THE FUNDAMENTAL RIGHTS IMPLICATIONS OF EU LEGISLATION: SOME CONSTITUTIONAL CHALLENGES

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Abstract

The architecture of the EU system of protection of fundamental rights is uniquely complex. The web of Charter and Convention articles is closely interwoven with general principles of EU law, Treaty provisions as well as with rights enshrined in EU legislation. The latter have received limited attention to date. EU legislation increasingly directly or indirectly, explicitly or implicitly, sets fundamental rights standards or marks the presence of Union law—thereby allowing the European Court of Justice to do so. The variety of EU legislation with fundamental rights implications sheds light on the active dimension of EU fundamental rights policy and poses multiple challenges for the interaction between the European and domestic legal orders that are explored in this article.

1. Introduction

The entry into force of the Lisbon Treaty has marked a new era for the European Union’s involvement in fundamental rights matters. With the Charter of Fundamental Rights of the European Union (“the Charter”) gaining the same legal value as the European Union Treaties, and the accession of the European Union to the European Convention for Human Rights becoming compulsory, the protection of fundamental rights in EU primary law has been considerably consolidated. The protection afforded by general principles of EU law should soon co-exist with two written and direct sources of rights.

This new and complex constitutional framework has triggered much attention and debate on the relationship between the various primary law
sources for the protection of fundamental rights. EU lawyers have engaged in a detailed examination of the interactions between the Charter and the ECHR, the Charter and Treaty provisions as well as the Charter and general principles of European Union Law. Some of the core concerns result from uncertainties on the precise scope of EU fundamental rights jurisdiction, the respective effects of general principles of EU law and of the Charter in private disputes, the role of the Charter and that of the ECHR as possible competing sources for the protection of fundamental rights in the EU, and their relationship with national constitutional rights. The consistency and scope of the constitutional framework provided for by EU law on the matter are thereby being helpfully explored and tested.

In contrast, limited attention has been devoted to the growth of EU legislation that has implications for the protection of fundamental rights. Yet, in recent years the importance of such acts of secondary law has grown. EU political institutions are increasingly (directly or indirectly, explicitly or implicitly – as we shall see below) setting fundamental rights standards in the process of exercising the competences entrusted to them, or marking the presence of Union law and thereby allowing the European Court of Justice to do so. Although fragmented – since there is no general Treaty provision enabling the EU actively to develop a fully-fledged fundamental rights policy – such a definition of human rights protection intensifies the impact of EU fundamental rights jurisdiction on domestic legal orders. Matters affected


7. See, however, de Witte, “Non-market values in internal market legislation” in Nic Shuibhme (Ed.), Regulating the Internal Market (Edward Elgar, 2006) at p. 75 and Kosta, Fundamental Rights in Internal Market Legislation (PhD Thesis defended at the European University Institute, 2013).

range from specific fundamental rights competences (such as EU anti-discrimination law), to core EU economic law (e.g. freedom of expression and media services). EU legislation may thus set fundamental rights standards and/or establish the scope of human rights protection on a given subject.

The different instances of EU legislation with fundamental rights implications sheds light on the active dimension of EU fundamental rights policy. The process through which EU political institutions are increasingly empowered to have a say on EU fundamental rights matters – or politicization – has significant constitutional implications. It means that the ECJ now has new interlocutors on fundamental rights matters, insofar as it may engage in a dialogue on the standards and scope of protection with the European Parliament and the Council. (The increased democratic legitimacy of the legislative process through the involvement of the European Parliament also adds to the political weight of the relevant legislation.) The existence of instruments adopted by EU political institutions may also be relied upon by the ECJ to embolden its approach to fundamental right matters. In the meantime, the stronger relevance of legislative choices sheds light on the political dimension of ECJ rulings on fundamental rights in the absence of such legislative choices or in case of disagreement between the judiciary and political institutions. Certain political constitutional theorists actually argue that the existence of reasonable disagreement on rights warrants political debate on their content and scope. The politicization of the fundamental rights discourse in the EU public sphere therefore impacts on the interplay between the judiciary and political institutions.

The greater role played by legislation in broadening fundamental rights jurisdiction also represents a challenge from the perspective of the interaction between the European and domestic legal orders as will be explored in this article. The fundamental rights implications of EU legislation are difficult to rationalize with the tools traditionally available to articulate European and national decision-making. On the one hand, it is hard to capture them by the principle of conferred competences, which is designed to circumscribe the scope of legislative intervention. As pointed out by Paul Craig, the balance between EU competences and domestic autonomy actually is the result of “the


10. Muir, “The Court of Justice: A fundamental rights institution among others” in Dawson, de Witte and Muir (Eds.) Judicial Activism At The European Court Of Justice (Edward Elgar, 2013) Ch. 5.

symbiotic interaction” between several variables, including – beyond the wording of Treaty provisions – the adoption of EU legislation and the interpretation thereof by the judiciary.12 The fundamental rights implications of EU legislation thus go well beyond the mere exercise of a competence concerned with fundamental rights protection;13 the existence of legislation often serves as a triggering factor for a multitude of spillover effects in domestic legal orders (section 3, below).14 Fundamental rights are destined to protect individuals against most severe forms of attacks on their personal dignity irrespective of the origins of such an intrusion. Those in search of protection as well as those institutions willing to provide it indeed rely on the mere existence of legislation to convey EU fundamental rights protection irrespective of the precise constitutional framework and mandate initially held by political institutions. On the other hand, the principle of subsidiarity, which regulates the exercise of European competences, offers little more support to capture the fundamental right implications of EU legislation. As will be discussed in section 4, below, although its underlying rationale (i.e. to take decisions as closely as possible to citizens) may be attractive, the precise definition and function given to it in the EU legal order is ill-suited to provide a suitable framework to delineate the respective role of the EU and the Member States on matters of fundamental right protection. The dynamics of such decision-making are thus difficult to grasp with the traditional constitutional tools.

This tension between the dynamics of fundamental rights protection conveyed by legislation and constitutional principles also exists within national legal orders. Yet, it has specific implications for the EU legal order. In recent years, the fundamental rights discourse tends to become a legitimating battle horse for the European Union. Not only is the Union legal order increasingly committed to respect fundamental rights,15 but fundamental rights are also becoming a more and more important part of EU “political messianism”.16 However, the EU remains anchored in a pluralist set of domestic constitutional orders and instruments for the protection of fundamental rights. The fundamental rights discourse developed at EU level is

13. For far-reaching proposals on this matter see Craig, ibid., 432 et seq.
thus both an element of cohesion and a possible source of dissent.\textsuperscript{17} The powers of EU political institutions to define the content and scope of rights “intrude into areas previously within the constitutional autonomy of Member States in a more invasive manner than could have been imagined in the early days of EU fundamental rights protection”.\textsuperscript{18} As Besselink suggests, the politicization of the fundamental rights discourse at EU level may touch upon highly sensitive areas of domestic constitutional law and policy without being anchored in a traditional constitutional setting that is as well established and accepted as the domestic one. In the following paragraphs, the limits of the constitutional principles of EU law in understanding the dynamics of EU fundamental rights law-making will therefore be outlined. As these limitations vary with the constitutional mandate given to EU political institutions, an overview of the different types of EU legislation having fundamental right implications is provided in a preliminary section (section 2).

2. The growing fundamental rights dimension of EU secondary legislation

More and more often, EU political institutions take decisions that result in establishing EU standards and mechanisms for the protection of fundamental rights; yet they do so with different degrees of visibility. Indeed, the constitutional landscape in which this occurs differs. One may distinguish between three main types of EU legislation that have fundamental rights implications based on the organic relationship between the fundamental rights and the legislation at hand – i.e., on the extent to which political institutions are mandated to set fundamental right standards.

2.1. EU legislation designed to “give specific expression”\textsuperscript{19} to a fundamental right

The first – and clearest – example of acts that have an impact on fundamental rights is secondary law designed to give expression to a fundamental right. A limited number of legal bases in the European Union Treaties empower

\textsuperscript{17} As very convincingly argued in von Bogdandy, op. cit. supra note 8. For further enquiry into this matter from a pluridisciplinary perspective see Muir and Leconte (Eds), “Understanding Resistance towards an EU Fundamental Rights Policy”, 15 Human Rights Review (2014, forthcoming).

\textsuperscript{18} Besselink, The Protection of Fundamental Rights post-Lisbon: The Interaction between the EU Charter of Fundamental Rights, the European Convention on Human Rights (ECHR) and National Constitutions (FIDE General Report, 2013).

political institutions to enact fundamental rights legislation.\textsuperscript{20} For instance, Article 19 TFEU enables the Council\textsuperscript{21} to take appropriate action to combat discrimination on the grounds of sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. It is a particularly broad enabling provision. Yet, other illustrations may be found in the Treaties: among others, Article 157(3) TFEU allows for the adoption of legislation on equal opportunities and treatment of men and women in employment and occupation; Article 16(2) TFEU requires legislation on the protection of personal data.

Most of the legal bases allowing political institutions to regulate specific fundamental rights are fairly recent. Enabling provisions on anti-discrimination date back to the Treaty of Amsterdam, while those on data protection and the rights of victims in criminal procedures\textsuperscript{22} were inserted in the TFEU with the Treaty of Lisbon. However, political institutions had adopted legislation giving shape to specific EU fundamental rights well before these Treaty reforms. For example, in the 1970s, EU institutions adopted a Directive on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions on the basis of the so-called “flexibility clause”.\textsuperscript{23}

Regulated fundamental rights are thus protected by EU law in two ways. Firstly, they are enshrined in primary law as general principles of EU law, Treaty and/or Charter provisions\textsuperscript{24} and should thus be respected by EU institutions, Member States and – subject to specific conditions\textsuperscript{25} – by individuals acting within the scope of Union law. Secondly, there is legislation specifically adopted in order to give expression to these fundamental rights. The legislation defines the content, scope of application and modes of protection of the said fundamental rights. This is the case, for example, of Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin adopted on the basis of Article 19(1) TFEU.\textsuperscript{26} This Directive defines the concept of discrimination (Art. 2), clarifies the scope of the prohibition of discrimination on the grounds of racial

\textsuperscript{21} With the consent of the European Parliament.
\textsuperscript{22} Art. 82(2)(b) TFEU.
\textsuperscript{24} As well as, although less directly, by the ECHR.
\textsuperscript{25} This is discussed further infra.
\textsuperscript{26} O.J. 2000, L 180/22.
or ethnic origin, which covers for example access to education (Art. 3), and provides a set of tools for the effective enforcement of the right (Arts. 7 to 13).

EU legislation designed to give expression to a given fundamental right therefore ensures greater protection than EU primary law in several ways. The legislation provides that the fundamental right is not only respected by EU actors acting within the scope of pre-established competences, but is also protected in a whole range of settings that may go beyond the scope of other EU competences. The legislation may also be shaped to regulate private relationships in much clearer terms than the equivalent provisions in EU primarily law. Finally, the legislation goes beyond EU primary law in so far as the competence to regulate the fundamental right implies a power to develop procedural tools for the enforcement of this fundamental right. The procedural dimension of fundamental rights legislation is thus extremely important in order to actually enhance the protection of the said fundamental right in domestic legal orders.

The existence of legal bases explicitly enabling fundamental rights intervention clarifies the mandate of political institutions and alleviates the burden to justify the relationship between the act and the relevant legal basis. In a set of recent cases, the Court has acknowledged the specific nature of “EU legislation giving expression to fundamental rights” and granted it specific effects in domestic legal orders; it is not yet clear, though, whether this qualification and the effects of the relevant EU rights could be extended beyond the scope of anti-discrimination law.

EU anti-discrimination legislation is a fairly straightforward example of “EU legislation giving expression to fundamental rights”. There is indeed a conjunction of procedural as well as substantive criteria supporting this view. From a procedural perspective, legal bases in the Treaty enable the adoption of instruments with the express and specific purpose of developing an anti-discrimination policy. Furthermore, in substance, the anti-discrimination directives have been adopted in order “to lay down a general framework for combating discrimination”. The protection against discrimination being a fundamental right protected by general principles of EU law as well as the Charter, EU anti-discrimination legislation is fairly clearly designed to give expression to a fundamental right.

27. This is discussed further infra.
28. E.g. Directive 2000/43, cited supra note 26, requires the Member States to adopt measures to prohibit race or ethnic discrimination in inter-personal relationships (Art. 1).
29. E.g. Directive 2000/43, ibid., requires the creation of a special body for the promotion of equal treatment and with specific competences (Art. 13).
30. Mangold and Kücükdeveci, respectively cited supra notes 4 and 19.
Other pieces of legislation that address matters related to rights protected by the Charter or general principles of EU law may be more difficult to classify as “EU legislation giving expression to fundamental rights”. For example, the wording of the relevant legal base and/or the content of the instrument is not always clearly tailored in terms of fundamental right protection. While the Working Time Directive has in that respect already been subject to debates leading the Court to implicitly deny it the characteristics of “EU legislation giving expression to fundamental rights” (as discussed further below), an example of EU legislation that may qualify as such is the current Data Protection Directive.32 Although adopted in the mid–1990s as an internal market instrument on the basis of the equivalent of today’s Article 114 TFEU, in substance the Directive is specifically designed to give shape to a fundamental right (as now acknowledged by the new Art. 16(1) TFEU as well as Art. 8 of the Charter).

2.2. EU “accessory” power to legislate on fundamental rights

The second category of legislative instruments are acts designed to implement an “ordinary” EU competence – a competence other than fundamental rights protection – that incidentally sets fundamental right standards. In the process of giving shape to “ordinary” policies, political institutions may have to balance the “ordinary” EU objective to be achieved with fundamental rights protection. In such a situation, and in the words of Clemens Ladenburger, EU political institutions have “‘functional’ or ‘accessory’ powers to enact fundamental rights”.34 This is not uncommon in traditional areas of EU law such as competition, anti-dumping, anti-fraud or customs policy – in relation to which EU regulatory powers are of such importance that political institutions ought at times to provide standards of fundamental rights protection (for example, the right to be heard).35

This “functional” power to regulate fundamental rights has gained momentum over the years for two main reasons. Firstly, competences in the fields of migration and criminal policy acquired by the European Union with the entry into force of the Amsterdam and Lisbon Treaties respectively are natural – if not spectacular – test grounds for these “accessory” powers to regulate fundamental rights. These new and dynamic policy areas are inherently connected with fundamental right concerns. For example, the rights

32. O.J. 1995, L 281/31. Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. See also Kosta, op. cit. supra note 7.
33. Ladenburger, op. cit. supra note 20, at 23.
34. Ibid.
35. Ibid.
of entry and residence for family members of third-country nationals lawfully residing in the EU relates to migration flows as well as to the fundamental right to family life. Similarly, an instrument such as the European Arrest Warrants enhances the mutual recognition of judicial decisions while defining the right for arrested persons to be heard. The adoption of instruments in these fields may also result from, or create, a presumption that the Member States comply with certain fundamental right standards.36

The second reason for the increased importance of this second type of legislation is the commitment of EU institutions, especially the Commission, to pay more attention to the fundamental rights implications of legislation. While these institutions have for several years already inserted standard formulae in the preamble of legislation in order to assert that the text complies with fundamental rights, the Commission has also committed to pay more attention to the fundamental rights dimension of legislation in preliminary as well as subsequent stages of the legislative process.37 This has been done by including points on the matter in preliminary consultations as well as in impact assessments. Although it has been observed that there is still room for improvement in the development of the “culture of fundamental rights”38 within the Commission as well as in the legislative process itself,39 these efforts may strengthen the incidental fundamental rights standards setting in EU legislation.

2.3. EU legislation defining the scope of the EU courts’ fundamental right jurisdiction

The third and final category of legislation that ought to be examined also establishes norms for the purpose of exercising “ordinary” EU competences but does not set fundamental rights standards and a mechanism of protection as such. This legislation merely defines the scope of EU law for the purpose of triggering protection of fundamental rights by EU courts. EU institutions and Member States are under a duty to respect fundamental rights when acting within the scope of EU law; by tracing the contours of EU law, this legislation therefore provides an open door for European judges to scrutinize measures giving effect to Union obligations in light of European standards of fundamental rights protection.

36. This is discussed further infra.
38. Ibid. at 4.
One may distinguish three sets of circumstances falling within the scope of EU law for the purpose of triggering fundamental right protection: 40 (i) domestic measures implementing EU law; (ii) domestic measures adopted under a permitted derogation from an EU obligation and (iii) situations to which a rule of EU substantive law is applicable. Secondary legislation is a powerful tool to shape the scope of Union law for the purpose of triggering such primary law protection. Secondary law may indeed define obligations to be implemented by the Member States (supra category (i)), identify derogations from these obligations (supra category (ii)) and/or establish substantive norms governing given situations (supra category (iii)). The stronger and clearer the mandate of the European Union to ensure adequate protection of fundamental rights standards, the more likely it is that “ordinary” legislation will be used as an indirect vehicle for fundamental rights protection.

However, the relevance of this threefold categorization and the precise way to define the scope of EU law is still subject to much debate, 41 the intensity of which has been revived in recent years owing to two sets of concerns directly related to fundamental rights protection. For example, some authors have suggested on several occasions that the scope of EU law should be understood more broadly whenever this is a pre-condition for enhancing fundamental rights protection throughout the European Union. 42 Conversely, the wording of Article 51 of the Charter suggests that this instrument may accord fundamental rights protection in a lower number of circumstances than other primary law sources of protection. According to this article, the Charter only covers domestic measures implementing EU law (category (i) supra). Nevertheless, the explanations on Article 51 of the Charter are broader, they recall that “it follows unambiguously from the case law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of Union law”. As the scope of EU fundamental rights jurisdiction is thereby subject to controversy, the first cases on the matter suggest that the Court will

41. Ibid.
42. Two of the most far-reaching proposals on the matter in recent years are those of A.G. Sharpston in Zambrano and von Bogdandy et al., both cited supra note 3. In essence – and although their approaches significantly vary –, they suggest anchoring the expansion of the scope of EU law in the Treaty provisions on EU citizenship.
give great importance to the perimeters of EU law as defined in secondary legislation to complement the interpretation of Treaty provisions.43

3. The spillover effects of EU legislation on matters of fundamental right protection

Political institutions are increasingly involved in defining fundamental rights standards and the scope of EU fundamental rights jurisdiction. Relying on a new political mandate as well as on the stronger primary law background for fundamental rights protection, European institutions use legislation as a vehicle to enhance European fundamental rights jurisdiction over domestic legal orders. The spillover effects of European secondary law in domestic legal orders shape up differently depending on the initial constitutional mandate given to EU political institutions on fundamental rights matters. The following discussion thus addresses each of the three types of legislation described in the preceding section in turn. Legislation designed to “give specific expression” to a fundamental right allows for secondary law to cover novel aspects of domestic policies beyond the classic areas of competences of the EU (3.1). Similarly EU “functional” power to legislate on fundamental rights allows the EU legal order to expand its “accessory” jurisdiction on fundamental rights (3.2), and finally, legislation defining the scope of EU law conveys an ever growing fundamental rights jurisdiction (3.3).

3.1. Giving specific expression to a fundamental right beyond the pre-existing reach of EU law

First of all, it is important to recall that legislation giving expression to a fundamental right may (if the legal base allows) define its own substantive scope and thus impact on the substantive scope of EU law.44 A recent illustration of this relates to the anti-discrimination directives adopted on the basis of said Article 19(1) TFEU. Although the competences of EU institutions provided by that article are “within the limits of the powers conferred by [the provisions of the Treaty] upon the Union”, the directives adopted on that legal basis cover matters that are distinct from the scope of other EU competences. For example, although the European Union has limited competences in the field of education (it may only support and complement domestic intervention through incentive measures and

43. E.g. Case C-617/10, Fransson, judgment of 26 Feb. 2013, nyr; this is discussed further infra.
44. E.g. von Bogdandy, op. cit. supra note 8 at 1309.
recommendations to the exclusion of harmonization\textsuperscript{45}), Directive 2000/43 prohibits discrimination based on race or ethnic origin in education.\textsuperscript{46} As a corollary, the lack of anti-discrimination legislation to cover a specific type of discrimination in a given social setting not covered by other provisions of EU law means that such a situation does not fall within the scope of Union law.\textsuperscript{47}

The impact that EU legislation designed to give expression to a fundamental right has on the substantive scope of EU law has lately been highlighted by the \textit{Kücükdeveci} case. Ms \textit{Kücükdeveci} sued her private employer for breach of an obligation enshrined in a directive. The employer had made use of provisions of national law excluding periods of employment completed before reaching the age of 25 from the calculation of the length of employment for the purpose of assessing the notice period for dismissal. That rule was a purely domestic rule, unrelated to the implementation of any EU obligations or competences. Nevertheless the Court found that the situation fell within the scope of European law owing to the expiry of the implementation period of Directive 2000/78 establishing a general framework for equal treatment in employment and occupation.\textsuperscript{48} Directive 2000/78 indeed prohibits age discrimination in relation to dismissals: it thus brought the said national legislation within the scope of European Union law only by virtue of the material scope of the anti-discrimination Directive.\textsuperscript{49}

Second, the ECJ acknowledged that EU legislation giving expression to a fundamental right is capable of having particularly far-reaching effects in domestic legal orders. In the same \textit{Kücükdeveci} case, the ECJ indeed requested the referring court to disapply – if necessary – the provision of national legislation breaching the EU prohibition of age discrimination\textsuperscript{50} irrespective of the fact that the dispute was between two private parties.\textsuperscript{51} Since \textit{Kücükdeveci}, it is thus established that the existence of secondary legislation giving specific expression to a fundamental right (a general principle of EU law in the case at hand) allows EU law to have a direct impact on the outcome of an inter-personal dispute in matters covered by a fundamental rights directive.

\textsuperscript{45} Arts. 165(4) and 166(4) TFEU.
\textsuperscript{46} Directive 2000/43, cited supra note 26, Art. 3(1)(g).
\textsuperscript{47} Hence the debates on the outcome of the annulment action in Case C-236/09, \textit{Test-Achats}, [2011] ECR I-773.
\textsuperscript{48} O.J. 2000, L 303/16.
\textsuperscript{49} \textit{Kücükdeveci}, cited supra note 19, para 25.
\textsuperscript{50} As enshrined in a general principle of EU law given specific expression by Directive 2000/78, cited supra note 48.
It has been argued that this approach to intensifying the effects of EU law owing to the special nature of EU legislation giving specific expression to a fundamental right could (if not should) be broadened. Nevertheless, the Court has so far been reluctant to extend this approach beyond EU anti-discrimination law. The best example of such reluctance is the Dominguez case. This involved a dispute between an employee and employer on the matter of paid annual leave. The provisions of national law upon which the employer relied were contrary to the wording of Directive 2003/88 concerning certain aspects of the organization of working time – the implementation period of which had expired at the time of the dispute. The Court acknowledged that the situation fell within the substantive scope of Directive 2003/88 for the purpose of asserting a far reaching duty of consistent interpretation of national law in light of European law (i.e. the indirect effect of the Directive). Nevertheless, it recalled the limitations to the direct effect of Directives and made it clear that if the dispute was between two private parties (which was left for the national court to decide), Directive 2003/88 could not “of itself” apply to the dispute. Unlike in Kückideveci, the impact of EU law on the domestic legal order was thus contained within the boundaries of the principle of consistent interpretation.

There are several significant differences in the reasoning of the Court between the Kückideveci and Dominguez cases. The most important difference for our purpose is that, according to the Court, the fundamental rights dimension of the legislation involved in each case varies. In Kückideveci, the legal reasoning is framed by the specific relationship between the general principle prohibiting age discrimination and Directive 2000/78 giving specific expression to this fundamental right. In contrast, in Dominguez, the silence of the Court suggests that it is reluctant to consider

52. E.g. Grousset, Pech, Petursson, op. cit. supra note 40, at 29 et seq.
55. Dominguez, cited supra note 53, para 42.
56. Another interesting difference relates to the precise effects of EU law on the horizontal dispute at hand. In Kückideveci, the Court concluded that domestic law should be disapplied and thus the age discrimination eliminated. In Dominguez, the Court does not mention the possibility of setting aside national law but states that the Directive cannot apply “of itself”. This nuance relates to technicalities of the definition of direct effect which are beyond the scope of the present paper. See Dougan, “When worlds collide! Competing visions of the relationship between direct effect and supremacy”, 44 CML Rev. (2007), 931–936 and Muir, “Of Ages in and Edges of EU Law”, 48 CML Rev. (2011), 23–62.
57. Interestingly, it was the Court itself that brought the general principle and the Charter into the equation during the proceedings, while the national court had seemingly limited its question to the Directive: see de Mol, “Dominguez: A deafening silence”,” 8 EuConst (2012), 280–303, at 290–291.
the provisions of Directive 2003/88 on annual paid leave as the specific expression of a fundamental right protected by EU primary law. The Court re-asserts that the principle of annual paid leave is a “particularly important principle of European Union social law”\(^{58}\) but declines to qualify it as a general principle of EU law. The Court also refuses to refer to Article 31(2) of the Charter, which relates to the right of every worker to an annual period of paid leave. The careful approach of the Court in \textit{Dominguez} may be due to reluctance to expand the procedural implications of the \textit{Kücükdeveci} case, to the difficulty of classifying Article 31(2) of the Charter as providing a right or a principle within the meaning of Article 52(5) of the Charter\(^{59}\) or to that of engaging in a debate on whether some of the provisions of the Solidarity Title of the Charter could be matched by corresponding general principles of EU law despite the clear caution of the UK, Poland and the Czech Republic in relation to such provisions.\(^{60}\)

The Court’s rationale for declining to acknowledge that a specific provision of Directive 2003/88 may be the specific expression of the fundamental right to annual paid leave and to apply the “\textit{Kücükdeveci} effect” beyond the scope of EU anti-discrimination law remains unclear.\(^{61}\) Nevertheless, this sharpens the contrast between EU legislation giving specific expression to a fundamental right, and other legislation. It is indeed now clear that certain directives giving specific expression to a fundamental right allow litigants to rely on EU law in a new range of settings that did not exist previously in the constitutional landscape of Union law. The possibility of making use of directives giving specific expression to a fundamental right to enhance the effects of EU law will certainly be explored by applicants in the years to come. An interesting test-case could relate to EU data protection law. As pointed out supra, now that there is a specific legal basis for the adoption of legislation on data protection\(^{62}\) and that the right to data protection is asserted by Article 16(1) TFEU as well as Article 8 of the Charter, it is difficult to see why the “\textit{Kücükdeveci} effect” would not apply to data protection legislation giving specific expression to the corresponding fundamental right.\(^{63}\)

\(^{58}\) \textit{Dominguez}, cited supra note 53, para 16.

\(^{59}\) E.g. Pech, op. cit. supra note 4, at 1861.

\(^{60}\) Protocol 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, Art. 1(2).

\(^{61}\) One could expect a vivid debate on the matter within the Court itself. See e.g. the views of A.G. Trstenjak in \textit{Dominguez}, cited supra note 53.

\(^{62}\) Please note that secondary legislation on the matter already existed before the Lisbon Treaty as is discussed supra. See also O.J. 2012, C 102/24, COM(2012)11, “Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)”.

\(^{63}\) See Muir, op. cit. supra note ???, at note 115.
The accessory fundamental rights dimension of legislation giving effect to “ordinary” EU policies may also have significant unsettling effects as regards the relationship between national and European legal orders. Two aspects of this tension have triggered much attention in recent years.

To start with, EU “functional” powers to address fundamental rights matters may be used as an “indirect” vehicle for EU institutions to interfere with domestic fundamental rights regimes. Fundamental rights standards and mechanisms established by EU legislation as an “accessory” to a given EU policy objective can indeed be enforced against the Member States as any other EU standard or requirement for a specific protection mechanism. This is best exemplified by the Commission’s reliance on EU internal market legislation, setting out mechanisms for the protection of personal data against Hungary, as part of package of infringement actions designed to express the Commission’s concerns for fundamental rights protection and the rule of law in that country.

Such a use of legislation giving effect to a policy objective that is initially different from fundamental rights protection may be perceived as a circumvention of limits on EU competences and feed virulent criticisms, although EU institutions are actually seeking for a legal base in EU law to monitor fundamental right breaches. The level of fundamental rights protection set in EU legislation may also be controversial insofar as it has not necessarily been processed through a fully-fledged political debate on fundamental rights protection; also, it may be argued that the fundamental right at hand has been regulated through the prism of another policy objective that is given prevalence over the fundamental right. This could for example be observed from the reactions to the Commission’s proposal to regulate the exercise of the right to take collective action in order to ensure compliance with EU rules on the free movement of services and freedom of establishment.

Secondly, increased reliance on the principle of mutual recognition has given peculiar twists to the ability of EU secondary legislation to create fundamental rights obligations for the Member States. This has been particularly noticeable in recent years in the fields of EU migration and criminal law. The creation of EU mechanisms such as the Common European Asylum System (which facilitates the transfer of asylum seekers between Member States) and the European Arrest Warrant (regarding the transfer of persons for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order) requires that all Member States provide equivalent levels of fundamental rights protection to those persons being moved from one Member State to another. This triggers frictions between domestic and EU standards of protection as well as among domestic standards.

The level of fundamental rights protection required may indeed either be set in the legislation itself or, in the absence of specific provisions in the legislation, it may exclusively follow from the application of the principle of mutual recognition. Insofar as EU legislation explicitly sets a specific level of protection, this standard will in principle prevail over domestic standards by virtue of the principle of primacy but problems may arise when the level of protection thereby established is lower than what is provided for at domestic level. This is what happened in the recent Melloni case: Article 4a(1) of the European Arrest Warrant Framework Decision on the surrender of a person convicted in absentia was deemed by Spanish courts to conflict with Spanish constitutional law offering a greater level of protection of the rights to a fair trial and the rights of the defence. The ECJ asserted the compatibility of Article 4a(1) of the European Arrest Warrant Framework Decision with the Charter before considering whether Article 53 of the Charter (according to which “Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, … by the Member States’ constitutions”) could be invoked to allow Spanish authorities to apply higher fundamental rights standards. The ECJ refused this interpretation of Article 53 of the Charter. Instead, it treated the balance between the efficiency of the mechanisms of European Arrest Warrant and the protection of the rights of defence struck in EU legislation as satisfactory and was concerned to ensure the effectiveness of the instrument. Spain was thus expected to implement EU legislation irrespective of the fact that this would infringe its own

standards of fundamental right protection. This approach illustrates that the setting of fundamental right standards in legislation designed to implement an “ordinary” policy may have powerful implications for domestic standards of protection.\(^70\)

As regards EU legislation that does not explicitly set fundamental right standards, political institutions have made a policy choice to assume the existence of a certain level of fundamental rights protection. Yet, assumptions of an appropriate or equivalent fundamental rights protection may be rebutted. On the one hand, the relevant legislation may itself require that a Member State check that certain fundamental rights standards are complied with by the receiving state before transferring the person.\(^71\) On the other hand, even when the legislation is silent, the ECJ – following the M.S.S. case of the European Court for Human Rights\(^72\) – stated in the N.S. case that a mechanism relying on mutual recognition such as that created by Regulation 343/2003 (establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national) “precludes the application of a conclusive presumption that [another] Member State … observes the fundamental rights of the European Union”.\(^73\) Not only does Union law preclude such a conclusive presumption of fundamental rights compliance, but it also accommodates EU law obligations in case of certain threats to fundamental rights. Indeed:

“[T]he Member States, including the national courts, may not transfer an asylum seeker to [another Member State... ] where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of

70. This may be contrasted with the more nuanced Jeremy F case, in which the Court adopts an interpretation of Arts. 27(4) and 28(3)(c) of the European Arrest Warrant Framework Decision that allows national constitutional law to provide higher standards of protection of the right of appeal than the Framework Decision itself. Nevertheless, here again, the ECJ is concerned to respect closely the underlying logic and effectiveness of the European Arrest Warrant Framework Decision. The Court closely circumscribes the time limits for appeal procedures provided in national law: Case C-168/13 PPU, Jeremy F v. Premier ministre, judgment of 30 May 2013, nyr, para 73. See more generally on this case, Millet, “How much lenience for how much cooperation? On the first preliminary reference of the French constitutional council to the Court of Justice”, in this Review 000-000.


being subjected to inhuman or degrading treatment within the meaning of that provision.”

This approach establishes a duty for the Member States to be concerned about the fundamental rights record of their peers and has been referred to as establishing a “horizontal Solange”. This is certainly welcome insofar as it ensures that EU law obligations may not lead to severe downgrading of fundamental rights protection. Yet, a significant consequence is that the existence of EU legislation on a matter closely intertwined with fundamental rights matters, but not specifically designed to regulate fundamental rights protection, becomes a vehicle to create an EU obligation (supervised by EU institutions and national courts) for the Member States to be alert to the fundamental rights records of their peers. As pointed out by Iris Canor, this technique makes it possible “elegantly to subvert the division of competences taboo”.

The Common European Asylum System did not result in the harmonization of the substantive criteria for the management of asylum claims. At the time of the ruling, Member States largely retained the competence to examine applications according to their own laws and/or to set living conditions in detention centres. Nevertheless, the consequence of N.S. is that EU law requires that national authorities react to serious deficiencies in the standards applied by other Member States on these matters. EU “accessory” power to regulate fundamental rights matters thus expand as far as creating a form of peer review system among the Member States in the field of fundamental rights protection.

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74. Ibid., paras 99–106.
75. Canor, op. cit. supra note 71.
76. Ibid. at 385. See also the observations made by the Court on the Member States’ duty to respect fundamental rights outside the scope of EU law in Jeremy F cited supra note 70, as noted by Labayle, “Fin des questions, début des difficultés? La réponse de la Cour de justice au Conseil constitutionnel à propos du mandat d’arrêt européen dans l’affaire Jérémy Forrest” available at <www.gdr-elsj.eu/2013/06/01/cooperation-judiciaire-penale-fin-des-questions-debut-des-difficultes-la-reponse-de-la-cour-de-justice-au-conseil-constitutionnel-a-propos-du-mandat-darret-europeen-dans-laffaire-jeremy-forrest/> (last accessed 15 Nov. 2013).
77. In the meantime, the EU legislature has now adjusted its approach by the adoption of a set of updated instruments: EU Commission, “The EP votes on the Common European Asylum System” (Press Release, 12.6.2013); see also O.J. 2013, L 180 and Canor, op. cit. supra note 71, at 391–392.
3.3. **EU legislation conveying an expansionist EU fundamental rights jurisdiction**

When seized by a claim suggesting that a Member State may be violating EU fundamental rights, the Court of Justice ought, at a preliminary stage, to decide whether the situation is covered by EU law. As observed earlier, the very existence of a piece of EU legislation can provide guidance for the Court’s assessment. Nevertheless and once again, the principle of conferred competences as defined in Article 5(2) TEU only offers limited support on that matter. There is instead a clear dichotomy “between the power to legislate and the interpretative authority of the Court of Justice in determining the scope of EU Law”. In particular, the Court may find that national actions fall within the scope of EU law although the legislation does not establish any specific obligations for the Member States in that field, thus making it difficult for observers to anticipate when the EU system for fundamental rights protection may operate.

These types of spillover effects are particularly well illustrated by the recent *Fransson* case of the Court of Justice. The case suggests that the Court is willing to rely on the existence of EU legislation in order to assert EU fundamental rights jurisdiction in settings in which the degree of connection between Union law and the exercise of domestic public authority is particularly tenuous. The Court asserted that provisions of national law imposing tax penalties and criminal proceedings for tax evasion should comply with EU fundamental rights even though these national provisions had not been adopted for the purpose of transposing the Value Added Tax (VAT) Directive, and the Directive actually left ample discretion to the Member States on how to sanction tax evasion. From the Court’s perspective – running against the views of several intervening Member States, the Commission and the Advocate General – the fact that the national rules gave effect to EU law was enough to trigger EU fundamental rights protection.

81. See also: A.G. Cruz Villalón in *Fransson*, ibid., para 57.
82. Ibid., para 28.
83. Ibid., para 26.
What is remarkable from this case is the diffuse link between the domestic rule checked for compliance with EU fundamental rights standards and EU law obligations. The Court took a functional approach to the definition of the scope of EU law; a rule giving effect to an EU obligation falls within the scope of EU law and triggers fundamental rights protection even if such a rule does not refer to or clearly flow from EU law. This provided a sufficient basis to shift the responsibility for guaranteeing fundamental rights protection to the EU and illustrates the impact that Union legislation on technical matters in principle unrelated to fundamental rights (such as VAT regulation) may have on the EU’s fundamental rights jurisdiction.

In all three settings examined supra (subsections 1 to 3), the existence of legislation creating substantive law obligations allows the EU institutions – among whom the EU judiciary play a prominent role – to assert the fundamental rights jurisdiction of European law beyond its prima facie limits. These reflections on the scope and effects of EU legislation with fundamental rights implications illustrate the difficulty of containing decision-making on fundamental rights matters within the boundaries established by the doctrine of attributed competences. The dynamics of fundamental rights law-making go well beyond what can be grasped by this principle. The claims to universalism that are inherent to the very existence of fundamental rights protection make use of EU legislation as a vehicle to broaden the influence of European over domestic legal orders.

4. Inadequacies of the EU principle of subsidiarity to rationalize fundamental rights decision-making at EU level

What may be particularly unsettling about EU fundamental rights jurisdiction is that, once European institutions assert their ability to intervene in fundamental rights matters and do set a given fundamental rights standard, the said standard is often exclusive. It then takes primacy over domestic standards. Although EU legislation may assert that the Member States can provide additional protection to a given fundamental right, such a proviso is only relevant for the mechanisms and procedures giving effect to the said

84. The author is grateful to the reviewers for very useful comments on this point.
85. Which they do not always do.
87. Besselink, op. cit. supra note 6, 664.
right, but the definition of the right itself is often pre-empted by the Union legal order.\textsuperscript{89} Besides the ability of the EU to intervene, the appropriateness as well as the overall degree of such an intervention are thus open to criticism.\textsuperscript{90} The European fundamental rights standard may indeed be perceived as illegitimate when spelled out by institutions that do not benefit from a high degree of democratic support or as inappropriate if it is not the highest standard available in the EU.

The principle of subsidiarity could be a useful tool to regulate the use of fundamental rights competences at EU level, and thereby to address these criticisms, since its underlying rationale is to seek to make decisions as closely as possible to EU citizens.\textsuperscript{91} Yet, as it is defined in EU law, it hardly provides useful guidance to rationalize EU intervention on fundamental right matters. According to Article 5(3) TEU, the principle relies on a two-tier comparative efficiency test. The EU may intervene only if the Member States cannot sufficiently achieve the desired objective and if the EU can actually do better on the matter. This comparative efficiency test is inappropriate to guide fundamental rights standards-setting either by political institutions or by the Court, as we shall now see. Indeed, it does not allow a means of addressing tensions between values that are central to controversies on the EU fundamental right discourse.

4.1. \textit{Subsidiarity in the setting of fundamental rights standards by political institutions}

Although the (non-exhaustive) competence catalogue in Articles 3 to 6 TFEU does not provide much guidance on whether EU fundamental rights competences are exclusive or shared, it would seem logical that fundamental rights standard-setting (whenever such a competence is granted to the EU) is a shared competence of the EU and the Member States. Indeed, Member States should as a matter of principle be able to provide protection in the absence of EU legislative intervention on the matter. Article 5(3) TEU on subsidiarity thus in principle applies whenever political institutions exercise an EU competence with the effect of setting fundamental rights standards or when they establish mechanisms for the protection of fundamental rights.

\textsuperscript{89} See e.g. A.G. Poiares Maduro in Case C-303/06, \textit{Coleman}, [2008] ECR I-5603. See also Stone Sweet and Stranz, “Rights Adjudication and constitutional pluralism in Germany and Europe”, 19 JEPP (2012), 92, at 105.

\textsuperscript{90} See also F. de Witte, “Sex, drugs & EU law: The recognition of moral and ethical diversity in EU law”, 50 CML Rev. (2013), 1545–1578.

\textsuperscript{91} E.g. Recital 1 of the Protocol 2 on the Application of the principles of subsidiarity and proportionality.
Although the principle is thus doctrinally relevant, its practical implications in the context of fundamental rights protection are most unclear. In particular, the enforceability of the principle as a ground for the annulment of a provision of EU law is known to be limited. Although the subsidiarity argument is often invoked in political negotiations preceding the adoption of a text, the Court of Justice has so far been very reluctant to second guess the political agreement reached by political institutions on matters of subsidiarity. Such reluctance is likely to be even stronger in the context of EU legislation having fundamental rights implications. The reasons for such a limited practical and legal relevance have been explored by several authors and are twofold.

The first explanation is that the function of fundamental rights protection in EU law (e.g. that of consumer protection or employment law) differs from that of competences having a cross-border component and makes the EU principle of subsidiarity inappropriate to provide useful guidance. The definition of the principle of subsidiarity provided for in Article 5(3) TEU relies on the assumption that the principle articulates the relationship between the EU and the Member States in a transnational context. However, certain EU fundamental rights competences – especially in the case of legislation designed to “give specific expression” to a fundamental right – are concerned with regulating relationships within States; they go further to deepen European integration than merely regulating relationships among States. As pointed out by Fritz Scharpf, contemporary EU anti-discrimination law for example cannot normatively be supported by the traditional discourse on European integration. Instead, it may represent a contribution to a new Europeanization; an ideal to be employed as both a normative justification and for the purpose of developing a European model that involves neither economic liberties nor transnational mobility. There is thus a mismatch between the function of the principle of subsidiarity as defined in EU law and

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92. See e.g. debates at the Council on COM(2008)426. “Proposal for a Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation” and in national parliaments on COM(2012)130. “Proposal for a Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services”.


98. Ibid.
the function of fundamental rights standard-setting in the EU. The EU “aims to
bring into being a European public sphere based on a shared understanding of
rights and so motivate agreement on a federal structure for Europe that in
various ways goes beyond national allegiances and political cultures.” 99 In the
context of EU fundamental rights law, the conceptual relevance of a
subsidiarity test concerned with the appropriate (national v. European) level
for the regulation of fundamental rights standards is thus foreign to the
dynamics of fundamental rights standard-setting through legislation;
especially when such legislation is specifically designed to give expression to
a fundamental right.100

The second – and closely related – element explaining the difficulty of
applying the traditional EU subsidiarity test to legislation involving
fundamental rights relates to the nature of fundamental rights standard-
setting. As pointed out by Gareth Davies, genuine dilemmas and controversies
on matters of fundamental rights protection primarily originate in collisions
between objectives or values.101 In contrast, the subsidiarity test as it is
defined by EU law is based on an assessment of effectiveness of the law in
view of pursuing a pre-established objective. Key conflicts on the definition
of fundamental rights standards thus cannot be solved by comparative
efficiency tests; they are instead concerned with prioritizing and balancing
values.102

This observation is relevant for both EU legislation designed to “give
specific expression” to a fundamental right and EU “accessory” power to
legislate on fundamental rights. The first category of legislative acts
prioritizes one fundamental right over other fundamental rights and
objectives; in this regard key problems will be that controversial aspects are
likely to result from the interaction with other values that will not form part of
the subsidiarity test.103 As for the second category of legislation, such
legislation is developed with the view of achieving a specific and “ordinary”
EU objective, the prevalence of which is assumed by EU law so that conflicts
with national values will not part of the subsidiarity test either.104 As the same
author stressed, “the value-violence [which is being done to] some States, or

(2006), 725, at 733.
100. See also Horsley, op. cit. supra note 95, at 275.
102. Acknowledging that it is more difficult to apply precepts of comparative efficiency
that underpin subsidiarity to heads of competence that are other than economic: Craig,
“Subsidiarity: A political and legal analysis”, 50/81 JCMS (2012), 72, at 75.
103. See also Davies, op. cit. supra note 94.
104. Ibid.
the autonomy cost which [is thereby imposed], is considerable…. Subsidiarity, however, will not be involved”.

4.2. Subsidiarity and EU courts’ fundamental rights jurisdiction

The relevance of the principle of subsidiarity in the process of judicial processes complementing that of legislative action on fundamental rights matters is perhaps less obvious than it is for the legislative process as such. Yet, when interpreting EU legislation the Court may be called upon to issue rulings with significant constitutional implications on matters of fundamental rights protection. The problem here is that the human rights standard applied by the Court may be different from the one chosen by EU political institutions or applicable in the relevant domestic system for comparable problems; it may also conflict with other fundamental rights and values protected nationally while not necessarily having been subject to political agreement in the process leading to the adoption of EU legislation defining the scope of EU intervention. Should the subsidiarity test apply to the ECJ’s legal reasoning? In other words, can the appropriateness of the Court making final decisions about the level of fundamental rights protection in such a context at times be examined?

If one relies on the wording of Article 5(3) TEU as well as that of the Protocols on the role of national parliaments in the European Union (including a mechanism on subsidiarity control) and on the application of the principles of subsidiarity and proportionality, it may appear that the principle of subsidiarity is primarily addressed to EU political institutions. Yet, the wording of Article 5(3) TEU does not actually prevent the Court from being subject to the principle of subsidiarity. Several provisions of EU primary law may actually be seen as illustrating the relevance of the principle of subsidiarity for the Court’s activities. General principles of EU law for example partly result from the common constitutional traditions of the Member States, thus suggesting that the rights protected at EU level are also building on national traditions. Furthermore, the Charter itself bends to the principle of subsidiarity as explicitly stated in its Article 51(1).

107. Protocols 1 and 2. See also de Burca, op. cit. supra note 79; more recently Horsley, op. cit. supra note 95, at 274 and Groussot, Pech, Petursson, op. cit. supra note 40, at 22–23.
108. Art. 6(3) TEU; Carozza, “Subsidiarity as a structural principle of international human rights law”, 97 AJIL (2003), 38, at 54–56.
Several authors have also pointed to the existence of the Court’s actual sensitivity to the notion of subsidiarity as illustrated in the low degree of judicial review applied to sensitive cases. For example, de Burca stressed that in Opinion 2/94 the Court declined to make a decision on the competence for the EU to accede to the ECHR, thereby leaving it for the Member States to decide. Lenaerts and Gutiérrez-Fons also analyse cases such as *Omega* – in which the Court acknowledged that Member States may have different definitions of fundamental rights – as embedding respect for the principle of subsidiarity in the Court’s case law.

It is thus tempting to argue that the principle should indeed be respected by the Court itself. Nevertheless, these references to the relevance of the principle of subsidiarity for the Court’s work in matters of fundamental rights protection relate to a different understanding of the principle than that formulated in Article 5(3) TEU. They do not result from a comparative effectiveness test; they are instead inspired by broader procedural and deeper democratic arguments. While such arguments may be most welcome, they do not correspond to the specific definition of the principle of subsidiarity enshrined in Article 5(3) TEU.

The practical implications of this observation on the inappropriateness of the subsidiarity test defined by Article 5(3) TEU to structure the interpretative powers of the Court on fundamental right matters can be illustrated by reference to Article 53 of the Charter. According to this provision, the judicial interpretation of the Charter may not restrict or adversely affect human rights and fundamental freedoms as recognized by the Member States’ constitutions. If this provision is read as an expression of the EU principle of subsidiarity, controversies on the adequate level of protection are likely to be framed in terms of a hierarchical relationship between European and national legal orders. This increases the chances that values and objectives defined by EU law will be given precedence over conflicting domestic values on behalf of the efficiency of EU legislative mechanisms, as illustrated in *Melloni* – in which the Court closely stuck to the guidance provided by EU secondary law to address a conflict of interpretation of the rights of the defence in criminal proceedings with the Spanish Constitutional Court. While this may be consistent with Article 5(3) TFEU, and may be in line with the traditional

110. de Burca, op. cit. supra note 79, 225.
113. See also Davies, op. cit. supra note 94, 72 et seq.
114. *Melloni*, cited supra note 69, paras 47 to 54.
approach to the construction of the EU legal order, it may be perceived as distorting the genuine purpose of Article 53 of the Charter.

5. Conclusion

Legislation may have significant implications for the protection of fundamental rights in the EU. It may be specifically designed to give expression to a fundamental right, “incidentally” set fundamental rights standards and create mechanisms for their protection or the mere existence of EU legislation can mark the presence of EU law, thereby creating a duty for the Member States to comply with EU fundamental rights law in the relevant field. The combined existence of such legislative opportunities and a consolidated primary law framework for the protection of fundamental rights after the Lisbon Treaty enables political and jurisdictional institutions to broaden the scope of Union fundamental rights intervention through a wide range of techniques.

The development of a fundamental rights discourse in internal politics is both important for the definition of the normative model offered by the EU legal and political order\textsuperscript{115} and difficult to rationalize with reference to the tools traditionally made available for that purpose by EU law. This warrants close attention. The dynamics of fundamental rights decision-making go well beyond the \textit{prima facie} legislative competences attributed to the EU.\textsuperscript{116} Similarly, the principle of subsidiarity, which is often considered as the second relevant tool to conceptualize the process of European integration, is inadequate to rationalize these developments. It is designed in such a way that it does not actually address the genuine challenges raised by EU fundamental rights law-making, which are directly related to collisions between values and objectives. EU institutions thus need to identify new parameters to address these collisions.

This quest for new parameters is ongoing. On the one hand, the unsettling constitutional landscape in which EU fundamental rights jurisdiction evolves may explain the ECJ’s concern to heavily rely on the wording of EU legislation, and thus political support, in order to address tensions between domestic and European legal orders on fundamental rights matters, as illustrated in the recent \textit{Melloni} case.\textsuperscript{117} This may also explain the intensity of criticisms of rulings, in which the Court revises choices on the content and

\textsuperscript{115}See e.g. Scharpf, op. cit. supra note 97, at 127.

\textsuperscript{116}The author is grateful to the reviewers for very useful comments on this point.

\textsuperscript{117}\textit{Melloni}, cited supra note 69. See also Case C-491/10 PPU, Pelz, [2010] ECR I-14247. See further Canor, op. cit. supra note 71, at 410 and Torres Pérez, “Spanish Constitutional
limitations of EU fundamental rights protection made by the legislature.\textsuperscript{118} On the other hand, Article 53 of the Charter and Article 4(2) TEU remain vivid reminders that the greater involvement of the EU in fundamental right matters ought to be shaped while bearing in mind standards of protection established at domestic level. On matters of fundamental right protection, the interaction between the EU judiciary, EU political institutions and domestic legal orders in the years to come promises to remain most interesting.

\textsuperscript{118} E.g. see \textit{Test-Achats}, cited supra note 47, paras 20–21 in which the Court declared a provision of Directive 2004/113 implementing the principle of equal treatment between men and women invalid, and thus marked its disagreement with the way the Council had decided to give effect to the principle of equal treatment.