter inapplicable, as the Spanish compensation scheme was not intended to implement EU law[158] and did not come under the scope of the Directive.[159] The Directive's guarantee scheme provided protection against the employer's insolvency and benefited the employees, while the Spanish compensation scheme compensated for the protraction of judicial proceedings and benefitted the employers.[160] The Court noted that the applicability of the Charter does not hinge on the EU's legislative competence but on the implementation of EU law.[161] Interestingly, in contradiction to the earlier case law, the ruling suggested that the Directive's minimum harmonization clause placed the Spanish scheme outside the scope of the Directive.[162] The CJEU also noted that the applicability of the Charter is linked to the supremacy and effectiveness of EU law and is not justified in cases that pose no risk to these.[163]

[156]Para. 33.
[157]Case C-198/13 *Hernández*, ECLI:EU:C:2014:2055.
[158]Para. 37.
[159]Paras 38–45.
[160]Paras 38–45.
[161]Paras 36 and 46.
[162]Para. 45.
[163]The CJEU reiterated the rationale of the apparent diagonal application, which is "the need to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in such a way as to undermine the

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In *Spetsializiran nakazatelen sad*,[164] the CJEU was invited to judge a provision of Bulgarian criminal procedure. Bulgarian law made the judicial approval of a plea bargain in organized crime matters conditional on the consent of "the other persons accused on the basis of their membership of that criminal group."[165] Directive 2016/343 establishes some common minimum rules applicable to criminal proceedings, and the defendants argued that the above Bulgarian provision implemented these. Article 7 of the Directive sets out the right to remain silent and the right against self-incrimination, but Article 7(4) makes it clear that these do not prevent Member States from rewarding cooperative behavior and attaching benefits to the non-exercise of these rights. The defendants argued that Bulgaria made use of this regulatory authority when establishing the plea bargain rules.

The Court found the Charter inapplicable.[166] Although coming under the scope of Article 7(4), the Bulgarian provisions' "degree of connection" to EU law was weak.[167] Article 7(4) allowed for but did not oblige Member States to make cooperation an extenuating circumstance[168] and was ambiguous.[169] The judgment seems to contradict the Court's earlier stance on EU provisions recognizing national regulatory authority. Article 7(4) was not a minimum harmonization clause but a substantive delimitation. Still, the Court refused to conceive it as a re-delegation and treated it as a recognition of the pre-existing sovereign powers that limited the purview of the obligations emerging from the Directive. The question was still open: did the judgment overrule the earlier case law or merely distinguish it? For instance, in *Alemo-Herron v Parkwood*, although going beyond the minimum harmonization, the measure at stake was part of the transposing legislation. The UK arguably adopted it in the belief of transposing EU law. On the other hand, the Bulgarian law was not adopted with the specific intention to implement Directive 2016/343.

This question of delimitation, however, seems to lose its relevance a couple of months later when, in *TSN*,[170] the CJEU excluded opt-ups from the scope of the Charter. Here, the question was whether the Charter covered employee benefits that exceeded the regulatory baseline. Directive 2003/88 provides for paid annual leave of at least four weeks[171] and expressly authorizes Member States to adopt measures more favorable to employees.[172] Under the Finnish rules, employees were entitled to a longer term of paid annual leave, but the employer could refuse to transfer the overhang if the periods of the sick leave and the paid annual leave overlapped, while the four-week paid annual leave secured by the Directive could be carried over. The argument was that this exclusion of transferability breached the Charter.[173,174]

The CJEU found the Charter inapplicable.[175] Its conclusion rested on two pillars. First, after reiterating the principle that the applicability of the Charter is not a thematic issue,[176] it pointed out that, in the field of social policy, the EU had shared competence and Article 153 TFEU

unity, primacy and effectiveness of EU law." Para. 47. It concluded that the legislation at this stage presented no such risk. Para. 47.

[164]Case C-467/19 PPU *Spetsializiran nakazatelen sad*, ECLI:EU:C:2019:776.

[165]Para. 30.

[166]Paras 36–37.

[167]Para. 40.

[168]Paras 34 and 42.

[169]Para. 35.

[170]Joined Cases C-609/17 and C-610/17 *TSN*, ECLI:EU:C:2019:981. For an analysis, *see* Maxime Tecqmenne, *Minimum Harmonisation and Fundamental Rights: A Test-Case for the Identification of the Scope of EU Law in Situations Involving National Discretion?*, 16 EUROPEAN CONSTITUTIONAL LAW REVIEW 493 (2020).

[171]Article 7.

[172]Article 15.

[173]According to Article 31(2) of the Charter, "[e]very worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave."

[174]Para. 41.

[175]Paras 53–55.

[176]Para. 46.

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expressly limited the EU's activities to "support[ing] and complement[ing] the activities" of the Member States.[177] Second, in accordance with this constitutional authorization, the Directive provided for minimum harmonization.[178] The Court distinguished this from transposing discretion[179] and conceptualized the minimum harmonization clause not as a re-delegation of power but as a pre-existing legislative authority unimpaired by the Directive.[180]

The ruling seems to usher in a new approach to EU provisions recognizing national regulatory authority, such as minimum harmonization clauses. The question remains, however, if the CJEU had decided the same way, if the minimum harmonization had not been a constitutional limitation but merely a legislative choice, i.e., if the directive had been adopted in a field where the EU's legislative competence is less limited.

VI. Over-Implementation: Applying the Charter by Reason of Abetting

At times, Member States may unintentionally over-implement EU law. A rule may be subject to divergent interpretation, especially if it needs to be interpreted in conjunction with the Charter, and a Member State may go beyond what EU law requires. These scenarios may feature opt-ups in a technical sense, but they can be distinguished. For example, the Member State does not consciously use the minimum harmonization clause but adopts the national measure in the erroneous belief that it is required to do so. The Court has applied the Charter in such scenarios. Inadvertent over-implementation may justify the application of the Charter for two reasons. First, the implementing provision has to be interpreted in conformity with the implemented rule. Second, the inadvertent over-implementation of the Framework Decision still needs to comply with the Charter, as EU law is the "abettor" of the rule, which was adopted in the belief that this is prescribed by EU law.

Arguably, *Alemo-Herron v Parkwood* may be conceptualized as a case of over-implementation and not as an opt-up (although this is not how the Court justified the application of the Charter).

In *OM*,[181] the dispute emerged from Bulgarian law's provision for the confiscation of assets linked to a criminal offense. OM lawfully transported goods from Turkey to Germany but, without the knowledge of his employer (owner of the vehicle), used the vehicle to smuggle antique coins illegally. The coins were discovered, and the vehicle was confiscated.

The link to EU law was constituted by Framework Decision 2005/212.[182] Interestingly, however, the CJEU did not engage in any detailed analysis about the purpose and nature of the Bulgarian provisions; it simply demonstrated that the Framework Decision requires Member States, among others, to confiscate instrumentalities of criminal offenses punishable by deprivation of liberty for more than one year and the case came under its scope. It seems that the Court took it as granted that the Bulgarian rules on confiscation transposed the Framework Decision.[183]

The twist in the case was that the Framework Decision envisaged minimum harmonization, but Bulgarian law inadvertently went beyond that. Article 2(1) of the Framework Decision provides for the confiscation of the instrumentalities of criminal offenses punishable by deprivation of liberty for more than one year. Although the text of the provision is unqualified, suggesting that all instrumentalities have to be confiscated, the CJEU held that it has to be read in conjunction with Recital 3 and the right to property enshrined in Article 17 of the Charter

[177]Para. 47.
[178]Para. 46.
[179]Para. 50.
[180]Paras 48–49 and 52.
[181]Case C-393/19 *OM*, ECLI:EU:C:2021:8.
[182]Framework Decision 2005/212 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, [2005] OJ L 68/49.
[183]Paras 33–41.

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and, as a result, it does not extend to the assets of parties acting in good faith.[184] Bulgarian law exceeded this and provided for the confiscation of all assets linked to a criminal offense, irrespective of whether the third person acted in good faith. Technically, this element of the Bulgarian rule went beyond the scope of and, hence, was not excluded by the Framework Decision. Still, the Court held that Bulgarian law was prevented from going beyond the content of minimum harmonization. The ruling cogently explains why Article 2(1) of the Framework Decision attributed the meaning the Court attributes to it but fails to explain why this meaning should have a straight-jacketing effect on national law. After all, the Framework Decision contains no exhaustive regulation, and Member States have the right to provide for confiscation beyond the purview of the Framework Decision. Still, the Court simply stated what the Charter-compliant reading of Article 2(1) of the Framework Decision is before concluding, without any bridging, that it precluded Bulgarian law from confiscating the assets of bona fide third parties.

Arguably, the most reasonable conceptualization is that the Bulgarian rule was meant to implement the Framework Decision, even if it eventually over-implemented it.

VII. The Cumulative Application of EU and National Standards

An "either or" pattern can work only if there is a clear delimitation between the implementation of EU and national rules. The overly broad conception of the diagonal scope of the Charter as a side-effect leads to cumulative application. Article 53 of the Charter provides that it does not restrict or impair "human rights and fundamental freedoms as recognised, in their respective fields of application, ... by the Member States' constitutions." Although this provision could be construed as referring to parallel systems given that it refers to national constitutions "in their respective fields of application," the CJEU interpreted it as providing for cumulation in cases not closely determined by EU law.

In *Melloni*,[185] the question of whether a Member State executing a European arrest warrant can, with reference to its constitution, make the surrender of a person convicted *in absentia* conditional upon the conviction being open to review by the issuing Member State.[186] The CJEU laid down two important tenets. First, as a general rule, Article 53 of the Charter gives way to national constitutional standards higher than the European baseline. Second, although Member States may apply their higher standards when implementing EU law, they may not apply them to avoid or impair the application of EU law.[187] Given that, in this case, EU law allowed little or even no interpretative "wiggle room," the Member State was not viewed as applying higher standards to its implementation of EU law but as curtailing the scope of an EU law command.[188] The higher level of rights protection had to bend before the EU's interest in mutual recognition and cooperation in criminal matters. Put another way, the CJEU deprived the defendant of a higher level of rights protection under national law for the sake of the effectiveness of EU criminal enforcement.

The notion that EU and national human rights apply simultaneously showcases the inconsistency of the Court's conception of diagonal application.

First, the Charter (and, earlier, the general principles of law) filled the constitutional vacuum left by the expulsion of national constitutions; hence, the cumulative application amounts to a conceptual contradiction. It inconsistently bifurcates the exclusionary effects of

[184]Paras 55–58.
[185]Case C-399/11 *Melloni*, ECLI:EU:C:2013:107.
[186]Paras 2 and 55.
[187]Para. 58.
[188]Paras 60–64.

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the Charter: in this conception, the Charter is horizontally exclusive but diagonally merely secures a baseline.[189]

Second, the above approach inevitably leads to a distinction between genuine "implementation," which, as in *Melloni*, cannot be revised under the national constitution, and spurious "implementation," which refers to national acts remotely linked to EU law and is subject to cumulative human rights requirements.[190] Presumably, the tax sanctions applied in *Åkerberg Fransson* and *Berlioz* were only remotely linked to EU law, but both were subject to human rights regimes. The conception that cumulative application is ruled out if it gives room to eventually higher national standards that block the application of EU law is based on the idea of "displacement" and the principle that EU law has supremacy, even over national constitutions. In this case, the national constitution is put aside because it goes against the effectiveness of EU law; that is, it goes against EU law.[191]

Third, the cumulative application leads to unsurmountable practical problems. A higher level of protection always comes at a price, whether it be another right or the public interest (or the democratic process). For instance, in *Alemo-Herron v Parkwood*, the freedom to conduct a business clashed with the employees' social rights; by protecting the former, the CJEU downgraded the latter. The quest for a higher level of protection was incomprehensible in this case. In the same vein, in *Melloni*, the right to a fair trial and the right of defense vailed to the public interest in the effectiveness of criminal enforcement.

C. The Doctrine of Displacement

The conceptualization of the diagonal scope of the Charter should emerge from its constitutional function. The CJEU's case law failed to identify this constitutional function, which has hindered it from developing a consistent line of interpretation. It is submitted that the constitutional function of the diagonal scope is to safeguard the supremacy of EU law. National courts cannot be expected to refrain from applying the national constitution to EU law if EU law does not secure a comparable level of constitutional protection. This poses a significant threat to the supremacy of EU law. Hence, the Charter should come into play if and when the national constitution is disapplied.[192] The CJEU's pervasive thematic approach, which has a tendency to apply the Charter in fields shifted to the scope of EU law, goes against the above constitutional authorization. The CJEU was not vested with the power to use a thematic approach and to cut the Gordian Knot instead of unraveling it. After all, the Member States created the Charter to limit the EU, not to limit themselves. This logic is not called into question by the fact that Member States often act as the EU's agents and, as such, should be governed by the same rules as their principal. Accordingly,

[189]Bernhard Schima, *EU fundamental rights and Member State action after Lisbon: Putting the ECJ's case law in its context*, 38 FORDHAM INTERNATIONAL LAW JOURNAL 1097, 1125 (2015) ("Such deference seems appropriate whenever a case is not entirely determined by EU law.").

[190]*Cf.* Daniel Sarmiento, *Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe*, 50 COMMON MARKET LAW REVIEW 1267, 1289 (2013) (The impact of the Charter hinges on whether "EU law has completely or only partially 'determined' the Member State's action. The notion of 'determination' is to be understood as a concept equivalent to that of discretion.")

[191]*See* Case C-105/14 *Taricco*, ECLI:EU:C:2015:555; Case C-42/17 *M.A.S. & M.B.*, ECLI:EU:C:2017:936.

[192]As to the inherent link between supremacy and diagonality, see AG Kokott's opinion in *Bonda*, Case C-489/10, ECLI:EU:C:2011:845, where she argued that the Charter applies diagonally only if the Member State action can effectively be traced back to an EU law norm: "19. If the obligation can thus arise from European Union law for the Member States to provide for criminal penalties . . . , then conversely the possible limits to this obligation must also arise from European Union law and in particular from the fundamental rights of the European Union. The European Union law obligation to impose criminal penalties for infringements of European Union law can only exist to the extent that the fundamental rights of the persons concerned, which are guaranteed at European Union level, are not affected." See also AG Cruz Villalón's opinion in *Åkerberg Fransson*, C-617/10 Åkerberg Fransson, ECLI:EU:C:2012:340, where he argued that the diagonal application of the Charter is warranted only where EU law has "a presence at the origin of the exercise of public authority" (para. 33).

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the Charter's diagonal application reacts to a constitutional vacuum and is destined to secure the effective supremacy of EU law. This implies a "rule-by-rule" approach; in other words, with the exception of "European matters," the Charter does not govern particular thematic fields, only the application of specific rules.

An important misconception shaping the case law is that a diagonal application of the Charter is also meant to ensure the effectiveness and uniformity of EU law. The Charter does not ensure the effectiveness of EU law since it protects fundamental rights, and rights protection rarely enhances the efficacy of law enforcement. It is not meant to contribute to EU law's uniform application either. For instance, when a Member State implements the EU consumer protection law's requirement of a reasonable cooling-off period, EU law proposes that national laws be uniform in ensuring that consumers can cancel the contract within a reasonable period of time and does not propose uniformity beyond that. On the contrary, it explicitly accepts the lack of uniformity beyond the requirements emerging from the foregoing EU law norm.

An important consideration is that the Charter is not meant to ensure that Member States respect the core values of the EU. The Charter's horizontal application is based on the consideration that no public authority may exist without rule-of-law limits. The same rationale explains and justifies the apparent diagonal application. However, this rationale is not valid in cases where Member States are not acting as the EU's agents but are pursuing domestic policies (genuine diagonal application). It was the Member States who conferred sovereign powers on the EU, not the other way around. The Charter applies to Member States when they implement EU law, not when the core values of the Charter are endangered. End-driven solutions put this scheme upside down and ignore the fact that genuine diagonal application of EU human rights and the rule of law are predominantly secured by Articles 2 and 7 TEU. Although these are way less effective, this is the structure of the EU's constitutional architecture. It would be more consistent to incorporate the Charter, via Article 2 TEU, against the Member States[193] than to overstretch its diagonal scope in violation of the contemplation of the *pouvoir constituent*.

The conception proposed by this paper is based on the idea of "displacement," with the exception of "European" matters. Due to its supremacy, the Charter's diagonal application should be limited to cases where EU law displaces national constitutions and creates a constitutional vacuum.[194] EU law has supremacy, even over national constitutions. EU law's immunity from national constitutional review entails a constitutional vacuum, and the function of the Charter is to fill this. The Charter was not meant to authorize the EU to conduct a human rights review of the Member States. The Charter's diagonal application is an accessory of the doctrine of supremacy and not a shift of constitutional power. The Charter should apply to the Member States only if and to the extent an EU law norm supersedes the national constitution. The displacement of national bills of rights is the only constitutional warrant that justifies the Charter's diagonal application. The legitimate purpose of the Charter is not to keep national actions within human rights limits or to replace national bills of rights in any sense. The legitimate purpose is to ensure that the EU operates within such limits, including cases where national acts are attributable to the EU. If, in a given case, the application of the national constitution is not ruled out by the supremacy of EU law, there is no legitimate reason to apply the Charter in lieu of the national constitution.

The proposed doctrine is in harmony with the contemplation of the *pouvoir constituent*, and even with this rationale, the Court itself attributes to the Charter's diagonal application. Furthermore, it embeds a clear and consistent legal test and predictability in terms of outcome. All

[193]Csongor István Nagy, *The Diagonality Problem of EU Rule of Law and Human Rights: Proposal for an Incorporation À L'Européenne* (2019) 21(5) GERMAN LAW JOURNAL 838, 850–55 (2020). *Contra* Nóra Chronowski, Alkotmányosság három dimenzióban 72 (ELKH, Budapest, 2022) (Arguing that this interpretation is excluded by the restrictions embedded in the second sentence of Article 6(1) TEU and Article 51 of the Charter.).

[194]*Cf.* Dinah Shelton, *The boundaries of human rights jurisdiction in Europe*, 13 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 95, 111 (2003) (The general principles of law were introduced "[t]o fill the human rights gap.")

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national acts come under the national constitution, except that the national constitution is not applicable because of the supremacy of EU law.

The legitimate function of the apparent diagonal application calls for a norm-centered, "rule-by-rule" approach (contrary to the Court's competence-centered notion). As noted above, with the exception of "European matters," the Charter does not govern particular thematic fields but the application of specific rules. By way of a metaphor, the relationship between EU and national law is not like oil and water, which build a laminar structure, but like a marble cake, where the two batters mix but do not fuse. In most matters, the applicable rules are made up of a blend of EU and national provisions. Although EU and national norms can be identified and distinguished from each other, in most cases they make up the applicable rules jointly. Legal harmonization makes EU law pervasive and often applicable in some abstract sense, even if its role may be marginal.

The diagonal application of the Charter is warranted if the application of a national bill of rights impairs the supremacy of EU law. Only EU law norms and the embedded legal requirements are immune from the requirements of national constitutions. For instance, if Member States implement the EU consumer protection law's requirement of a reasonable cooling-off period, it is the right of cancellation and the requirement of a reasonable time period that can reasonably come under the scope of the Charter since these requirements displace the national constitution. The rulings in *Florescu* and *Commission v. Hungary (Central European University)* showcase the ensuing overstretch of losing sight of the constitutional function of the diagonal scope.

There is no legitimate reason to treat sanctions differently from substantive norms. According to the doctrine of displacement, the Charter would not be applicable in *Åkerberg Fransson* and *Berlioz*.

EU mechanisms ancillary to national procedures and rules, which assist a national procedure or recognize a national law status, have a dual character. If not implementing EU law, the national procedure or rule does not come under the scope of the Charter. At the same time, EU law cannot assist national law if the latter fails to comply with the Charter. This implies that, while the Charter remains inapplicable to the underlying national procedure, the EU mechanism's compliance depends on the underlying national procedure's compliance with the Charter. In *J. McB. v L. E.*, EU law defined wrongful removal with reference to Irish child custody law. While Irish law did not come under the scope of the Charter, the assessment of the reference hinged on whether the invoked Irish law fulfilled the requirements of the Charter. EU law could not be allowed to give effect to Irish law without ascertaining that it did not violate the Charter. In *AB*, the Slovak criminal procedure did not come under the scope of the Charter, but a European arrest warrant could support it if it fulfilled the requirements of the Charter. Here again, EU law could not be allowed to assist a national procedure without ascertaining that it fulfilled the requirements of the Charter. As a general principle, even though the Charter does not govern the national act, the assisting EU mechanism is blocked if it appears to be complicit in any infringement of human rights.

The proposed doctrine of displacement implies that, contrary to *N.S.* and *Alemo-Herron v Parkwood* and in accordance with *Hernández*, the *Spetsializiran nakazatelen sad* and *TSN* stated that opt-ups and other provisions where EU law recognizes national regulatory authority should not give rise to the application of the Charter.

Opt-ups should be distinguished from inadvertent over-implementation. EU law rules may be uncertain and subject to divergent interpretations, and Member States may misinterpret them. The cause of this may be that the EU law rule is interpreted in isolation and not in conjunction with the Charter. This may lead to over-implementation, where the Member State goes beyond the Directive because of the Directive itself. Opt-ups should be distinguished from cases where a Member State does not consciously use the minimum harmonization clause but adopts the national measure in the erroneous belief that this is required to transpose a Directive. This happened in *OM*, where Bulgaria appeared to over-implement a Directive, and the Court regarded this as the implementation of an EU law. The British measure in *Alemo-Herron v Parkwood* may also be viewed in this way (although this is not how the CJEU's reasoning justified the application

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of the Charter). By defining the perimeter of the EU law norm, the Court may also define the perimeter of the implementing measure, which has to be interpreted in the light of the EU law norm, which, in turn, has to be interpreted in the light of the Charter. In cases of inadvertent over-implementation, EU law is the "abettor" of the national measure and, as AG Cruz Villalón put it in *Åkerberg Fransson*, has "a presence at the origin of the exercise of public authority";[195] hence, it should come under the scope of the Charter.

However, "European" matters are an important exception to the above principle. These are fields taken over by the EU either by constitutional exhaustion (exclusive competence) or by legislative exhaustion (complete legislative pre-emption, full harmonization).[196] In these cases, the EU effectively "outsources" enforcement, and the Member States act as the EU's agents; hence, their actions are attributable to it. For instance, EU competition law is applied in a decentralized system, and national competition authorities are acting in the place of the Commission in matters that, before 2004, were handled exclusively by the Commission. Similarly, Directive 2005/29/EC introduced full (maximum) harmonization concerning unfair business-to-consumer commercial practices. When applying it, Member States may be conceived as being the "outsourced" enforcers of a fully Europeanized field.

D. Conclusions

The inconsistent terminology of Article 51 of the Charter, referring solely to "implementation" and its explanatory note, referring to both "implementation" and "interpretation" and introducing "scope," a collective term to embrace both of them, entailed uncertainty about the proper construction of the Charter's diagonal scope. However, the ensuing debate has remained symbolic.[197] The debate about whether the Charter applies merely to the implementation of EU law or to all matters that come under the scope of EU law uses terminological disagreement to veil substantive issues. It is difficult to identify a case that comes under the scope but involves no implementation of EU law in any sense. The real difference is not between "scope" and "implementation" but between the overinterpretation of "scope" and "implementation" and the interpretation that is in line with the original constitutional function and rationale.

The CJEU, faithful to the language of Article 51, refers to all cases where the Charter is applied to the Member States as implementation. However, this is a necessity caused by the inconsistent language of Article 51 and its explanatory note. The drafters chose implementation in Article 51 and indicated in the explanatory note that this does not rule out an application because of interpretation, as established in *ERT*. By way of shorthand, they also introduced a collective term to refer to implementation and interpretation jointly. For some, the introduction of this overarching term may have entailed the conflation of the two terms and rationales it was supposed to embrace. However, this would go against the very explicit statement in the explanatory note that puts an equality sign between Article 51 and the then-existing case law. Furthermore, the "implementation" theory is unfit to explain or justify the application of the Charter in all cases. When a Member State justifies

[195]Para. 33.

[196]*See*, for instance, the order of the *Bundesverfassungsgericht* in *Right to be forgotten II*, 1 BvR 276/17, where it held that legal provisions fully harmonized under EU law are governed solely by the Charter (and not by the *Grundgesetz*). *See* Dana Burchardt, Backlash against the Court of Justice of the EU? The Recent Jurisprudence of the German Constitutional Court on EU Fundamental Rights as a Standard of Review, 21(S1) GERMAN LAW JOURNAL 1 (2020).

[197]For an analysis of the "terms of the debate," *see* Daniel Sarmiento, *Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe*, 50 COMMON MARKET LAW REVIEW 1267, 1274–78 (2013) (Arguing that, according to the CJEU, there is "no relevant distinction between 'implementation' and 'scope of application'."); Thomas von Danwitz & Katherina Paraschas, *A fresh start for the Charter: fundamental questions on the application of the European Charter of Fundamental Rights*, 35 FORDHAM INTERNATIONAL LAW JOURNAL 1396, 1406–07 (2012) (The use of the different terms "does not simply bring up an argument on terminology, but actually raises questions about the significance of these terms when used in a particular context.")

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the restriction of free movement, it applies EU law in the sense that it tries to comply with it, but neither acts as the EU's agent nor are its constitutional requirements displaced by EU law. Although these cases emerge in the context of EU law, this circumstance is insufficient to constitute "implementation" of the law. It does not make them similar to cases where the Member States act as the EU's agents. If the Charter is applied by reason of implementation, its function is to fill a constitutional vacuum. If it is applied to judge a restriction of free movement, its function is to judge the legitimacy and proportionality of the restriction. The exceptions to the four freedoms are an excuse to depart from EU law, and this departure is expected to take place in conformity with the requirements of EU law. These EU law requirements embrace, among other things, proportionality. It may reasonably be argued that a restriction is not legitimate and proportionate if it is irreconcilable with the requirements of constitutionalism. As a result, the most reasonable interpretation is to conceive "implementation" in Article 51 as a *pars pro toto* term, which has the same import as "scope" in the explanatory note and which covers implementation in the narrow sense in the meaning of *Wachauf*, and interpretation within the meaning of *ERT*.

In the shadow of the above symbolic debate, the CJEU has developed case law on the Charter's diagonal application that fails at both legitimacy and coherence. The approach, detached from the original constitutional function and rationale, produced an amorphous and inconsistent judicial practice and a good deal of unpredictability. The case law may give rise to the perception that the Court sometimes fails to credibly distance itself from end-driven solutions. What makes the CJEU a non-political institution and ensures its legitimacy and authority are the "normative constraints"[198] it is subject to. The conception developed for the Charter's apparent diagonal application fails to faithfully reproduce the contemplation of the *pouvoir constituent* and is irreconcilable with the rationale the Court itself attributes to it.

Besides the important constitutional and legitimacy issues this causes, this approach may undermine the trust in the Court and give rise to the criticism that the Court's case law is, at times, *ultra vires* and features competence creep. This may impair the integration process. First, it may serve as a further justification for a constitutional court rebellion. Several constitutional courts set out reservations to the supremacy of EU law. These were justified for various reasons, such as the protection of human rights and constitutional identity.[199] Nonetheless, in the last few years, the major blows to the supremacy of EU law were entailed by the perception of *ultra vires* action.[200] Second, the Court's approach may also have a chilling effect on the integration process. The concept of an "ever closer union" rests on the dynamic idea that Member States continuously confer more powers on the EU. Nonetheless, this is pre-conditioned on the confidence that the Court's case law faithfully reproduces the contemplation of constitution-making power borne by the Member States. Apparently, the core lesson of the case law is that

[198]HJALTE RASMUSSEN, ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE: A COMPARATIVE STUDY IN JUDICIAL POLICYMAKING 415–18 (Nijhoff, 1986).

[199]From the wealth of literature, see the two thematic issues on constitutional identity of the Hungarian Journal of Legal Studies, in particular Lencka Popravka, *The impact of EU identity on constitutional identities: Romanian and Bulgarian Examples*, 63(2) HUNGARIAN JOURNAL OF LEGAL STUDIES 107 (2022); Ernő Várnay, *The Hungarian sword of constitutional identity*, 63(2) HUNGARIAN JOURNAL OF LEGAL STUDIES 79 (2022); Endre Orbán, *Constitutional identity in the jurisprudence of the Court of Justice of the European Union*, 63(2) HUNGARIAN JOURNAL OF LEGAL STUDIES 142 (2022); Fruzsina Gárdos-Orosz, *Tradition, Constitution, Identity and European Integration*, 63(1) HUNGARIAN JOURNAL OF LEGAL STUDIES 1 (2022); Zoltán Szente, *Constitutional identity as a normative constitutional concept*, 63(1) HUNGARIAN JOURNAL OF LEGAL STUDIES 3 (2022); Marie-Élisabeth Baudoin, Constitutional identity, *A new legal Babel in Europe*, 63(1) HUNGARIAN JOURNAL OF LEGAL STUDIES 21 (2022); Alain Delcamp, *The constitutional identity of the member states: False evidence or constitutive element of a new architecture of the Union?*, 63(1) HUNGARIAN JOURNAL OF LEGAL STUDIES 38 (2022); Laurianne Allezard, *Constitutional identity, identities and constitutionalism in Europe*, 63(1) HUNGARIAN JOURNAL OF LEGAL STUDIES 58 (2022).

[200]*See*, for instance, the judgment of the Bundesverfassungsgericht in the Public Sector Purchase Programme (PSPP) case, 2 BvR 1651/15, 2 BvR 2006/15; Decision K 3/21 of 7 October 2021 of the Polish Constitutional Tribunal; Decision nr. 390 of 8 June 2021 of the Romanian constitutional court, published in Monitorul Oficial nr. 612 of 22 June 2021.

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the extension of the scope of EU law may entail more oversight of human rights. Even innocuous directives, which merely restate the common core of national laws, may unintentionally bring with them the application of the Charter. The doubt about the faithful reproduction of their contemplation may dissuade Member States from consenting to future reform treaties. Protocol (No 30) on the application of the Charter to Poland and the United Kingdom, which may be conceived as a reservation, arguably reflects this distrust. This would have been unnecessary if the Charter's diagonal scope was constructed in line with its constitutional function and not applied beyond what EU law's supremacy justifies.[201]

The proposed doctrine of displacement obviates the above issues. It ensures that the diagonal scope of the Charter is conceived in conformity with its constitutional function and the contemplation of the *pouvoir constituent*. Furthermore, contrary to the CJEU's amorphous judicial practice, the doctrine of displacement provides a clear guiding principle. Both are the preconditions of a consistent and predictable case law.

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[201] Article 2 of the Protocol No. 30. *See* Daniel Denman, *The Charter of Fundamental Rights*, (4) EUROPEAN HUMAN RIGHTS LAW REVIEW 349, 356 (2010).

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