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European Fundamental Rights and the Member States: From 'Selective' to 'Total' Incorporation?

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Abstract

In parallel with American constitutional thought, there exists a doctrine of incorporation in the European legal order. European fundamental rights will thus not exclusively limit the European institutions. They may—in certain situations—equally apply to the public authorities of the Member States. This chapter looks at the incorporation doctrine across the three sources of European fundamental rights. With three distinct sources of fundamental rights, the constitutional principles governing the European incorporation doctrine are unsurprisingly more complex than the American incorporation doctrine. What are the similarities and dissimilarities between the European and the American incorporation doctrine? The Union presently favours selective over total incorporation. In this respect, it emulates the American constitutional order. Yet the European doctrine nonetheless differs strikingly from the classic American doctrine. For unlike the latter, the European legal order has not made incorporation dependent on the type of fundamental right *at issue. The European doctrine has, by contrast, made the incorporation of Union fundamental rights into national legal orders dependent on the* type of Member State action.

I. INTRODUCTION

THE QUESTION WHETHER a federal 'Bill of Rights' should bind state governments has been intensely debated in American constitutionalism.[1] For a long time, it considered its Bill of Rights to be

* I would like to thank the editors for their excellent suggestions.

[1] The 'Bill of Rights' is the constitutional shorthand for the first ten amendments to the 1787 Constitution. They had been proposed in 1789 to the first Congress by James Madison, but only came into effect, after their ratification by the States, in 1791. The incorporation doctrine is thereby the perhaps most controversial constitutional question of the second half of

exclusively addressed to the Union; and federal rights would therefore not bind the States. State action could thus solely be reviewed against the fundamental rights guarantees in *State* constitutions. This dramatically changed with the Fourteenth Amendment and the subsequent rise of the incorporation doctrine. The doctrine holds that *federal* fundamental rights may be 'incorporated' into the *State* constitutional orders.

What is the solution adopted by the European Union? The European legal order has, mutatis mutandis, followed the American solution and accepted that European Union fundamental rights may—in certain circumstances—directly apply to the Member States.[2] This chapter analyses these situations from a comparative constitutional perspective. It starts with a—brief—history of the American incorporation doctrine (Section II), before subsequently looking at the European Union's fundamental rights sources and their respective application to the Member States. While there was no 'Bill of Rights' in the original Treaties, three sources for European fundamental rights were subsequently developed.[3] Has an incorporation doctrine been developed for each of these 'Bills of Rights'; and if so, are there differences between them? The second part of this chapter investigates these questions. It starts with an analysis of the incorporation doctrine in the context of the Union's general principles (Section III.A), moves to the question of incorporation within the Charter of Fundamental Rights (Section III.B), and finally looks at any incorporating effect following the—future—Union accession to the European Convention of Human Rights (Section III.C).

The chapter wishes to show that the European Union has—similar to the traditional American solution—adopted a doctrine of *selective* incorporation. However, the European doctrine of selective incorporation differs strikingly from its American counterpart. For while the latter 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*

the twentieth century. It has been fought over with much brilliance and bile. For an overview of the debate—from different viewpoints, see only: R Berger, *Government by the Judiciary: The Transformation of the Fourteenth Amendment* (Indianapolis, Liberty Fund, 1997), and A Amar, *The Bill of Rights* (New Haven, Conn, Yale University Press, 1998).

[2] The question of incorporation must be distinguished from the question of direct effect. The doctrine of direct effect concerns the question whether federal provisions are sufficiently clear and precise. If they are, fundamental rights (like any ordinary European law) will have direct effect and will need to be applied by the executive and judicial branches. By contrast, the doctrine of incorporation concerns the question *against whom* they can be applied, in this case: whether European human rights may—exceptionally—also provide a judicial review standard for *national laws*. On the distinction between direct effect and the scope of application of a norm, see R Schütze, *European Constitutional Law* (Cambridge, Cambridge University Press, 2012) ch 9.

[3] On the three sources of fundamental rights in the European Union legal order, *cf* R Schütze, 'Three "Bills of Rights" for the European Union' (2011) 30 *Yearbook of European Law* 131.

involved. This has brought a great degree of uncertainty to the 'European' incorporation doctrine—a phenomenon that has recently given rise to arguments favouring total incorporation. The arguments for and against total incorporation have recently surfaced in *Zambrano*,[4] and shall be briefly presented in the Conclusion (Section IV).

II. THE AMERICAN DOCTRINE OF INCORPORATION

The American 'Bill of Rights' was not an integral part of the original US Constitution. It was added to the 1787 Constitution in the form of 10 amendments. This addition was to prevent the *federal* government from violating fundamental rights, and was traditionally not seen as limiting the powers of *state* governments. The classic view that the Bill of Rights was a constitutional safeguard solely against federal acts was espoused in *Barron v Baltimore*.[5] The case concerned the owner of a wharf in Baltimore, who claimed compensation from the mayor of the city on the ground that a decision of the city to divert the flow of a stream had ruined his property. And since the city had acted under powers granted by the State of Maryland, the question arose whether the Fifth Amendment—protecting private property—would apply to State actions.[6] The Supreme Court here held as follows:

> The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself, and the limitations on power, if expressed in general terms, are naturally, *and we think necessarily, applicable to the government created by the instrument*. They are limitations of power granted in the instrument itself, not of distinct governments framed by different persons and for different purposes. (emphasis added)[7]

The argument advanced by Chief Justice Marshall was as simple as it was persuasive. There were *two* constitutional orders over each American citizen—a federal and a State constitutional order; and each order provided

[4] Case C-34/09 *Zambrano v ONEM*, nyr. On the laconic character of the actual judgment, see Editorial, 'Seven Questions for Seven Paragraphs' (2011) 36 *European Law Review* 161.

[5] *Barron v Mayor & City of Baltimore*, 32 US 243 (1833).

[6] The Amendment states (emphasis added): 'No person shall ... be deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation*.'

[7] *Barron v Baltimore* (n 5) 247.

for its own limitations on public power in the form of fundamental rights. The—older—*State* constitutions protected *State* fundamental rights, while the—younger—*federal* Constitution protected *Union* fundamental rights. The fundamental rights that bound the federal government would thereby not even indirectly apply to the State governments. For

> [h]ad the people of the several States, or any of them, required changes in their [State] Constitutions, had they required additional safeguards to liberty from the apprehended encroachments of their particular governments, the remedy was in their own hands, and could have been applied by themselves.[8]

In the absence of clear constitutional language to the contrary,[9] the dual constitutional structure of the United States thus required a dual human rights standard. The right to private property, as protected by the Fifth Amendment, was in the *federal* US Constitution and therefore '*not* applicable to the legislation of the States' (emphasis added).[10]

1. The Fourteenth Amendment and Dual Federalism

This constitutional choice against incorporation prevailed until the Civil War.[11] Thereafter, and in an attempt to guarantee substantively similar rights to all American citizens, the US Constitution received three additional amendments.[12] Among these three 'Reconstruction Amendments' was the Fourteenth Amendment (1868). It states as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[13]

[8] *Barron v Baltimore* (n 5) 249.

[9] *Barron v Baltimore* (n 5) 250:

> Had Congress engaged in the extraordinary occupation of improving the Constitutions of the several States by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

[10] *Barron v Baltimore* (n 5) 251.

[11] On the Civil War (1861–65) as a constitutional watershed, *cf* R Schütze, 'Federalism as Constitutional Pluralism: "Letter from America"' in M Avbelj and J Komárek, *Constitutional Pluralism in the European Union and Beyond* (Oxford, Hart Publishing, 2012) 185, esp 199 f.

[12] The Thirteenth Amendment prohibits slavery or involuntary servitude, except as a punishment for crime. The Fifteenth Amendment prohibits any discrimination within the right to vote 'on account of race, color, or previous condition of servitude'. The Fourteenth Amendment is discussed below.

[13] US Constitution, Fourteenth Amendment, s 1.

The section 'revolutionised' the formal and substantive nature of federal citizenship. Formally, the first sentence inverted the antebellum relationship between state and federal citizenship. For had State citizenship hitherto (implicitly) conferred federal citizenship,[14] the Constitution now granted the latter directly; and it was federal citizenship that henceforth determined State citizenship by tying it to state residency. But more importantly: the substantive nature of federal citizenship was significantly strengthened. For the second sentence of the Amendment contained three distinct constitutional limitations on *State* governments. States would not only have to guarantee the 'equal protection of the laws', but no State was henceforth allowed to 'abridge the privileges or immunities of citizens of the United States' or 'deprive any person of life, liberty, or property, without due process of law'.

Had the Fourteenth Amendment led to an 'incorporation' of the Bill of Rights into the State legal orders? Was this a constitutional commitment to apply all federal fundamental rights to the States? The question was brought to the Supreme Court in 1872 in the *Slaughterhouse Cases*.[15] In order to protect health and safety within the city of New Orleans, the Louisiana legislature had adopted a law granting a monopoly in all slaughterhouse operations to a private cooperation. Local butchers brought proceedings against the State law claiming that it violated their federal rights as citizens of the United States—now protected by the 'Privileges and Immunities Clause' of the Fourteenth Amendment. The central question the Supreme Court had to answer was this:

> Was it the purpose of the Fourteenth Amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of *all the civil rights* which we have mentioned, from the States to the Federal government? (emphasis added)[16]

The Supreme Court answered this question in the negative. For in the eyes of the Court, there was a clear distinction between *state* rights and *federal* rights. The 'privileges and immunities clause' would only protect those rights 'which owe their existence to the Federal government, its national character, its Constitution, or its laws'.[17] And since the rights invoked

[14] 'Before the Civil War, the status of national citizenship remained at best vague. The Constitution mentioned it without defining what it was.' See L Tribe, *American Constitutional Law*, 3rd edn (New York, Foundation Press, 2000) 1298. Until the Civil War the United States indeed followed the constitutional solution that presently applies in the European Union, that is: Member States are (almost) entirely free to determine State membership, and this State citizenship will—indirectly—confer European citizenship *cf* Art 20(1) TFEU:

> Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

[15] *Slaughterhouse Cases*, 83 US 36 (1872).

[16] *Slaughterhouse* (n 15) 77.

[17] *Slaughterhouse* (n 15) 79.

by the local butchers would 'belong to citizens of the States as such',[18] they could not be invoked as federal rights. This—extremely—restrictive interpretation of the Privileges and Immunities Clause of the Fourteenth Amendment was—once more—justified by the existence of a dual constitutional structure. A *dual* form of government translated into a *dual* form of citizenship—each with 'its' exclusive sphere of rights.[19] And where a right was a 'privilege' traditionally granted under State citizenship, it could not be a privilege pertaining to federal citizenship! This dual federalist (mis-) interpretation of the Privileges and Immunities Clause severely restricted its potential as a textual platform for incorporation from the start.[20] But eager to push the incorporation of federal rights forward, the Supreme Court quickly moved to a less-than-ideal second textual platform: the Due Process Clause.[21]

B. 'Substantive Due Process': From 'Selective' to 'Total' Incorporation?

With the demise of dual federalism finally emerges the doctrine of incorporation.[22] In *Gitlow v New York*,[23] the plaintiff had published a 'Left Wing Manifesto' that led to a charge of criminal anarchy. Admitting that the State law legitimately restricted freedom of expression, the Supreme

[18] *Slaughterhouse* (n 15) 78.

[19] *Cf Cruikshank* 92 US 542 (1876), esp at p 551.

[20] The *Slaughterhouse* ruling was confirmed in *Twining v State* 211 US 78 (1908); as well as in *Adamson v California* 332 US 46 (1947), 51–53:

> With the adoption of the Fourteenth Amendment, it was suggested that the dual citizenship recognized by its first sentence secured for citizens federal protection for their elemental privileges and immunities of state citizenship. The *Slaughter-House* cases decided, contrary to the suggestion, that these rights, as privileges and immunities of state citizenship, remained under the sole protection of the state governments. This Court, without the expression of a contrary view upon that phase of the issues before the Court, has approved this determination ... This reading of the Federal Constitution has heretofore found favor with the majority of this Court as a natural and logical interpretation. It accords with the constitutional doctrine of federalism by leaving to the states the responsibility of dealing with the privileges and immunities of their citizens except those inherent in national citizenship.

[21] *Cf.* Tribe, *American Constitutional Law* (n 14) 1316:

> And despite the semantic difficulties that the process-based language of that provision poses for incorporation of the substantive guarantees of the Bill of Rights, the Supreme Court, beginning in the late nineteenth century, has indeed interpreted the Due Process Clause expansively, so that it essentially preforms many of the functions for which the Privileges and Immunities Clause was designed.

and JH Ely, Democracy and Distrust: Theory of Judicial Review (Cambridge, Mass, Harvard University Press, 1980) 18:

> Familiarity breeds inattention, and we apparently need periodic reminding that 'substantive due process' is a contradiction in terms—sort of like 'green pastel redness'.

[22] For an analysis of the demise of the philosophy of dual federalism, see E Corwin, 'The Passing of Dual Federalism' (1950) 36 *Virginia Law Review* 1, as well as R Schütze, *From Dual to Cooperative Federalism: The Changing Structure of European Law* (Oxford, Oxford, University Press, 2009) ch 2.

[23] *Gitlow v New York* 268 US 652 (1925).

Court nonetheless did 'assume that freedom of speech and of the press which are protected by the First Amendment from abridgment by Congress *are among the fundamental personal rights and "liberties" protected by the due process clause of the Fourteenth Amendment from impairment by the States*' (emphasis added).[24] This was a clear signal that the Court was to accept—in the future—the idea of incorporation and would thereby base this new constitutional theory on the 'Due Process Clause' within the Fourteenth Amendment. This new base was confirmed in *Palko v Connecticut*.[25] However, the Court here clarified that the federal incorporation doctrine would be a 'selective' doctrine. For it expressly rejected the general rule that every action that violated the Bill of Rights, if done by the federal government, was equally prohibited to the States.[26] The incorporation doctrine would solely protect a core of federal fundamental rights, namely those that were 'implicit in the concept of ordered liberty'.[27]

But what was meant by this 'ordered liberty'? According to the *Palko* Court, it would include 'principle[s] of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental'.[28] In subsequent jurisprudence, the Court would indeed develop various tests for determining when federal fundamental rights were incorporated into the State constitutional orders.[29] Yet none of these tests, let alone their co-existence, offered a convincing constitutional solution. And after 50 years of stumbling into wisdom, it was high time that the Supreme Court tried to systematise the constitutional rules governing selective incorporation. This finally appears to have happened in *McDonald et al v Chicago*.[30] The case concerned the most 'American' of fundamental rights: the right to bear arms.[31] Could this federal right be invoked to challenge a city ordinance providing that '[n]o person shall ... possess ... any firearm unless such person is the holder of a valid registration certificate for such firearm'?[32]

[24] Ibid, 666.

[25] *Palko v Connecticut* 302 US 319 (1937).

[26] Ibid, 323 (per Justice Cardozo):

> We have said that, in appellant's view, the Fourteenth Amendment is to be taken as embodying the prohibitions of the Fifth. His thesis is even broader. Whatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.

[27] *Palko* (n 25) 325.

[28] *Palko* (n 25) 325. For a criticism of the 'ordered liberty' test in particular, see concurring opinion of Justice Frankfurter in *Palko*; as well as: L Henkin, '"Selective Incorporation" in the Fourteenth Amendment' (1963) 73 *Yale Law Journal* 74.

[29] For the various tests for selective incorporation, see *Duncan v Louisiana* 391 US 145 (1968), esp pp 148–49.

[30] *McDonald et al v City of Chicago, Illinois et al* 561 US (2010) nyr.

[31] The Second Amendment states: 'A well regulated militia being necessary to the security of a free State, the right of the People to keep and bear arms shall not be infringed.'

[32] Chicago, Illinois, Municipal Code § 8–20–040(a) (2009).

The case offered the Supreme Court an opportunity for an evolutionary and systematic analysis of its incorporation doctrine. Five constitutional features were thereby identified to have shaped selective incorporation in the twentieth century. First, incorporation took place under the 'Due Process Clause'.[33] From this followed a second feature: only those federal rights that were 'of such a nature that they are included in the conception of due process of law' could be invoked against the States.[34] Third, the Supreme Court had often evaluated the legality of State laws under the Due Process Clause by reference to whether 'a civilized system could be imagined that would not accord the particular protection'.[35] Fourth, the early Court had not been hesitant in finding that a federal right was *not* protected through the Due Process Clause.[36] And finally: even where a federal right was seen to apply to the States, the standard of protection could be weaker.[37]

Which of these five 'historical' principles did the Court consider outdated? The Court believed to have abandoned three of the five principles in the second half of the twentieth century. Not only had it replaced a 'universalist' conception with a 'American' conception of due process, it had equally 'shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause'.[38] Indeed: most federal rights would today apply to State actions. Yet more importantly still: the Court felt it had abandoned the idea that even where a federal right had been incorporated, a weaker standard of protection could apply to state actions. The incorporated Bill of Rights would thus 'be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment'.[39] In light of this constitutional clarification, and despite a formal fanfare to the contrary,[40] the Supreme Court's jurisprudence thus came close to the idea of 'total incorporation'.[41]

[33] *McDonald et al v City of Chicago* (n 30) 10: 'For many decades, the question of the rights protected by the Fourteenth Amendment against state infringement has been analyzed under the Due Process Clause of that Amendment and not under the Privileges or Immunities Clause. We therefore decline to disturb the Slaughter-House holding.'

[34] *McDonald et al* (n 30) 11 (with reference to *Adamson*).

[35] *McDonald et al* (n 30) 12 (with reference to *Duncan*)

[36] *McDonald et al* (n 30) 13 (with reference to *Gitlow*).

[37] *McDonald et al* (n 30) 13.

[38] *McDonald et al* (n 30) 16.

[39] *McDonald et al* (n 30) 18 (with reference to *Malloy v Hogan* 378 US 1 (1964)).

[40] *McDonald et al* (n 30) 15: '[T]he Court never has embraced Justice Black's "total incorporation" theory.' The classic proponent of 'total incorporation' had indeed been Justice Black, *cf Adamson* 332 US 68–123 (dissenting opinion).

[41] There exist however a few federal rights that have not been found to be incorporated, such as the Fifth Amendment Right to indictment by a grand jury (*cf Hurtado v California* 100 US 516 (1884)).

Has the European Union followed this logic? Is there a European doctrine of incorporation? And if so, what are the similarities and differences between the United States and the European Union?

Let us tackle these questions in a third section.

III. THE EUROPEAN DOCTRINE OF INCORPORATION

While there was no 'Bill of Rights' in the original Treaties,[42] three sources for European fundamental rights were subsequently developed. The European Court first began distilling general principles protecting fundamental rights from the common constitutional traditions of the Member States. This *unwritten* bill of rights was inspired and informed by a second bill of rights: the European Convention of Human Rights. This *external* bill of rights was, decades later, matched by an *internal* bill of rights specifically written for the European Union: the Charter of Fundamental Rights. These three sources of European human rights are codified, in reverse order, in Article 6 of the Treaty on European Union:

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties ...
2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Has the European legal order developed an incorporation doctrine for each of these 'Bills of Rights'; and if so, are there differences between them?

Let us tackle these questions by looking at each 'Bill of Rights' chronologically.

A. Incorporation of General Principles of Union Law

Neither the 1952 Paris Treaty nor the 1957 Rome Treaty contained any express reference to human rights.[43] Nonetheless, the European Courts

[42] P Pescatore, 'Les Droit de l'homme et l'intégration européenne' (1968) 4 *Cahiers du Droit Européen* 629.

[43] For speculations on the historical reasons for this absence, see P Pescatore, 'The Context and Significance of Fundamental Rights in the Law of the European Communities' (1981) 2

would—within the first two decades of European integration—develop a (unwritten) bill of rights for the European Union. These fundamental rights would be *European* rights, that is: rights that were *independent* from national constitutions. This discovery of human rights as general principles of European law has been extensively discussed in the literature.[44] But was there an incorporation doctrine for these European human rights? In the absence of a European 'Fourteenth Amendment' serious doubts could have been raised. However, the European Court indeed developed such an—unwritten—doctrine for its unwritten bill of rights in two situations. The first situation concerns the implementation of European law (a). The second concerns derogations from European law (b).

i. The Implementation Situation: Member States as Executive Agents of the Union

The European Court expressly confirmed that *European* human rights bind *national* authorities when *implementing* European law in *Wachauf*.[45] The case concerned a tenant farmer, who had requested compensation for the discontinuance of a milk production quota pursuant to German agricultural legislation. The national legislation—implementing a European Regulation—made the receipt of compensation dependent on the consent of the lessor. And since the landlord had refused consent, the German administration had rejected a claim for compensation. Mr Wachauf appealed against the refusal claiming that his European fundamental right to property had been violated.[46] But would European rights bind national authorities? In this seminal case, the Court confirmed that European fundamental rights would indeed be 'binding on the *Member States when they implement* [European] rules' (emphasis added).[47]

What is the constitutional rationale behind incorporation in this scenario? Incorporation was here justified on the ground that the Member

Human Rights Journal 295; as well as MA Dauses, 'The Protection of Fundamental Rights in the Community Legal Order' (1985) 10 *European Law Review* 399. And for a new look at the historical material, see also G de Búrca, 'The Evolution of EU Human Rights Law' in P Craig and G de Búrca, *The Evolution of EU Law*, 2nd edn (Oxford, Oxford University Press, 2011) 465.

[44] For an overview of the various discussions, see Schütze, *European Constitutional Law* (n 2) ch 12.

[45] Case 5/88 *Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609. The idea had been implicit in the (earlier) ruling Case 36/75 *Rutili* v *Ministre de l'intérieur* [1975] ECR 1219.

[46] On the right to property as a European fundamental right, *cf* Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727, esp para 17: 'The right to property is guaranteed in the [Union] legal order in accordance with the ideas common to the constitutions of the Member States'.

[47] *Wachauf* (n 45) para 19.

States functionally act as the Union's decentralised executive branch.[48] It would be—black—magic, so the argument goes, if Union law could escape human rights control by leaving the implementation of controversial European policies to the Member States.

By contrast, individuals will not be able to challenge national laws that do not implement European legislation. An illustration of this limit on the European incorporation doctrine can be seen in *Maurin*.[49] The case concerned a violation of procedural due process rights in a French criminal investigation. Maurin had been charged with selling food products after their use-by date—a behaviour that qualified as fraud under French law. Could he invoke his European fundamental rights to contest his conviction in the national court?

The European Court held that this could not be done. Even though there existed a European directive with regard to the sale of foodstuffs, the latter did not impose any obligations on the Member States with regard to the sale of products that complied with the directive but whose use-by date had expired.[50] It followed that the national criminal law fell outside the scope of Union law, and the European Court 'therefore [did] not have jurisdiction to determine whether the procedural rules applicable to such an offence amount to a breach of the principles concerning observance of the rights of the defence and of the adversarial nature of proceedings'.[51] Incorporation of European fundamental rights was thus dependent on whether national actions could be constructed as implementing European law.

A serious grey zone within this implementation situation therefore arises, where the Member States do not mechanically apply European law, but are left with autonomous discretion in its implementation. The paradigmatic case here is that of minimum harmonisation.[52] Will a Member State be bound to respect European fundamental rights when using 'its' national competence by going beyond the required European minimum standard? This tricky question has unfortunately not yet been decisively answered. And this has introduced a considerable degree of legal uncertainty within the implementing prong of the European incorporation doctrine. Three cases may illustrate this point. In *Wachauf*,[53] the Court expressly

[48] On the Member States acting as the Union executive, see R Schütze, 'From Rome to Lisbon: "Executive Federalism" in the (New) European Union' (2010) 47 *Common Market Law Review* 1385.

[49] Case C-144/95 *Maurin* [1996] ECR I-2909. For more recent case law, see also Case C-336/07 *Kabel Deutschland Vertrieb v Niederländische Landesmedienanstalt für den privaten Rundfunk* [2008] ECR I-10889; as well as Case 45/08 *Spector Photo Group v CBFA* [2009] ECR I-12073.

[50] *Maurin* (n 49) para 11.

[51] *Maurin* (n 49) para 12.

[52] *Cf* M Dougan, Minimum Harmonisation and the Internal Market' (2000) 37 *Common Market Law Review* 853; and see esp F de Cecco, 'Room to Move? Minimum Harmonization and Fundamental Rights' (2006) 43 *Common Market Law Review* 9.

[53] *Wachauf* (n 45).

referred to the wide margin of discretion left to the Member States in the implementation of the relevant European law and seemingly rejected the applicability of European human rights to the national law on this ground.[54] In *Bostock*,[55] the plaintiff had also argued that his property rights had been violated by the United Kingdom's failure to implement a compensation scheme for outgoing tenants under European agricultural legislation. And while finding that the European legislation did not require such a compensation scheme,[56] the Court nonetheless examined whether European fundamental rights had been violated by the national legislation.[57] The extension of the implementation situation to cases where the Member States are left with legislative discretion appears to have been confirmed in *Promusicae v Telefónica de España*.[58] And yet: there equally exist judicial authorities against extending the implementing situation to cases, where the Member States go beyond minimum harmonisation.[59]

ii. The Derogation Situation: Determining the Scope of Union Law

The European Court has come to accept a second situation in which European human rights are 'incorporated' into national legal orders. This is the case when Member States 'derogate' from European law.

[54] *Wachauf* (n 45) paras 22–23 (emphasis added):
The [European] regulations in question accordingly leave the competent national authorities a sufficiently wide margin of appreciation to enable them to apply those rules in a manner consistent with the requirements of the protection of fundamental rights, either by giving the lessee the opportunity of keeping all or part of the reference quantity if he intends to continue milk production, or by compensating him if he undertakes to abandon such production definitively. *The submission that the rules in question conflict with the requirements of the protection of fundamental rights in the Union legal order must therefore be rejected.*

[55] *Cf* Case 2/92 *The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock* [1994] ECR-I 955.

[56] *Bostock* (n 55) para 10:
Nothing in the regulations referred to by the national court requires Member States to introduce a scheme for the payment by a landlord of compensation to an outgoing tenant, or directly confers on a tenant a right to such compensation, in respect of the reference quantity transferred to the landlord on the expiry of a lease.

[57] *Bostock* (n 55) paras 17 f.

[58] Case 275/06 *Promusicae v Telefónica de España* [2008] ECR 271. The case will be discussed below.

[59] *Cf* Case C-2/97 *Società italiana petroli SpA (IP) v Borsana* [1998] ECR I-8597, esp para 40:
Since the legislation at issue is a more stringent measure for the protection of working conditions compatible with the Treaty and results from the exercise by a Member State of the powers it has retained pursuant to Article [153] of the [FEU] Treaty, it is not for the Court to rule on whether such legislation and the penalties imposed therein are compatible with the principle of proportionality.
See also Case C-6/03 *Deponiezweckverband Eiterköpfe v Land Rheinland-Pfalz* [2005] ECR I-2753.

This 'derogation situation' was first accepted in *ERT*.[60] The plaintiff had been granted an exclusive licence under Greek law to broadcast television programmes, which had been violated by a local television station. In the course of national proceedings, the defendant claimed that the Greek law restricted its freedom to provide services under the European Treaties and equally violated its fundamental right to freedom of expression. But could European fundamental rights be invoked to judicially review the Greek law in this situation? The latter had not been adopted to implement European legislation; and, yet, in a preliminary ruling, the European Court held that where a Member State relied on European law

> in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided by [Union] law, must be interpreted in the light of the general principles of law and in particular fundamental rights.[61]

In such a derogation situation, national rules would be subject to European fundamental rights, in this case: the right to freedom of expression.

The *ERT* judgment was a silent revolution, since it implicitly overruled an earlier finding to the contrary.[62] The constitutional rationale behind the derogation situation remains however contested.[63] For while one can easily understand that the Member States should be bound by European fundamental rights when acting as the Union executive branch, why should the exercise of their powers be limited when acting under a—legitimate—public policy exception granted by the Treaties? Moreover: the *ERT* judgment was—as many revolutions are—ambivalent about its ambit. Would European human rights apply to all national measures somehow 'derogating' from European law, or only to—express or implied—derogations from the Union's free movement provisions?[64] The wider rationale had indeed been suggested in a part of the *ERT* judgment requiring national rules simply to fall within the scope of European law.[65] And the relationship

[60] Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others* (*ERT*)[1991] ECR I-2925.

[61] *ERT* (n 60) para 43.

[62] In Case 60 and 61/84 *Cinéthèque SA and others v Fédération nationale des cinémas français* [1985] ECR 2605.

[63] See in particular F Jacobs, 'Human Rights in the European Union: The Role of the Court of Justice' (2001) *European Law Review* 331, 336–37; and more recently PM Huber, 'The unitary Effect of the Community's Fundamental Rights: The *ERT*-Doctrine Needs to be revisited' (2008) 14 *European Public Law* 323, 328: 'Though this concept is approved from various sides, it is neither methodologically nor dogmatically convincing.'

[64] *Cf* Case C-368/95 *Vereinigte Familiapress Zeitungsverlags- und vertriebs GmbH v Heinrich Bauer Verlag* [1997] ECR I-3689.

[65] *ERT* (n 60) para 42:

> [W]here such rules do fall within the scope of [Union] law, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental

between the derogation rationale and the wider scope rationale has never been conclusively resolved.[66]

But even if the wider scope rationale is the right one, the question remains what exactly is meant by it. Various meanings here still compete with each other. And the Court has so far not shown any authoritative preference for one jurisprudential line over the others. Thus, it has sometimes identified the scope of European law with the scope of existing European *legislation*.[67] Alternatively, it has defined it by reference to the Union's *legislative competences*.[68] (This would, of course, broaden the applicability of incorporation to areas in which the Union has not yet adopted positive legislation.) Finally, the Court could mean all situations that fall within the scope of the Treaties *tout court*.

rights the observance of which the Court ensures and which derive in particular from the European Convention on Human Rights.

In the following paragraph the Court then refers to the derogation rationale as a 'particular' expression of this wider scope rationale.

[66] It is clear that the European Treaties must, in a jurisdictional sense, first apply to a given situation. Thus in the *Grogan* Case (Case C-159/90 *Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* [1991] ECR I-4685), the Court declared that the defendants could not invoke the European fundamental right to freedom of expression against Irish legislation prohibiting activities assisting abortion. According to the European Court, the defendants had distributed information on abortion clinics not on behalf of the latter and it thus followed that

> the link between the activity of the students associations of which Mr Grogan and the other defendants are officers and medical terminations of pregnancies carried out in clinics in another Member State is too tenuous for the prohibition on the distribution of information to be capable of being regarded as a restriction within the meaning of the Treaty (para 24).

The national legislation thus lay outside the scope of European law (see para 31).

[67] *Cf* Case C-309/96 *Annibaldi v Sindaco del Comune di Guidonia and Presidente Regione Lazio* [1997] ECR I-7493, paras 21 and 24:

> Against that background, it is clear, first of all, that there is nothing in the present case to suggest that the Regional Law was intended to implement a provision of [Union] law either in the sphere of agriculture or in that of the environment or culture ... Accordingly, as [European] law stands at present, national legislation such as the Regional Law, which establishes a nature and archaeological park in order to protect and enhance the value of the environment and the cultural heritage of the area concerned, applies to a situation which does not fall within the scope of [European] law.

And see also Case 323/08 *Rodríguez Mayor v Herencia yacente de Rafael de las Heras Dávila* [2009] ECR I-11621, para 59:

> However, as is clear from the findings relating to the first two questions, a situation such as that at issue in the dispute in the main proceedings does not fall within the scope of Directive 98/59, or, accordingly, within that of [Union] law.

See also Case C-555/07 *Kücükdevici v Swedex* [2010] ECR I-365, esp paras 23–25.

[68] This appears to be the meaning of the phrase in *Cinéthèque* (n 62) para 26:

> Although it is true that it is the duty of this Court to ensure observance of fundamental rights in the field of [Union] law, it has no power to examine the compatibility with the European Convention of national legislation which concerns, as in this case, an area which falls within the jurisdiction of the national legislator.

In favour of this second view, see also AG Sharpston in Case 34/09 *Zambrano v ONEM*, nyr—discussed below (*cf* Conclusion).

And there is—sadly—a second uncertainty bedevilling the incorporation doctrine within the derogation situation. For the Court makes the application of the Treaties dependent on the presence of a cross-boarder element in a given situation.[69] It has thus long held that the fundamental freedoms would not apply to 'purely internal situations'.[70] A good illustration of a 'purely internal situation' being excluded from the scope of the European incorporation doctrine can be seen in *Kremzow*.[71] Having been convicted of murder before an Austrian court, Kremzow claimed that his Union rights of defence had been violated. He had indeed not been heard by the national court; and yet, the European Court rejected his claim on the jurisdictional ground that the appellant's situation was 'not connected in any way with any of the situations contemplated by the Treaty provisions on freedom of movement for persons'.[72] For as he had not exercised his free movement rights prior to the trial, 'a purely hypothetical prospect of exercising that right [would] not establish a sufficient connection with [European] law to justify the application of [Union] provisions'.[73]

B. Incorporation and the Charter of Fundamental Rights

The desire for a *written* bill of rights for the European Union became prominent in the late twentieth century. The idea behind an internal codification was to strengthen the protection of fundamental rights in Europe 'by making those rights more visible in a Charter'.[74] The Charter was proclaimed in 2000, but was originally *not* legally binding. It took almost a decade before the Lisbon Treaty recognised the Charter as having 'the same legal value as the Treaties'. Would this mean that the same constitutional principles that govern the incorporation of European human rights as general principles apply, mutatis mutandis, to the Charter? This second subsection investigates this question in two steps. We start with the general rules for all Member States before exploring the special rules applicable to Poland and the United Kingdom.

[69] See only Case 299/95 *Kremzow* [1997] ECR I-2629; Case C-309/96 *Annibaldi v Sindaco del Commune di Guidoma* [1997] ECR I-7493; as well as more recently Case C-333/09 *Noel v SCP Brouard Daude* [2009] ECR I-205.

[70] *Cf* A Tryfonidou, 'The Outer Limits of Article 28 EC: Purely Internal Situations and the Development of the Court's Approach through the Years' in C Barnard and O Odudu (eds), *The Outer Limits of European Law* (Oxford, Hart Publishing, 2009) ch 9.

[71] *Kremzow* (n 69).

[72] *Kremzow* (n 69) para 16.

[73] *Kremzow* (n 69) para 16.

[74] Charter, Preamble 4.

i. General Rules for all Member States

Will the 'Charter of Fundamental Rights *of the European Union*' be binding on the Member States?[75] The Charter expressly answers this question in its Article 51. The latter establishes its field of application as follows:

> The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States *only when they are implementing Union law*. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties. (emphasis added)[76]

The provision clarifies that the Charter is, in principle, addressed to the Union, and only exceptionally applies to the Member States 'when they are implementing Union law'. This extends the *Wachauf* jurisprudence to the EU Charter. The article is however silent on the second scenario: the derogation situation. Will the incorporation doctrine under the Charter thus be more 'selective' than the doctrine within the Union's general principles prong?

The Explanations relating to the Charter are inconclusive. They state:

> As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States *when they are in the scope of Union law*. (emphasis added)[77]

The *Explanations* substantiate this statement by referring *both* to *Wachauf* and *ERT*; yet, ultimately revert to a formulation according to which European fundamental rights 'are binding on Member States when they *implement* [Union] rules' (emphasis added).[78] In light of this devilish inconsistency, the Explanations have—arguably—little explanatory value. The wording of Article 51, on the other hand, is crystal clear and may prove an insurmountable textual barrier for the Court wishing to extend Charter incorporation to the 'derogation situation'.[79] Thus: unless the Court chose

[75] For an early analysis of this 'federal' question, see P Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 *Common Market Law Review* 945.

[76] Art 51(1) Charter.

[77] Explanations, p 32.

[78] Ibid. The Explanations here quote Case C-292/97 *Karlsson* [2000] ECR I-2737, para 37 (itself referring to *Bostock* (n 55) para 16).

[79] This view is taken by C Barnard, 'The 'Opt-Out' for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?' in S Griller and J Ziller (eds), *The Lisbon Treaty: EU Constitutionalism Without a Constitutional Treaty?* (Wien, Springer, 2008) 256, 263: 'Even if the Explanations are wider, it is unlikely that they will be used to contradict the express wording of the Charter since the Explanations are merely guidance on the interpretation of the Charter. The Charter will therefore apply to states only when implementing [Union] law[.]'.

to 'amend' the provision,[80] the scope of the incorporation doctrine under the Charter would be smaller than the incorporation doctrine developed for the Union's general principles.[81]

But what is the relationship between the (incorporated) European and a higher national standard under the Charter? Could a Member State here challenge the supremacy of European law by insisting on its higher national standard? This problem had been unequivocally answered in favour of the European standard within the context of the Union's general principles. For the Charter—on the other hand—a different solution could have been envisaged by Article 53. According to this provision, the Charter must not be interpreted to restrict human rights protected 'by the Member States constitutions' 'in their respective fields of application'. The provision has been said to challenge the supremacy principle of European law,[82] and has consequently been interpreted away as a—legally—meaningless political 'inkblot'.[83]

Yet this is not the only possible meaning of Article 53. An alternative reading can view the provision from the perspective of the principle of preemption.[84] Article 53 here simply states that a higher national human rights standard will not be preempted by a *lower* European standard. An illustration of the parallel application of European and national fundamental rights can be seen in *Promusicae v Telefónica de España*.[85] Representing producers and publishers of musical recordings, the Promusicae had asked the defendant to disclose the identities and physical addresses of persons whom it provided with Internet services. These persons were believed to

[80] In favour of this view, see AG Bot in Case C-108/10 *Ivana Scattolon v Ministero dell'Istruzione, dell'Università e della Ricerca*, nyr, esp para 120:

> Besides the fact that a restriction of the scope of the Charter in relation to the scope of the fundamental rights recognised as general principles of EU law was not, in my view, the intention of the authors of the Charter, a strict interpretation of Article 51(1) of the Charter does not appear desirable. Indeed, it would lead to the creation of two separate systems of protection of fundamental rights within the Union, according to whether they stem from the Charter or from general principles of law. That would weaken the level of protection of those rights, which could be regarded as being contrary to the wording of Article 53 of the Charter, which provides, in particular, that '[n]othing in [the] Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law ...'.

[81] In favour of this view, see M Borowsky, 'Artikel 51' in J Meyer (ed), *Kommentar zur Charta der Grundrechte der Europäischen Union* ([Basel], Lichtenhahn, 2006) 531, 539.

[82] For a discussion of this point, see JB Liisberg, 'Does the EU charter of Fundamental Rights Threaten the Supremacy of Community Law?' (2001) 38 *Common Market Law Review* 1171. For an excellent discussion of Art 53 of the Charter in light of a—potential—conflict between European law and Spanish fundamental rights, see A Torres Pérez, 'Constitutional Dialogue on the European Arrest Warrant: The Spanish Constitutional Court Knocking on Luxembourg's Door' (2012) 8 *European Constitutional Law Review* 105, esp 115 f.

[83] Liisberg, 'Does the EU Charter of Fundamental Rights ...?' (n 82) 1198.

[84] On the principle of preemption in the European legal order, see Schütze, *European Constitutional Law* (n 2) 2012) ch 10.

[85] Case C-275/06 *Promusicae v Telefónica de España* [2008] ECR 271.

have used the KaZaA file-sharing program, which infringed intellectual property rights. The defendant refused the request on the ground that under Spanish law such a disclosure was solely authorised in criminal—not civil—proceedings. Promusicae responded that the national law implemented European law, and thus had to respect its European fundamental right to property.

The question before the European Court therefore was: must Articles 17 and 47 of the Charter 'be interpreted as requiring Member States to lay down, in order to ensure effective protection of copyright, an obligation to communicate personal data in the context of civil proceedings'?[86] Not only did the Court find that there was no such obligation,[87] it added that the existing European legislation would 'not preclude the possibility for the Member States of laying down an obligation to disclose personal data in the context of civil proceedings'.[88] A higher national standard for the protection of property was thus *not* prohibited. However, this higher national standard would need to be balanced against 'a further [European] fundamental right, namely the right that guarantees protection of personal data and hence of private life'.[89] And it was an obligation of the national court to reconcile the two fundamental rights by striking 'a fair balance' between them.[90] In conclusion: as long as a higher national fundamental right standard did not clash with a different European fundamental right, the higher national standard was allowed. And this constitutional idea might be the future function given to Article 53 of the Charter.

ii. Special Rules for Poland and the United Kingdom

The general rules governing the relationship between the Charter and the Member States are qualified for Poland and the United Kingdom.[91] The two States have insisted on a special Protocol that governs the application of the Charter to them. [92] The Protocol is not a *full* 'opt-out' of the Charter.[93] It expressly requires 'the Charter to be applied and interpreted by the courts of

[86] *Promusicae v Telefónica de España* (n 85) para 41. Article 17 and Article 47 of the Charter protect, respectively, the right to property and the right of an effective remedy.

[87] *Promusicae* (n 85) para 55.

[88] *Promusicae* (n 85) para 54.

[89] *Promusicae* (n 85) para 63.

[90] *Promusicae* (n 85) paras 65 and 68.

[91] Protocol (No 30) on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.

[92] The European Council has already agreed that the Czech Republic will be added to Protocol No 30 when the Treaties are next amended, *cf* European Council (29–30 October 2009), Presidency Conclusions, Annex I: (Draft) Protocol on the Application of the Charter of Fundamental Rights of the European Union to the Czech Republic, especially Art 1: 'Protocol No 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom shall apply to the Czech Republic.'

[93] This has recently been confirmed by Case C-411/10 *NS v Secretary of State for the Home Department*, nyr, esp paras 119 f.

Poland and the United Kingdom'.[94] However, opinions differ as to whether the Protocol constitutes a simple clarification for the two States—not unlike the Explanations;[95] or, whether it does indeed represent a *partial* opt-out by establishing special principles for the two countries.[96]

The two Articles that make up the Protocol state:

> Article 1
>
> The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.
>
> In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.
>
> Article 2
>
> To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.

In what ways, if any, do the two articles establish special rules governing incorporation under Article 51 of the Charter? According to Article 1(1) of the Protocol, the Charter must not *extend* the review powers of the courts to find national laws of these States incompatible with European rights. This provision assumes that Charter rights go beyond the status quo offered by the Union's unwritten bill of rights. This has recently been denied by the Court.[97] But if a future Court was to find Charter rights that did not correspond to human rights in the Treaties,[98] then Poland and the United Kingdom would not be bound by these 'additional' rights when implementing European law. The Protocol would here constitute a *partial*

[94] Protocol No 30, preamble 3.

[95] Protocol No 30, preamble 8: 'Noting the wish of Poland and the United Kingdom to clarify certain aspects of the application of the Charter'. For a sceptical view on the purpose of the Protocol, see M Dougan, 'The Treaty of Lisbon 2007: Winning Minds, Not Hearts' (2008) 45 *Common Market Law Review* 617, 670: '[T]he Protocol's primary purpose is to serve as an effective political response to a serious failure of public discourse. Indeed, the Protocol emerges as a fantasy solution to a fantasy problem[.]'

[96] Protocol No 30, preamble 10: 'Reaffirming that references in this Protocol to the operation of specific provisions of the Charter are strictly without prejudice to the operation of other provisions of the Charter.'

[97] *Cf* Case C-411/10 *NS v Secretary of State for the Home Department* (n 93).

[98] For an example of just where this might happen, see K Leanaerts and E de Smijter, 'A "Bill of Rights" for the European Union' (2001) 38 *Common Market Law Review* 273, 282–84.

opt-out from the Charter. This is repeated 'for the avoidance of any doubt' in the context of the 'solidarity' rights in Article 1(2).[99]

But what is the constitutional purpose behind Article 2 of the Protocol? In order to understand this provision, we need to keep in mind that some Charter rights expressly refer to 'national laws governing the exercise' of European fundamental rights.[100] Take for example the 'right to marry and right to found a family'—a right of particular concern to Poland.[101] According to Article 9 of the Charter '[t]he right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights'. Assume that the Court confirms the existence of a directly effective European right that would, in implementing situations, bind the Member States. Would 27 different national laws govern the exercise of this right? Or would the Court revert to the *common* constitutional traditions of the Member States? And even if the former was the case, could a couple consisting of a Spaniard and a Pole claim a right to celebrate their same-sex marriage—a marriage that is allowed in Spain but prohibited in Poland? To avoid any normative confusion, Article 2 of the Protocol clarifies that any reference to national laws and practices only refers—respectively—to 'law or practices of Poland or of the United Kingdom'.

B. 'Incorporation' of the European Convention of Human Rights

To clarify the status of the European Convention in the European legal order, the Commission had, long ago, suggested that accession to the Convention should be pursued.[102] But under the original Treaties, the European Union lacked the express power to conclude human rights treaties.

[99] And yet, this might only be true for Britain as Declaration (No 62) looks like a Polish opt-out from the opt-out:

> Poland declares that, having regard to the tradition of social movement of 'Solidarity' and its significant contribution to the struggle for social and labour rights, it fully respects social and labour rights, as established by European Union law, and in particular reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union.

[100] The following Charter rights use the phrase: Art 9—'Right to marry and to found a family'; Art 10—'Freedom of Thought, Conscience, and Religion'; Article 14—'Right to Education'; Art 16—'Freedom to conduct a Business'; Art 27—'Workers' right to information and consultation within the undertaking'; Art 28—'Right of collective bargaining and action'; Art 30—'Protection in the event of unjustified dismissal'; Art 34—'Social security and social assistance'; Art 35—'Health Care'; and Art 36—'Access to services of general economic interest'.

[101] Declaration (No 61) by the Republic of Poland on the Charter of Fundamental Rights of the European Union: 'The charter does not affect in any way the right of Member States to legislate in the sphere of public morality, family law, as well as the protection of human dignity and respect for human physical and moral integrity.'

[102] Commission, Memorandum: Accession of the European Communities to the European Convention on the Protection of Human Rights and Fundamental Freedoms, [1979] *Bulletin of the European Communities*—Supplement 2/79, esp 11 f.

The Commission thus proposed using the Union's general competence: Article 352 TFEU; yet—famously—the Court rejected this strategy in Opinion 2/94.[103] In the view of the Court only a subsequent Treaty amendment could provide the Union with the power of accession. This power has now been granted by the Lisbon amendment. According to Article 6(2) TEU, the European Union 'shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms'.

What will the constitutional principles governing incorporation here be? Is there any need for an incorporation doctrine once the European Union accedes to the ECHR? After all: the Member States are already formal parties to the European Convention. The answer is—surprisingly—positive. For while the substantive human rights standard established by the Convention is likely to be the same for the Union and its Member States, the formal effects of the Convention on the Member States will differ. As an international agreement, the European Convention currently binds the Member States under classic international law. Under classic international law, States remain free to choose which domestic legal status to grant an international treaty. For a majority of Member States,[104] the Convention will indeed only have a legislative status, that is: it is placed *below* the national Constitution. In the event of a conflict between a European Convention right and the national Constitution, the latter will thus prevail.[105]

This normative hierarchy will change, when the Union becomes a party to the European Convention. For once the Convention has become binding on the Union, it will bind the Member States *qua* European law. This follows from Article 216 TFEU, according to which '[a]greements concluded by the Union are binding upon the institutions of the Union *and on its Member States*.' (emphasis added). The provision 'incorporates' all Union agreements into the national legal orders.[106] The European Convention will thus be *doubly* binding on the Member States: they are *directly* bound as parties to the Convention and *indirectly* bound as members of the Union.

[103] Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Opinion 2/94 [1996] ECR 1759.

[104] On this point, see N Krisch, 'The Open Architecture of European Human Rights Law', (2008) 71 *Modern Law Review* 183, 197:

> [F]rom the perspective of the domestic courts national constitutional norms emerge as ultimately superior to European human rights norms and national courts as the final authorities in determining their relationship. This seems to hold more broadly: asked about their relationship to Strasbourg, 21 out of 32 responding European constitutional courts declared themselves not bound by ECtHR rulings.

[105] For the German legal order, see the—relatively—recent confirmation by the German Constitutional Court in *Görgülü* (2 BvR 1481/04 available (English) at www.bverfg.de/entscheidungen/rs20041014_2bvr148104en.html).

[106] A Peters, 'The Position of International Law within the European Community Legal Order' (1997) 40 *German Yearbook of International Law* 9, 34: 'transposing international law into [Union] law strengthens international rules by allowing them to partake in the special effects of [Union] law'.

And with regard to the binding effect of the Convention *qua* European law, the Convention will have a hierarchical status *above* each national Constitution. Substantially, Union accession to the ECHR might even lead to a total incorporation of Convention rights *as European fundamental rights*. This follows from the Legal nature of international agreements in the Union legal order. For the Convention will—as an international agreement—be akin to a European 'regulation'; and as such will be directly and generally applicable in the Member States.[107]

It was—arguably—because of this strong *normative* effect of accession to the Convention that the Member States insisted on strong *political* safeguards of federalism in this context. Indeed: accession will not solely depend on the Union institutions but also its Member States *as States*. First, the Council will need to conclude the agreement by a *unanimous* decision of its member governments,[108] having previously obtained the consent of the European Parliament.[109] But unlike ordinary international agreements of the Union,[110] the Union decision concluding the agreement will only enter into force 'after it has been approved by the Member States in accordance with their respective constitutional requirements'.[111] The Member States will thus be able to block Union accession twice: once in the Council and once outside it. And while they may be under a constitutional obligation to consent to accession as members of the Council, this is not the case for the second consent. For the duty to accede the Convention expressed in Article 6(2) TEU will only bind the Union—and its institutions—but not the Member States as such.

IV. CONCLUSION: FROM 'SELECTIVE' TO 'TOTAL' INCORPORATION?

In parallel with American constitutional thought, there exists a doctrine of incorporation in the European legal order. European fundamental rights will thus not exclusively limit the European institutions. They may—in certain situations—equally apply to the public authorities of the Member States.

[107] On the effect and status of international agreements in the European Union, see R Schütze, 'The Morphology of Legislative Power in the European Community: Legal Instruments and the Federal Division of Powers' (2006) 25 *Yearbook of European law* 91, esp 131 f.

[108] Art 218(8) TFEU—second indent.

[109] Art 218(6)(a)(ii) TFEU.

[110] While the procedure resembles that for the conclusion of mixed agreements, it differs from the latter in that it makes the validity of the Union decision *legally* dependent on its prior ratification by the Member States.

[111] Art 218(8) TFEU—second indent.

This chapter looked at the incorporation doctrine across the three sources of European fundamental rights. With three distinct sources of fundamental rights, the constitutional principles governing the European incorporation doctrine are—unsurprisingly—more complex than those governing the American incorporation doctrine. Indeed for each of the Union's three 'bills of right', the doctrine applies to slightly different situations. With regard to the Union's general principles, the Court has expressly recognised that incorporation will take place in two contexts, namely when the Member States *implement* European law and where they *derogate* from European law. The Charter of Fundamental Rights appears to textually limit incorporation to the implementing situation. And unless the Court decided to go against this express wording, the incorporation doctrine under the Charter would be more 'selective' that that applying to the Union's unwritten general principles. With regard to the European Convention of Human Rights, formal accession could, on the other hand, eventually lead to *total* incorporation. In the worse case scenario, then, there potentially are three distinct incorporation doctrines for the Union's three bills of rights!

But what are the similarities and dissimilarities between the European and the American incorporation doctrine? The Union presently favours selective over total incorporation. In this respect, it emulates the traditional American constitutional solution. Yet the European doctrine nonetheless differs strikingly from the classic American doctrine. For unlike the latter, the European legal order has not made incorporation dependent on the *type of fundamental right* at issue. The European doctrine has, by contrast, made the incorporation of Union fundamental rights into national legal orders dependent on the *type of Member State action*. If the Member States implement (or derogate from) European law, their national authorities will be bound—regardless of the fundamental right at issue.

Should this form of selective incorporation be embraced as a better constitutional solution than that adopted by American constitutionalism? The answer must be in the negative. For the problem with the present European version of selective incorporation is its uncertain scope—especially with regard to the derogation situation.

This uncertainty has recently given rise to arguments in favour of abandoning selective incorporation altogether. In her opinion in *Zambrano*,[112] Advocate General Sharpston analysed in detail the question whether European fundamental rights—in this case: the fundamental right to family life—ought to be invoked as free-standing rights whose application was *independent* of the type of situation engaged in by the Member States.[113] In her view this should indeed be the case whenever the Member

[112] Case C-34/09 *Zambrano v ONEM*, nyr. On the laconic character of the actual judgment, see Editorial 'Seven Questions for Seven Paragraphs' (n 4).

[113] *Zambrano* (n 112) Opinion of AG Sharpston, para 152.

States act within the scope of the Union's competences.[114] This *total incorporation within the scope of Union competences* was said to have a number of advantages, in particular:

> [S]uch a definition of the scope of application of EU fundamental rights would be coherent with the full implications of citizenship of the Union, which is 'destined to become the fundamental status of the nationals of Member States'. *Such a status sits ill with the notion that fundamental rights protection is partial and fragmented*; that it is dependent upon whether some relevant substantive provision has direct effect or whether the Council and the European Parliament have exercised legislative powers. In the long run, only seamless protection of fundamental rights under EU law in all areas of exclusive or shared EU competence matches the concept of EU citizenship. (emphasis added)[115]

This solution is based on the—homogenising—equality rationale behind European citizenship. Each citizen of the Union should be equally entitled to exercise her rights within the scope of the European Treaties—regardless of how the Member States had acted or whether a cross-border element was involved.

Yet the choice between selective and total incorporation ultimately depends on the European Union one wants. Indeed: even the proponents of total incorporation have found that the social reality of European society may not (yet) be ripe for the homogenising effects of this constitutional theory. Advocate General Sharpston thus denied the application of her *Zambrano* theory to the facts of the case. For according to her learned opinion, the new theory 'would involve introducing an overtly federal element into the structure of the EU's legal and political system'.[116] '[A] change of the kind would be analogous to that experienced in US constitutional law',[117] for indeed: '[t]he federalizing effect of the American incorporation doctrine is well known.'[118] What, then, was required for total incorporation to take place? Since '[a] change of that kind would alter, in legal and political terms,

[114] Yet the learned Advocate General added an exception to this rule so as to placate the Member States—ever fearful of European human rights entering into their 'reserved' areas (*Zambrano* (n 112) para 168):

> Fundamental rights protection under EU law would only be relevant when the circumstances leading to its being invoked fell within an area of exclusive or shared EU competence. The type of competence involved would be of relevance for the purpose of defining the proper scope of protection. In the case of shared competence, the very logic behind the sharing of competence would tend to imply that fundamental rights protection under EU law would be complementary to that provided by national law.

This proviso, however, would introduce, through the back door, a similar degree of constitutional uncertainty as existed before. On the rise of 'competence cocktails' in the European legal order, see R Schütze, 'Lisbon and the Federal Order of Competences: A Prospective Analysis' (2008) 33 *European Law Review* 709.

[115] *Zambrano* (n 112) Opinion of AG Sharpston, para 170.

[116] *Zambrano* (n 112) Opinion of AG Sharpston, para 172.

[117] Ibid.

[118] *Zambrano* (n 112) Opinion of AG Sharpston, para 173.

the very nature of fundamental rights under EU law', it would require 'both an evolution in the case-law *and* an unequivocal political statement from the constituent powers of the EU (its Member States), pointing at a new role for fundamental rights in the EU'.[119] This 'constitutional moment' had not yet taken place.[120] Yet, the Advocate General was eager to add:

> In proposing that answer, I am accepting that the Court should not, in the present case, overtly anticipate change. I do suggest, however, that (sooner rather than later) *the Court will have to choose between keeping pace with an evolving situation or lagging behind legislative and political developments that have already taken place*. At some point, the Court is likely to have to deal with a case—one suspects, a reference from a national court—that requires it to confront the question of whether the Union is not now on the cusp of constitutional change (as the Court itself partially foresaw when it delivered Opinion 2/94). Answering that question can be put off for the moment, but probably not for all that much longer.[121]

We must wait and see when and how the Court will answer this fundamental question.[122]

[119] Ibid.

[120] *Zambrano* (n 112) Opinion of AG Sharpston, paras 174–75:
For present purposes, the material point in time is the birth of Mr Ruiz Zambrano's second child, Diego, on 1 September 2003. It is that event (the entry into the equation of a citizen of the Union) which—if Mr Ruiz Zambrano is right—ought to have led the Belgian authorities to accept that he had derivative rights of residence and to treat his claim for unemployment benefit accordingly. At that stage, the Treaty on European Union had remained essentially unchanged since Maastricht. The Court had clearly stated in Opinion 2/94 that the European Community had, at that point, no powers to ratify the European Convention of Human Rights. The Charter was still soft law, with no direct effect or Treaty recognition. The Lisbon Treaty was not even on the horizon. Against that background, I simply do not think that the necessary constitutional evolution in the foundations of the EU, such as would justify saying that fundamental rights under EU law were capable of being relied upon independently as free-standing rights, had yet taken place.

[121] *Zambrano* (n 112) Opinion of AG Sharpston, para 177.

[122] In the meantime, an interesting—academic—solution has been suggested by A von Bogdandy and his team (*cf* A von Bogdandy et al, 'Reverse Solange—Protecting the Essence of Fundamental Rights Against EU Member States' (2012) 49 *Common Market Law Review* 489). Starting from *Zambrano*'s insistence on an inviolable substance of citizenship rights, the authors 'are taking that jurisprudence one step further and propose to basically define this "substance" with reference to the essence of fundamental rights enshrined in Article 2 TEU'. 'This standard applies to public authority *throughout* the European legal space. Consequently, a violation by a Member State, even in purely internal situations, can be considered an infringement of the substance of Union citizenship' (ibid 491). This solution is, however, subsequently limited in light of the authors' belief that '[t]he respective experiences undergone by federal States like the USA or Germany are not a suitable way for Europe to proceed' (ibid, 496). This limitation takes the form of a 'reverse' *Solange*, and is described as follows (ibid, 491): 'In order to preserve constitutional pluralism, which is protected by Article 4(2) TEU, we suggest framing a "reverse" *Solange* doctrine, applied to the Member States from the European level. This can be put briefly as follows; beyond the scope of Article 51(1) CFREU Member States remain autonomous in fundamental right protection *as long as* it can be presumed that they ensure the essence of fundamental rights enshrined in Article 2 TEU. However, should it come to the extreme constellation that a violation is to be seen as *systemic*, this presumption is rebutted. In such a case, individuals can rely on their status as Union citizens to seek redress before national courts.'