# Margins of Appreciation

National Values, Fundamental Rights and EC Free Movement Law

# Margins of Appreciation: National Values, Fundamental Rights and EC Free Movement Law

Niamh Nic Shuibhne*

**Abstract**

*The reconciliation of diverse national values with EC protection of fundamental rights is an ongoing tension. The problems that need to be worked out are made all the more complicated by the often constitutional status of these norms at Member State level, against the backdrop of the objectives of EC free movement law. This article explores some of the ways in which the case law and commentary have conceived balancing frameworks so that different, and often competing, interests can be weighted. The core argument here is that striving to conceptualise free movement as a fundamental right in itself attracts considerable problems. Rather, a free movement infused respect for internal State value spaces, which then allows persons and traders to exercise external choice in moving among them, is developed.*

## Introduction

In the European Community legal order, protection of fundamental rights is firmly established in the framework of judicial review; through that process, the Court of Justice managed to invigorate the value of fundamental rights *vis-à-vis* other Treaty objectives. The complexity, substance and symbolism of that protection have progressed vividly in the decades since the more mechanical terseness of *Stauder* and *Internationale Handelsgesellschaft* – in the latter case, for example, it was stated with muted significance that 'respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice'.[1] The Court may not have said much (in quantitative terms) in that judgment, but it did set down a profound

* Reader in EC Law, University of Edinburgh. This article is based on a presentation developed for the Durham European Law Institute Seminar Series; thanks to all those who participated and, in particular, to Eleanor Spaventa. For very helpful comments, thanks to Panos Koutrakos and the independent referee. I am especially grateful to Graeme Laurie and Ken Mason.

[1] Case 11/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, para. 4. In *Stauder v City of Ulm*, the Court had proclaimed in respect of the challenged measure that it contained 'nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court' (Case 29/69, [1969] ECR 419, para. 7).

interpretative canon that is still applied today: 'the protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.'[2]

This article explores that particular feature of EC fundamental rights protection: its challenging and sensitive location at the interface between nationally protected values and supranational free movement law. The European Court of Human Rights (ECtHR) seeks to understand individual State variables of protection against the more general principles of the ECHR. It has developed a (patrolled) State space through its 'margin of appreciation' doctrine to enable the persistence of legitimate State expressions of rights protection. The Court of Justice, however, must somehow balance State *variables* of protection. When goods, persons or services cross national borders, they are likely to cross value borders too. This basic fact can trigger a whole range of fundamental rights conflicts that the Court must accommodate – against each other; but also, against or within the additional competing demands of the EC internal market and free movement law. Applying a margin of appreciation is therefore futile; but perhaps a *margins* of appreciation thesis could work. The argument developed here suggests that the complex dynamic generated by competing versions of fundamental rights protection could be fed into a person-centred understanding of the free movement of – put simply, morals. The ambition of the argument is to preserve legitimately different national value structures in an *internal* sense to the greatest extent possible. This evokes the idea of a Member State space within which particular understandings of fundamental rights protection could continue to apply. But it then draws from Community free movement law in an *external* sense i.e. nonetheless, enabling goods, persons and services to move outwards, through the exercise of choice, between those State/moral spaces. This would concretise a distinct and value-added supranational contribution for Community law to make to fundamental rights protection. It would also realise a significance for freedom of movement that does not demand potentially artificial – or, at least, contested – claims to be made about the normative character of Treaty rights.

The argument is structured in three main parts. First, following a very brief overview of contemporary EU fundamental rights discourse, the ways in which free movement and fundamental rights interact will be sketched out. A particular focus here will include the debates about conceptualisation of the right to move as, itself, a fundamental right – and the problems that this approach can cause. Second, focusing more specifically on national claims about the

[2] *Internationale Handelsgesellschaft*, para. 4.

protection of 'their' values, the way in which free movement law manages diversity through the derogation framework will be outlined. Review of Member State justification arguments by the Court of Justice must be accepted as legitimate if free movement objectives are to have any role here. The particular (potential) impact of the Charter of Fundamental Rights will also be discussed.

The challenge of competing national claims will then be addressed, expressed in the orthodox language of 'conflicts of rights' but infused with a self-consciously transnational meaning. The approach here does not portray these conflicts as choices between fundamental rights and economic freedoms. Instead, it tries to find a way to facilitate preservation of the often legitimate national differences of opinion that feed into differences of national (often constitutional) laws, while still finding a contribution that the objectives of free movement law can make. In essence, if States can reflect protection of national values within their jurisdictions and desist from applying an extra-territorial reach to those choices, the solution reached may be something of a compromise. But it is a compromise that reflects both local and Community understandings of fundamental rights protection; and one that could give true meaning to the hazy promise of 'united in diversity'. Specific examples from different national understandings of the right to life will be used as an empirical case study, in order to demonstrate the reality and complexity of the consequences that can occur when States choose to do things differently. The impact of the analysis on the principle of primacy will also be touched upon, asking ultimately whether a supranationally driven accommodation of localised values amounts to the fragmentation, or deepening maturity, of the Community legal order.

## Locating the question

### *The EU and fundamental rights protection*

Douglas-Scott described the 'turn of the century European Union [as] manifest[ing] an obsession with human rights.'[3] An important preliminary question asks why we need a specific *EU* rights standard at all.[4] In order to sketch the general contours of EU fundamental rights discourse, this section outlines five contemporary strands of the debate that are distinct (or at least largely

[3] Douglas-Scott, S. (2002), *Constitutional Law of the European Union*, Harlow, Longman, p. 431.
[4] See, for example, de Búrca, G. (2002), 'Convergence and divergence in European public law: The case of human rights', in P. Beaumont, C. Lyons and N. Walker (eds.), *Convergence and Divergence in European Public Law*, Oxford, Hart Publishing, pp. 131-150.

distinct) from the more specific context of free movement law. It should first be noted that many contributions to the literature question, or at least seek to defend, the value of fundamental rights in a constitutional framework *per se* and in the EU constitutional framework in particular – something reignited by recent years of more deliberate EU constitutional ambition. So much could be argued on this point that here, instead, I invoke a presumption, captured neatly by the House of Lords Select Committee on European Union: '[m]odern constitutions are expected to contain Bills of Rights…That any EU constitution should include a Bill of Rights, specifying rights of the citizen and limiting the powers of the EU institutions seems beyond argument.'[5] Arguments in favour of a bill of rights are imbued also with the function of enhancing EU legitimacy.[6] Questions about fundamental rights provisions of the EU Treaties and, more particularly, the EU Charter of Fundamental Rights, will be addressed throughout this article.

Turning to the five strands of discourse and analysis, the first discusses the requirement that fundamental rights must be respected by and within the actions of the EC and EU institutions. This obligation finds expression in Article 6(2) TEU and in the Charter of Fundamental Rights of the European Union.[7] This obligation can also be expressed by the idea that the institutions sometimes act as 'principals' in their design, implementation and enforcement of Community law; and that they should respect fundamental rights throughout the exercise of those functions. Article 6(3) TEU then stipulates, however, that '[t]he Union shall respect the national identities of its Member States', reflecting the tensions that this article seeks to consider.

Second, analysis on the gestation, proclamation, scope and evolving legal status of the Charter itself should be singled out as a subject that has sparked considerable comment. A substantive body of commentary on the Charter emerged within a short time, but its proposed

---

[5] House of Lords Select Committee on European Union, Session 2002-03/6th Report, *The Future Status of the EU Charter of Fundamental Rights*, paras. 44 and 45.

[6] See de Búrca, G. (1995) 'The language of rights and European integration', in J. Shaw and G. More (eds.), *New Legal Dynamics of European Union*, Oxford, Clarendon Press, pp. 29-54; and de Búrca, G. (2003), 'Fundamental rights and citizenship', in B. de Witte (ed.) *Ten Reflections on the Constitutional Treaty for Europe*, Florence: Robert Schuman Centre for Advanced Studies, pp. 11-44 at 17-18.

[7] Published in its original format at OJ 2000 C364/1; see especially, Article 51(1). The revised text of the Charter, lying in wait for the ratification of the Lisbon Treaty, can be found at OJ 2007 C303/1. The wording in Article 51(1) on the scope of the Charter changes from (in the original version) 'the institutions and bodies of the Union' to its 'institutions, bodies, offices and agencies'. The Lisbon Treaty was published at OJ 2007 C306/1.

legal effect via the short-lived Constitutional Treaty quickly shifted the nature of the debate.[8] The Lisbon Treaty also offers a clarified legal status for the Charter through an amended Article 6 TEU.[9]

The relationship between the EU and the Council of Europe, which materialises most deeply in the interplay between EC law and the ECHR and the respective jurisdictions of the Court of Justice and the ECtHR, is an ongoing debate that raises intriguing questions about both institutional and normative hierarchies. More specific questions within that broader relationship include indirect review of primary EC law by the ECtHR, exemplified in the *Matthews* judgment and deriving from State responsibility to ensure that their international arrangements comply with the ECHR;[10] and an eventual political response to the Court's finding that EU accession to the ECHR requires an enabling Treaty-based competence.[11] Accession had long been advocated in the academic literature, so that effective external supervision of the EU institutions could be put in place and to avoid inconsistencies in ECHR interpretation.[12]

Fourth, there is a growing body of law and legal analysis on the EU (as distinct from the EC) and fundamental rights protection. Analysis of the adoption, implementation and

---

[8] See, for example, Eicke, T. (2000), 'European Charter of Fundamental Rights: Unique opportunity or unwelcome distraction?', *EHRLR*, 3, pp. 280-296. The Constitutional Treaty was published at OJ 2003 C169/1.

[9] An amended Article 6(1) TEU would provide that '[t]he 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.'

[10] *Matthews* v *United Kingdom*, (App. 24833/94) (1999) 30 *EHRR* 361.

[11] See Opinion 2/94, [1996] ECR I-1759; the post-Lisbon Article 6(2) TEU would state that '[t]he Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.' The Final Report of Working Group II to the European Convention on the Future of Europe ('Incorporation of the Charter/Accession to the ECHR'), CONV 354/02, 22 October 2002, pp. 11-12, drew an analogy between the EU Charter and a domestic bill of rights, thus locating the EU alongside the Member States within the overall ECHR framework.

[12] See, for example, O'Leary, S. (1996), 'Accession by the European Community to the European Convention on Human Rights: The opinion of the European Court of Justice', *EHRLR*, 4, pp. 362-377. See also CONV 354/02, which refers to the 'strong political signal' to 'greater Europe' that accession to the ECHR would demonstrate (p. 11). Article 52(3) of the Charter does attempt to delimit the scope for divergence in any event, establishing the text of the ECHR as a minimum standard, allowing the EU to depart from that standard only in order that the protection of rights might be *increased*, a situation which is also analogous to states vis-à-vis the ECHR (see Article 53 ECHR).

application of the European Arrest Warrant provides a good example of this.[13] Finally, attention is now increasingly focused on the EU as a fundamental rights 'player'. The establishment of the Fundamental Rights Agency for the European Union is perhaps one example of this.[14] More recently, it is impossible not to be stirred (one way or the other) by the disarmingly confident vision of the EU's role on the global stage contained in the *Kadi* ruling and in the Opinion of Advocate General Maduro.[15]

Often cutting across these five thematic divisions, reflections on the application of fundamental rights by the Court of Justice have generated the greatest volume of analysis of all. The development of this jurisdiction, while affected to some degree by both the Charter and the Treaty reform process, remains strongly within the province of the Court in a manner quite unlike *e.g.* the debate on ECHR accession. The kinds of questions relevant here evoke the balancing act long practised by the Court in cases involving the protection of fundamental rights, looking to different 'versions' of a given right (national, ECHR, EC), different fields of responsibility for its safeguarding (the same three levels can be used here, in terms of institutions) and other competing interests and concerns (right A 'versus' right B versus interest C versus freedom D, and so on). This article now turns more specifically to protection of fundamental rights 'against' an overarching competing objective – the realisation of free movement within the EC internal market.

*Fundamental rights and free movement law*

Since the EC does not have a general fundamental rights *competence*, it was observed above that judicial review has constituted one of the most significant spaces within which EC fundamental rights *standards* – and expectations – have been given substance. Within the broad theme of free

---

[13] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ 2002 L190/1. See further, V. Hatzopoulos, 'With or without you... judging politically in the field of Area of Freedom, Security and Justice'. (2008) 33 *ELRev* 44-65; N. Fennelly, 'Pillar talk: fundamental rights protection in the European Union', (2008) 1 *Judicial Studies Institute Journal* 95-120; E. Guild (ed), *Constitutional Challenges to the European Arrest Warrant* (2006, Wolf Legal Publishers).

[14] See the Agency's website, including an outline of its annual work programmes, at http://fra.europa.eu/fra/index.php. See further, P. Alston and O. de Schutter (eds) *Monitoring Fundamental Rights in the EU: The Contribution of the Fundamental Rights Agency*, (Oxford: Hart Publishing, 2005).

[15] Case C-402/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, judgment of 3 September 2008, not yet reported (Opinion of Advocate General Maduro delivered on 16 January 2008).

movement, this has occurred almost always within the function of indirect judicial review, through the Article 234 EC preliminary reference procedure.

Case law involving both fundamental rights concerns and free movement objectives can be organised into four groups. First, there are cases in which claims based on fundamental rights needed to be balanced against economic/trade free movement objectives. Important recent examples of this variable include *Schmidberger*,[16] *Omega*,[17] *Viking Line*,[18] and *Laval*.[19] Outcomes have been quite mixed in terms of which claim ultimately 'won out', and how hands on/off the Court was when adjudicating on the substance of the fundamental rights claim in its analysis of free movement law.[20] The challenges that this case law provokes are in direct contrast to the simplicity with which they are summarised here, and they are central to the arguments developed in this article. They are also closely related to the fourth category of cases outlined in this section. All of these questions are, therefore, picked up in detail below.

Second, fundamental rights claims feature regularly in the context of personal movement. Case law of this kind has a long history through the Court's protection of movement for purposes of work, establishment and service provision/receipt, both for primary Member State national movers and, albeit formally in a derivative sense, their family members irrespective of nationality. Much of the foundational jurisprudence has been subsumed within and indeed expanded on by the application of the EU citizenship rights to move and reside.[21] Arguments grounded in fundamental rights do not *always* effect the broadest protective scope;[22] but more

---

[16] Case C-112/00 *Schmidberger* v *Austria* [2003] ECR I-5659 (free movement of goods 'versus' freedom of association).

[17] Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH* v *Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609 (freedom to provide services 'versus' right to human dignity).

[18] Case C-438/05 *International Transport Workers' Federation* v *Finnish Seamen's Union*, judgment of 11 December 2007, not yet reported (freedom of establishment 'versus' right to take collective action, including the right to strike).

[19] Case C-341/05 *Laval un Partneri Ltd* v *Svenska Byggnadsarbetareförbundet, Svenska Eyggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet*, judgment of 18 December 2007, not yet reported (freedom to provide services 'versus' right to take collective action).

[20] See generally, J. Morijn, 'Balancing fundamental rights and common market freedoms in union law: Schmidberger and Omega in the light of the European constitution', (2006) 12 *ELJ* 15-40.

[21] See Article 18 EC and Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L229/35.

[22] See, for example, the more restrictive outcomes in Case C-257/00 *Givane* v *Secretary of State for the Home Department* [2003] ECR I-345 and Case C-109/01 *Secretary of State for the Home Department* v *Akrich* [2003] ECR I-9607.

guarded results are the exception and not the rule in ECJ jurisprudence.[23] In *Metock*, the Court applied its now familiarly expansive interpretation of 'obstacles' to the exercise of free movement, emphasising 'the importance of ensuring the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the EC Treaty … [I]f Union citizens were not allowed to lead a normal family life in the host Member State, the exercise of the freedoms they are guaranteed by the Treaty would be seriously obstructed.'[24]

A third (related but distinct, it is submitted by this author; though others might disagree) thread of case law occurs when finding an exercise of free movement rights is really just a formality through which, in substance, a general fundamental rights claim is enforced. The decision in *Carpenter* is the ultimate *bête noire* here.[25] *Akrich* may provide another example; here, the Court instructed the referring tribunal that it should 'have regard' to ECHR obligations on respect for family life – notwithstanding the substantive finding in the case that the circumstances of the individual concerned fell outwith the scope of Community law.[26] If this was not intended as an *obiter* comment, then as an arguable trespass into the general fundamental rights competence of Strasbourg, it could bring *Akrich* into an even sharper version of this third category also.

Finally, and as noted, often related to the first category outlined above, a fourth understanding of fundamental rights in free movement case law occurs with conceptualisation of the free movement right *itself* as a 'fundamental' right. This reasoning can be applied to cases involving economic as well as personal free movement.[27] A 'fundamental' right to move was

---

[23] The judgment in *Metock*, expressly overturning *Akrich*, is a very recent example of the rights-oriented approach of the Court in personal free movement cases (Case C-127/08 *Metock and others v Minister for Justice, Equality and Law Reform*, judgment of 25 July 2008, not yet reported).

[24] *Metock*, paras. 56 and 62.

[25] Case C-60/00 *Carpenter* v *Secretary of State for the Home Department* [2002] ECR I-6279; see further, N. Nic Shuibhne, 'Derogating from the free movement of persons: When can EU citizens be deported?' (2006) Cambridge Yearbook of European Legal Studies vol. 8, 187-227, especially pp. 199-200. On the attachment of long-term respect for family life to the ephemeral provision of services, the decision in *Carpenter* was arguably overturned in Case C-200/02 *Zhu and Chen* v *Secretary of State for the Home Department* [2004] ECR I-9925, paras. 21-23.

[26] See *Akrich*, para. 58.

[27] Advocate General Maduro captured a holistic version of the idea through the lens of citizenship in *Alfa Vita* (Joined Cases C-158/04 and C-159/04 *Alfa Vita Vassilopoulos AE and Carrefour Marinopoulos AE* v *Elliniko Dimosio and Nomarchiaki Aftodioikisi Ioanninon* [2006] ECR I-8135, Opinion of Advocate-General Poaires Maduro, para. 40).

developed initially through freedom of movement for workers,[28] broadened gradually to the general idea of 'persons'.[29] Things are more controversial when the discussion turns to a more general (fundamental) right to *trade*, as expressed through the free movement of goods, for example, or providing and receiving services.[30] Oliver and Roth point to references which stop short of fundamental rights terminology,[31] but they do locate one instance where the Court described the free movement of goods as a 'fundamental right'.[32] They point also to the general tone of *Keck*, dispelling the notion of Article 28 as encompassing a general right to trade unhindered.[33]

Oliver and Roth rightly caution us against drawing generalised conclusions from isolated examples of the language of rights.[34] Examples from the case law nonetheless show that the right to move was conceptualised as a fundamental 'something' very early on, but commentary is

---

[28] See, for example, Case 152/82 *Forcheri* v *Belgium* [1983] ECR 2323, para. 11 ('the right to free movement…constitutes a fundamental right of workers and their families'), Case 222/86 *UNECTEF* v *Heylens* [1987] ECR 4097, para. 14 ('free access to employment is a fundamental right') and Case C-415/93 *Union Royale Belge des Societes de Football Association ASBL* v *Jean-Marc Bosman* [1995] ECR I-4921, para. 129 ('the fundamental right of free access to employment which the Treaty confers individually on each worker').

[29] See, for example, Case C-416/96 *Nour Eddline El-Yassini* v *Secretary of State for Home Department* [1999] ECR I-1209, para. 45 ('the fundamental right of persons to move freely within the Community'); *cf.* the more nuanced phrasing in Case C-441/02 *Commission* v *Germany* [2006] ECR I-3449, para. 34 ('the fundamental *principle* of freedom of movement for persons', emphasis added).

[30] For an example of the more limited view, see A. von Bogdandy, 'The European Union as a human rights organisation? Human rights and the core of the European Union', (2000) 37 *Common Market Law Review* 1307, 1326. *Cf.* S. Douglas-Scott, *Constitutional Law of the European Union*, (Harlow: Longman, 2002), p. 435: 'the European Court has named specific Treaty items as fundamental rights: namely, non-discrimination on grounds of nationality in Article 12 EC and the four fundamental freedoms of goods, services, persons and capital.' In support, she cites Case 240/83 *Procureur de la République* v *ADBHU* [1985] ECR 520, para. 9.

[31] P. Oliver and W.-H Roth, 'The internal market and the four freedoms', (2004) 41 *Common Market Law Review* 407, finding descriptions of the free movement of goods as e.g. 'one of the fundamental principles in the Treaty' (Case C-265/95 *Commission* v *France* [1997] ECR I-6959, para. 27).

[32] Case C-228/98 *Dounias* v *Minister for Economic Affairs* [2000] ECR I-577, para. 64.

[33] Oliver and Roth, p. 409, discussing Joined Cases C-267-8/91 *Keck and Mithouard* [1993] ECR I-6097; the authors note the pre-*Keck* plea in this vein delivered in the first line of Advocate General Tesauro's Opinion in Case C-292/92 *Hünermund* v *Landesapothekerkammer Baden-Württemberg* [1993] ECR I-6787.

[34] As Oliver and Roth observe (at p. 408), 'it is naïve to construct an entire theory on the basis of one word occurring in an isolated judgment, especially as its use may simply be attributable to a translation error; but where a term is used consistently in a series of judgments, that cannot go unheeded.'

divided on whether the intended application is philosophically equivalent to a fundamental *human* right.[35] The argument has been made that attributing the character of fundamental rights to economic freedoms sourced in the EC Treaty denigrates the substance of 'true' fundamental rights at a normative level.[36] Craig and de Búrca summarise a related charge, that 'the Court has manipulated the rhetorical force of the language of rights, while in reality merely advancing the commercial goals of the common market, being biased towards "market rights" instead of protecting values which are genuinely fundamental to the human condition.'[37] This critique has been responded to using an argument about priority within an overall rights framework, which must be driven by the allocation of weighting or balance – not all rights are equal, and when conflicts arise even 'fundamental' rights require in most instances to be balanced against each other.[38] Perhaps less expectedly, it is suggested too that classification of the economic freedoms as fundamental rights could devalue *their* status rather than the other way around; the argument that Treaty freedoms might be unduly limited by (other) competing fundamental rights is closely related to this.[39] The attribution of one normative standing or the other to a Treaty freedom takes on particular significance when different 'rights' are being balanced against one another in order to find some resolution, to make ultimate choices, when they compete in real cases. These questions will be explored in more detail below; first, the way in which the Treaty envisaged the balance – through the derogation or justification aspect of free movement law – will be outlined,

---

[35] This is not a debate confined to analysis of the EC; on a right to trade in the WTO context, for example, see the competing viewpoints of E-.U. Petersmann, 'European and international constitutional law: Time for promoting"cosmopolitan democracy"'and S. Peers, 'Fundamental Right or Political Whim? WTO Law and the European Court of Justice', both in G. de Búrca and J. Scott (eds.), *The EU and the WTO, Legal and Constitutional Issues*, (Oxford: Hart Publishing, 2001) at 81-110 and 111-130 respectively.

[36] This viewpoint was especially prevalent around the timing of the controversial judgment in Case C-159/90 *Society for the Protection of the Unborn Child (SPUC)* v *Grogan* [1991] ECR I-4685. See especially, J. Coppel and A. O'Neill, 'The European Court of Justice: Taking rights seriously?', (1992) 29 *Common Market Law Review* 669, 689-691; see also, D.R. Phelan, 'Right to life of the unborn v. promotion of trade in services: The ECJ and the normative shaping of the European Union', (1992) 55 *Modern Law Review* 670, 677.

[37] P. Craig and G. de Búrca, *EU Law: Text, Cases and Materials*, 4th ed., (Oxford: OUP, 2007), p. 419.

[38] See J.H.H. Weiler and N.J.S. Lockhart, '"Taking Rights Seriously' seriously: The European Court of Justice and its fundamental rights jurisprudence', (1995) 32 *Common Market Law Review* 51 and 579, at 593-5, who challenge the rights denigration argument as an 'unjustified leap from a lexical equivalence to normative equivalence.'

[39] See for example, the Editorial Comments on *Carpenter*, 'Freedoms unlimited?', (2003) 40 *Common Market Law Review* 537.

so that the scope for and some possible limits to Court of Justice review of these situations is more clearly set out.

**Drawing a line: Free movement law and the derogation framework**

What the debates summarised above reflect more broadly is a sense that when questions about the protection of fundamental rights emerge, there should be a 'line' somewhere between the reach of Community law and the internal values and priorities of the States. The most basic expression of this line occurs within the purely internal situation, where no link to Community law at all exists. There, a State's behaviour in the field of fundamental rights may engage the jurisdiction of the ECtHR, but it should be outwith the competence of Luxembourg.[40] The more typical yet often indistinct line exists when Member States take/are given some internal space within which their own expressions of fundamental rights protection trump/are allowed to trump the requirements of Community free movement law.

A critical question that runs through that analysis is represented by the take/given and trump/allowed to trump dichotomies used here. Two opposing conceptual approaches are possible. First, is the retention of localised value judgments, for present purposes presumed to be ECHR compliant (a prerequisite returned to further below), something that attaches to a State's constitutional individualism and thus effects a real limitation on the primacy of Community law? Or, is it something over which the Community retains control, sanctioning national distinctiveness through its own management of derogation from free movement law?[41]

We saw above that EU respect for fundamental rights standards was accepted as a basic necessity; this manifests primarily through the actions of the institutions acting as principals. Moving down a line of responsibility, supervision of the Member States in the context of agency is also widely accepted – the argument runs that when Member States are acting directly as

---

[40] The preserve of purely internal situations is a complex question, however; see generally, N. Nic Shuibhne, 'Free movement of persons and the wholly internal rule: Time to move on ?', (2002) vol. 39:4 *Common Market Law Review* 731-771; E. Spaventa, 'Seeing the wood despite the trees? On the scope of Union citizenship and its constitutional effects' (2008) 45 *Common Market Law Review* 13.

[41] E. Spaventa has cast similar questions in the language of 'Federalisation versus centralisation: Tensions in fundamental rights discourse in the EU', in Dougan and Currie (eds.), *50 Years of the European Treaties: Looking Back and Thinking Forward*, (Oxford: Hart Publishing; forthcoming, 2009).

agents of the EU institutions (enacting national measures to implement an EC directive, for example), such acts should be supervised in the same way and against the same standards as direct EC institutional actions.[42] After this point, however, the line becomes blurred: should Member State actions that fall outwith the parameters of EC agency still be scrutinised according to EC rights standards; and if so, when? It has been argued here that this question becomes even more problematic and, at the same time, takes on a particular supranational resonance precisely because the national/other national(s)/ECHR/EC substance of a given right is not always the same.

On one view, the Court of Justice softened the potential steeliness of its own primacy doctrine in the development of EC fundamental rights protection by drawing from – in effect – two sources of Member State rights standards: international human rights instruments to which the States are signatories and the so-called common constitutional traditions of the States themselves. The place of national constitutional standards in EC law is deceptively simplistic when viewed through the optic of supremacy: on that basis, the normative level of the national rule or principle is irrelevant; EC law prevails in any case of conflict. But in reality, the informing of EC rights standards by 'common constitutional traditions' has complicated things. While a truly 'common' constitutional tradition might more easily find recognition before the ECJ, the fate of *un*common constitutional values is, as seen (though perhaps avoided) in *Grogan*, quite another matter. The simplistic formula of a supremacy override will not always be palatable, especially if what might be seen as a national peculiarity conforms nonetheless to ECHR standards. Cases like *Omega*, discussed in more detail below, raise a 'catch 22' primacy question also: was the national preference vindicated because a restriction on free movement law was trumped by the German application of human dignity, or does Community law prevail because the Court of Justice sanctioned this result?

Weiler has stressed the inherent value of constitutional differences, reminding us that they 'are often that part of social identity about which people care a great deal…The choice of fundamental rights is about the choice of fundamental values so the stakes are rather high.'[43] It is

---

[42] See especially, the decision in Case 5/88 *Wachauf* v *Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 2609; see generally, Weiler, J.H.H. (1999), 'Fundamental rights and fundamental boundaries', in *The Constitution of Europe*: '*Do the new clothes have an emperor' and other essays on European integration*, Cambridge, CUP, pp. 102-129.

[43] Weiler, J.H.H., (1999), 'Fundamental rights and fundamental boundaries', in *The Constitution of Europe*: '*Do the new clothes have an emperor' and other essays on European integration*, Cambridge,

important to note that not all Member States face the primacy dilemma – as Clapham observes, in some Member States, Community law and constitutional law have an equivalent status and so 'the operation of a Community freedom cannot be challenged as anti-constitutional or contrary to human rights.'[44] But when conflicting values emerge in real cases, as seen in Ireland in the *X* case (discussed below), then even a constitutional provision which itself rates EC law *higher* than national constitutional law can retreat in judicial priority.[45] The ample volume of free movement case law tells us plainly that States have always tried and continue to try to do some things differently. Protectionism is not always wayward. When it involves protecting a fundamental right, the debate about what should/should not come within the remit of the Court of Justice takes on an appropriately heightened sensitivity.

The Charter of Fundamental Rights is an interesting, and untested, player in all of this. It is a comprehensive and contemporary expression of both substantive fundamental rights standards and 'horizontal provisions' developed to manage the complex liaisons between national, European and international standards of protection. It is also something of a legal curiosity. Originally 'proclaimed' rather than adopted, it has no direct legally binding effect at present. Nonetheless, since it is considered not to reflect any *new* rights, Advocate General Tizzano initially applied a simple but brilliant interpretative twist to its provisions: essentially, if no new rights are expressed within the Charter, then the rights reflected therein must already be binding.[46]

At present, the Charter refers to States' constitutional traditions only in its preamble, but a new Article 52(4) (to be effected by the Lisbon Treaty) provides that: 'In so far as this Charter

---

CUP, pp. 102-129, p. 102. See similarly, de Witte, B. (1991/2), 'Community law and national constitutional values', *Legal Issues of European Integration*, pp. 1-22 at 7.

[44] Clapham, A. (1990) 'A human rights policy for the European Community', *Yearbook of European Law*, 10, pp. 309-366; examples include Belgium, the Netherlands and Spain.

[45] Article 29.4.3º of the Irish Constitution provides *inter alia* that: '[n]o provision of this Constitution invalidates laws enacted, acts done or measures adopted by the State necessitated by the obligations of membership of the European Communities or of the Communities or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities, or institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the State.'

[46] Case C-173/99 *BECTU v. Secretary of State for Trade and Industry* [2001] ECR I-4881; Opnion of Advocate General Tizzano, paras. 27-28 in particular. The Court of Justice seemed initially reluctant to refer expressly to the Charter in its judgments, finally breaking the silence in Case C-540/03 *Parliament v Council* [2006] ECR I-5769; see especially para. 38, where it adopts the interpretative approach outlined by the Advocate General in *BECTU*.

recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.' The updated Explanations[47] advocate that '…rather than following a rigid approach of "a lowest common denominator", the Charter rights concerned should be interpreted in a way offering a high standard of protection which is adequate for the law of the Union and in harmony with the common constitutional traditions.' De Búrca has commented that this new addition might prove useful:

> This direction [to the ECJ] to strive for 'soft harmony' between national constitutional rights and the expression of those rights contained in the Charter is a more promising constitutional means of addressing the tension between them rather than positing the supremacy of one over the other … [T]his proposed amendment leaves many questions open, but that seems inevitable and appropriate to the complexity of Europe's legal pluralism.[48]

This is certainly true; but it may not be enough to generate legal solutions in the face of real conflicts generated by *un*common constitutional traditions. Some illustrations of this are outlined below through exploration of the parameters of the right to life, but it is worth noting very plainly that whether we feel comfortable or not with the Court of Justice confronting human dignity, abortion laws, or sensitivities about rights to strike, it has no choice – the references come, and the Court must answer them. The complexity of transnational life, not the Court of Justice, is what causes sensitive conflicts between uncommon constitutional traditions.

Article 53 of the Charter attempts to harmonise relations between the sources of human rights that are active in the EC domain.[49] The Explanations advise that '[t]his provision is

---

[47] OJ 2007 C307/17; where it is stated at the outset that while the Explanations 'do not as such have the status of law, they are a valuable tool of interpretation intended to clarify the provisions of the Charter.'

[48] De Búrca, G. (2003), 'Fundamental rights and citizenship', in B. de Witte (ed.) *Ten Reflections on the Constitutional Treaty for Europe*, Florence: Robert Schuman Centre for Advanced Studies, pp. 11-44, p. 22.

[49] Article 53 provides that 'Nothing in this 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 and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.' Liisberg presents a comprehensive survey of the drafting history of Article 53, observing that references to the Member States' constitutions were not present in initial drafts: see Liisberg, J.B. (2001), 'Does

intended to maintain the high level of protection currently afforded within their respective scope by Union law, national law and international law.' The problem here is that many measures do not remain conveniently within one or other of these respective scopes – instead, they traverse different potentially applicable sources of rights. And thus, rather than solving the real issues at play here, Craig and de Búrca rightly observe that Article 53 could preserve 'the existing tension between the autonomy of the EU/EC legal order on the one hand, and the claims of Member States to the authority of their fundamental constitutional provisions…on the other.'[50]

Let us now ask the question from the opposite angle, from the perspective of limits at the preliminary level of jurisdictional competence: within free movement law and its derogation mechanism, do EC standards of rights review ever become irrelevant? It was stated earlier that a small but identifiable core of situations purely internal to the Member States seems clearly to fall outwith the scope of EC supervision.[51] In between States as agents of the institutions and matters purely internal lies a vast, unsettled and controversial area; and this is where the extent of derogation review must be resolved. Even general review of Member State derogation claims can be unpredictable. For example, the frames of analysis are not necessarily static over time.[52] In terms of fundamental rights review more specifically, an analysis begins with the decision in *ERT*:

> '[The Court of Justice] has no power to examine the compatibility with the [ECHR] of national rules which do not fall within the scope of Community law. On the other hand, where such rules do fall within the scope of Community 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 rights the observance of which the Court ensures and which derive in particular from the [ECHR]. In particular,

---

the EU Charter of Fundamental Rights threaten the supremacy of Community law?', *CMLRev*, Vol 38(5), pp. 1171-1199 at 1172-1181.

[50] Craig, P. and de Búrca, G. (2007), *EU Law*, Oxford, OUP, p. 417.

[51] See, for example, the decisions in Case C-144/95 *Criminal Proceedings against Maurin* [1996] ECR I-2909 and Case C-299/95 *Kremzow* v *Austria* [1997] ECR I-2629.

[52] See, for example, the relatively strong statements supporting Member State regulation of lotteries on public interest grounds in Case C-275/92 *Her Majesty's Customs and Excise* v *Gerhart Schindler and Jörg Schindler* [1994] ECR I-1039, paras. 60-61; over time, however, the language in similar cases became much more muted, with emphasis more expressly placed on compliance with Community principles of non-discrimination and proportionality (*e.g*. Case C-243/01 *Criminal proceedings against Gambelli* [2003] ECR I-13031, paras. 67-76).

> where a Member State [seeks] to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights.[53]

Reaction to this approach in the literature tends to fall broadly into two camps – either ECJ review of derogations is a logical and appropriate extension of agency review; or it is an unacceptable intrusion into matters more properly within Member State preserve because derogation, by definition, should bring matters outside the scope of any further EC probing. Weiler conveys the former perspective succinctly: '[i]s it so revolutionary to insist that when the Member States avail themselves of a Community-law-created derogation they respect too the fundamental human rights, deriving from the constitutional traditions of the Member States, even if the Community construction of this or that right differs from its construction in this or that Member State?'[54] Coppel and O'Neill exemplify the more restrictive preference.[55]

Article 51 of the Charter appears intentionally to pull back from the breadth of *ERT*, with its phrasing that '[t]he provisions of this Charter are addressed … to the Member States *only when they are implementing Union law* (emphasis added).' Once again, the Explanations offer an overly simple interpretation. Citing *Wachauf, ERT and Karlsson*,[56] they attribute dubious certainty to the case-law, presenting it as a coherent line of authority. But confusingly, they describe the wording of Article 51 as 'follow[ing] unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in a Union context is only binding on the Member States when they *act in the scope of Union law*' (emphasis added). This is quite a leap from 'implementing' Union law.[57] It does appear that the political process has tried to signal a nuanced

---

[53] Case C-260/89 *Elliniki Radiophonia Tileorassi AE (ERT)* v *Dimotiki Etairia Pliroforissis* [1991] ECR I-2925, paras. 42-43.

[54] Weiler, J.H.H., (1999), 'Fundamental rights and fundamental boundaries', in *The Constitution of Europe*: '*Do the new clothes have an emperor' and other essays on European integration*, Cambridge, CUP, pp. 102-129, p. 123.

[55] See generally, Coppel J. and O'Neill, A. (1992), 'The European Court of Justice: Taking rights seriously?'*CMLRev*, 29, pp. 669-692.

[56] Case C-292/97 *Karlsson and others* [2000] ECR I-2737, especially at para. 45. The Explanations also add Case C-309/96 *Annibaldi* v *Sindaco del Comune di Guidonia and Presidente Regione Lazio* [1997] ECR I-7493 to the list of authority, which expresses yet another variation on the formula of Member State responsibility (see especially, paras. 18-24).

[57] On this point, see de Witte, B. (2001), 'The Legal status of the Charter: Vital question or non-issue?', *MJ*, 8, pp. 81-89 at 86, and, perhaps most optimistically in terms of Article 51 preserving

preference for tempering the *ERT* doctrine. Yet the Explanations offer the Court a lifeline from which it could draw to maintain the legal *status quo*.

Arguments have been made in favour of retreat. Advocate General Jacobs, writing extra-judicially and in contrast to the reasoning of Advocate General van Gerven in *Grogan*, has argued that once derogation has been accepted, that should be the end of the matter from the perspective of Community law.[58] This moves the cut-off 'line' further towards less searching review of Member State discretion. Nevertheless, he did accept that EC rights standards are legitimately part of the *substantive* review of the derogation itself – does moving those questions back a stage earlier in the reasoning paradigm really make much difference? Here, he introduces another distinction:

> when acting under…derogations, the Member States are subject to some constraints imposed by Community law, but not by others. For example, it is clear that Member States must not, when derogating, discriminate on grounds of nationality. That is necessary because of the fundamental status of the principle from the point of view of Community law … It is less clear whether certain restrictions on fundamental rights are similarly subject to review from the perspective of Community law.[59]

A strict application of this idea could deprive Community rights standards of any autonomous character, which sits at odds not just with the evolution of rights in EC legal history, but also with the contemporary process of enhancing their constitutionalisation. Advocate General Jacobs suggested that the ECJ needed to take the stance it did when it did; but that 'the time may now have come to recognise the very diverse character and scope of the different general principles.'[60] While it may be necessary to have some sort of cut-off point, beyond which Member State action lies outwith EC rights review, slicing up the character of general principles in the process may be difficult to justify.

For now, then, at least on a formal legal analysis, *ERT* remains valid. This means that even within derogation review, where the interest being claimed by the Member State is being

---

the scope of *ERT*, Alonso García, R. (2002), 'The general provisions of the Charter of Fundamental Rights of the European Union', Jean Monnet Working Article 4/02, http://www.jeanmonnetprogram.org/articles/02/020401.html, pp. 4-5.

[58] Jacobs, F.G. (2001), 'Human rights in the European Union: The role of the Court of Justice', *ELRev*, Vol. 26(4), pp. 331-341at 337.

[59] Jacobs, F.G., *ibid*., p. 337.

[60] Jacobs, F.G., *ibid*.

tested against the requirements of valid justification and proportionality, the Court of Justice may apply here too its own understanding of Community fundamental rights standards.[61] The final part of the argument tries to understand the actual application of this review within recent case law through Weiler's theoretical premise of 'fundamental boundaries'. But it goes further too, advocating that an internal 'seal' should be applied to those boundaries, allowing in the end for a more rationalised coexistence of national preferences *and* free movement objectives.

**Value spaces in a free movement context**

*Fundamental Boundaries*

Recalling the quest above to locate the 'line' between EC review and legitimate Member State autonomy, Weiler has developed the idea of 'fundamental boundaries'. These boundaries encase a preserved space within which legitimate expression of constitutional diversity can endure. Weiler suggests that 'if fundamental rights are about the autonomy and self-determination of the individual, fundamental boundaries are about the autonomy and self-determination of communities.'[62] He locates this idea in the ECHR margin of appreciation doctrine, asserting that this allows the co-existence of both a 'universal, culturally transcendent core of human rights [and] the differences in the protection of human rights in these societies within the large band which exists beyond the universal core.'[63] Siting his thesis relative to *ERT*, he suggests that, in derogation review, 'the Community should not impose its own standard on the Member State measure but allow a wide margin of appreciation, insisting only that the Member State not violate the basic core encapsulated in the ECHR.'[64] Thus, with the proviso that ECHR requirements are met, he argues that there is a point at which both the principle of EC law primacy and the function of EC rights review defer to national constitutional norms, even (and

---

[61] For an analysis of the judgment in *Omega* in this vein, see M.K. Bulterman and H.R. Kranenborg, 'What if rules on free movement and human rights collide? About laser games and human dignity: the *Omega* case', (2006) 31 *ELRev* 93.

[62] Weiler, J.H.H., (1999), 'Fundamental rights and fundamental boundaries', in *The Constitution of Europe*: '*Do the new clothes have an emperor' and other essays on European integration*, Cambridge, CUP, pp. 102-129, p. 104.

[63] Weiler, J.H.H.., *ibid*., p. 105.

[64] Weiler, J.H.H., *ibid*., p. 126. Moreover, he feels that this position is consistent with that adopted by the Advocate General in *Grogan*; see also, de Búrca, G. (1993), 'Fundamental rights and the reach of European Community law', *Oxford Journal of Legal Studies*, 13, pp. 283-319 at 318.

perhaps, most likely) if the domestic standard is expressed in few or even just one Member State(s).

The judgment in *Omega* is arguably one of the clearest examples we have of, in terms of degree of interpretation, deference by the Court of Justice to an uncommon constitutional tradition – though we should exercise some analytical caution, since one *Omega* does not a new dawn necessarily make. The fumbling of services law in *Grogan* was perhaps a less confident earlier attempt.[65] In *Omega*, the Court of Justice first restated its formula that 'the Community legal order undeniably strives to ensure respect for human dignity as a general principle of law. There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right.'[66] In its application of proportionality review, however, it spoke of and drew plainly from 'the level of protection of human dignity which the national constitution seeks to guarantee in the territory of the Federal Republic of Germany'.[67] But if the former statement fulfils the demands of derogation review in a formalistic sense, the language used and conclusions reached through proportionality signal clear respect for a fundamental State boundary. A similar sense of reconciliatory preferences, as between the general/EC and the specific/Member State emerged subsequently in *Jipa*:

> while Member States essentially retain the freedom to determine the requirements of public policy and public security in accordance with their national needs, which can vary from one Member State to another and from one era to another, the fact still remains that, in the Community context and particularly as justification for a derogation from the fundamental principle of free movement of persons, those requirements must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State without any control by the Community institutions.[68]

---

[65] See See O'Leary, S. (1992), 'Freedom of establishment and freedom to provide services: The Court of Justice as a reluctant constitutional adjudicator: An examination of the abortion information case', *ELRev*, Vol. 17(2), pp. 138-157, for a strong *legal* rather than moral analysis of the decision in *Grogan*, especially on the nature of services and their advertisement.

[66] *Omega*, para. 34.

[67] *Omega*, para. 39. Outlining the different types of proportionality analysis and the different burdens placed on States in consequence, see Advocate General Poiares Maduro in Case C-434/04 *Criminal proceedings against Jan-Erik Anders Ahokainen and Mati Leppik* [2006] ECR I-9171, paras. 23-26 of the Opinion.

[68] Case C-33/07 *Ministerul Administraţiei şi Internelor - Direcţia Generală de Paşapoarte Bucureşti v Gheorghe Jipa*, judgment of 10 July 2008, not yet reported; para. 23. See similarly, paras. 44 and 45

But what happens different Member State standards on the same issue clash not just with a binding (constitutional) EC version, but with each other also? Because in reality, even the decision in *Omega* was not just about Germany, but about conflicting understandings of the scope of human dignity. The facilitation through services of laser 'killing' games was perfectly lawful in the UK, where the company supplying related products and services to Germany was located. Thus, the conventional argument about incorrect or misplaced depiction of conflict of rights – the argument that would posit the situation in *Omega* as a conflict between the right to human dignity and the 'right' to provide services – is therefore incomplete. Two understandings of the right to human dignity underpin the case; what free movement might be able to provide is not a 'third right' but a mediative tool to negotiated between two State understandings of 'a' fundamental right. This is a rights review function that, ultimately, can fall only to the Court of Justice; and thus, it constitutes a dimension of EC rights competence that has real and added value. The following section first sets out the detail of this problem in a general sense; the ideas are then tested through a lens of the 'most fundamental' right – the right to life. The section is concluded with some reflections on the implications of the argument for the principle of primacy.

*Conflict of fundamental boundaries*

The Opinion of Advocate General Jacobs in *Konstantinidis* is often recalled for its foresight of the contribution to free movement law of EU citizenship rights.[69] It also captures very well the idea that when movement occurs between Member States, this can involve movement between different systems or versions of rights. Taking this further, ideas about conflict of rights – a standard device in the context of adjudication between competing claims, even within one constitutional system – can be refined by looking at the dynamics of various connections between the Member States, the EC and the Council of Europe.[70] This enables us to visualise just how

---

(a 'definite margin of discretion' that must nonetheless be 'must be exercised in conformity with the obligations arising under Community law') in Case C-244/06 *Dynamic Medien Vertriebs GmbH v Avides Media AG*, judgment of 14 February 2008, not yet reported.

[69] Case C-168/91 *Konstantinidis* v *Stadt Altensteig, Standesamt, & Landratsamt Calw, Ordnungsamt* [1993] ECR I-1191, see especially para. 46 of the Opinion (the celebrated '*civis europeus sum*' analogy).

[70] The Council of Europe is singled out here given the overwhelming appearance of the ECHR in Court of Justice fundamental rights cases, notwithstanding the appearance of other international instruments also – the latter remains sporadic. Also, the ECtHR shares with the Court of Justice a more distinct authority in jurisdictional terms (at least, and most likely much more than this) than other international decision-making forums.

densely tied the different sources of rights protection operating within the Community legal order actually are. By building from two-way to, ultimately, a four-way connection, we can also understand more clearly that the involvement of more norm-setting actors in any given situation will inherently and inevitably shift the responsibility for resolution of conflicts to the site of supranational decision-making – the only player within these groups that has genuine jurisdictional oversight of the variety of potentially competing rights and values.

If we think first about a series of bilateral relationships: *direct* legal connections are formed by the obligation to respect fundamental rights between: a Member State and its own (constitutional) rights standards; the Council of Europe and a Member State *vis-à-vis* ECHR implementation and enforcement; and, at least for agency review, between EC rights standards and a Member State. If the Lisbon Treaty is ratified largely as presently drafted, two more direct legal pathways would open up (between the EU and its own Charter; and between the EU and the ECtHR). *Indirect* bilateral pathways include the influence of Member State standards on the ECHR system (through the margin of appreciation); indirect ECtHR review of EU measures (via *Matthews*); the influence of the Charter on the ECtHR;[71] and the contribution of both common constitutional traditions and the principles underlying the ECHR to the shaping of EC fundamental rights. We can also identify a trilateral connection – indirect effecting of ECHR standards in Member States by the Court of Justice rather than through a case directly before the ECtHR.

Most judicial and academic analysis has involved discussion, assessment and manipulation of these pathways. In *Kadi*, for example Advocate General Maduro set the questions in institutional terms and offered a reasoned exposition of the normative and jurisdictional differences between the ECJ and ECtHR.[72] But a less frequently articulated, EC-*specific* dynamic is a dense quadrilateral connection, the complexities of which cannot be properly resolved by national courts or by the ECtHR *i.e.* competing or conflicting versions of the same right occurring in a given factual situation between Member *States* and within a framework of free movement – i.e. the construction of a right in Member State A versus its different construction in Member State B (and so on) versus the ECHR standard versus EC free movement objectives. It is somewhat ironic that while the notion of a cross-border link seems to be losing its hold in so many aspects of Community law, it is precisely the fact and/or possibility of movement

[71] See, for example, *Goodwin* v *United Kingdom*, (App. 28957/95) (2002) 35 *EHRR* 447.
[72] *Kadi*, para. 37 of the Opinion.

that creates the complexity of conflict here –the resolution of which is simply in jurisdictional terms outwith the capacity of Strasbourg.

We have seen through analysis of *ERT* and the Charter that the point at which the EC should step back even in a bilateral situation is uncertain and controversial. But where the EC and 'a' Member State have two different constructions of 'the same' value,[73] a margin of appreciation works very well. Spaventa constructs the different claims in another way, removing or at least recasting the normative status of freedom of movement within the competing rights discourse.[74] This is an intellectually coherent way to rationalise the method applied in *Omega*, and to offer (as she does) a convincing critique of *Laval* and *Viking Line*. But the quadrilateral pathway reveals too the silent party at the *Omega* table: not just a normatively weaker right to trade, but the divergent UK understanding of human dignity and its application. It is simply a fact that things become more problematic when there are more than two norm-setting actors involved. We end up, because of the very nature and purpose of free movement claims, with clashing margins of appreciation. We can try to leave this well alone until it happens, but it will happen. The balancing function then becomes more complicated and multi-dimensional. Subsidiarity will not work as an out-clause here because where EC action is *needed*, subsidiarity *requires* the EC to act; and only the EC/ECJ can really process conflicting rights and values that emerge in a quadrilateral sense. To make some sense of this multifaceted conflict thesis, these ideas will now be illustrated through a case study of the right to life.

*Through a lens: the right to life*

The right to life has been chosen here for a number of reasons. First, even though it is frequently conceptualised as the *most* fundamental of rights,[75] that does not preclude different (thus potentially competing) interpretations and manifestations of its scope. Second, State protection of its societal understanding of 'life' is deeply linked to expressions of value; so the political

---

[73] Constructions of a value *within* a Member State can differ too; for example, on the different application of abortion law within the United Kingdom, see Fegan E.F. and Rebouche R. (2003), 'Northern Ireland's Abortion Law: The Morality of Silence and the Censure of Agency', *Feminist Legal Studies*, Vol. 11(3), pp. 221-254.

[74] E. Spaventa in Dougan and Currie (eds.), *50 Years of the European Treaties: Looking Back and Thinking Forward*, (Oxford: Hart Publishing; forthcoming, 2009)

[75] See, for example, *McCann* v *United Kingdom* Appl. no. 18984/91, (1996) 21 EHRR 97, para. 147: '[Article 2 ECHR] enshrines one of the basic values of the democratic societies in the Council of Europe … one of the most fundamental provisions in the Convention.'

implications of clashing versions can be immense – we almost saw this come to fruition in *Grogan*. Third, cases involving a right to life are rarely normatively isolated since the right to life is a basic prerequisite for the enjoyment of other rights; cases involving protection of life will often spill over into the domains of privacy, family life and freedom of expression. [76]

The right to life is protected by Article 2 ECHR (as well as Protocol No 6 on the death penalty which all EU Member States have ratified). In certain circumstances, there is a positive obligation on national authorities to take measures to protect lives at risk from criminal acts of other persons.[77] Article 15 ECHR specifies that there can be no derogation from the right to life beyond very narrow exceptions expressly provided for in Article 2(2). There is some disagreement about whether a doctrine of implied limitations exists in relation to Article 2 or not.[78] But while the general principle remains that exceptions to the right to life should be construed strictly, not all States define the substance of life itself in the same way. Moreover, some variations have received clear ECtHR benediction.

The differences between national rules that regulate abortion are a good example of this, and States have enjoyed 'a wide margin of appreciation [*vis-à-vis* the ECHR] maintaining that "the protection of morals" is primarily a matter of domestic concern.'[79] The regulation of abortion falls, therefore, inside a Weilerian fundamental boundary, the ECtHR margin of appreciation both facilitating and allowing this to persist. The EU Network of Independent Experts on

---

[76] See, for example, *Pretty* v *United Kingdom*, Appl. no. 2346/02, (2002) 35 EHRR 1, para. 37.

[77] On this point, see Morris, D. (2003), 'Assisted suicide under the European Convention on Human Rights: A critique', *EHRLR*, 1, pp. 65-91 at 69, discussing *Osman* v *United Kingdom* (2000) 29 EHRR 245.

[78] See, for example, Black-Branch, J.L. (2001), 'Being over nothingness: The right to life under the Human Rights Act', case comment *Re A (Children) (Conjoined Twins: Medical Treatment*) *(No. 1)* [2001] 2 WLR 480 (CA), *ELRev*, 6 Supp (Human rights survey 2001), pp. 22-41 at 34-35, comparing the ECtHR decisions in *Paton* v *UK* (1980) 3 EHRR 408 and *McCann* (see especially, para. 147 of the latter).

[79] Forder, C.J. (1994), 'Abortion: A constitutional problem in European perspective', *MJ*, 1, pp. 57-100 at 56; essentially, neither 'everyone' nor 'life' in Article 2 ECHR have been held expressly to include or encompass the unborn, with emphasis placed on the precedence of the right to life of the mother in the factual circumstances brought before the ECtHR to date. A recent example of the ECtHR's reticence to explore this question can be seen in its judgment in *Vo v. France* ((2005) 40 EHRR 12). Finding no violation against France in terms of the scope of its obligations would have applied either way, the Court thus declined to consider the status of the embryo and/or foetus in respect of Article 2 ECHR in a substantive sense. See further, however, through the lens of Article 8 ECHR, N. Priaulx, 'Testing the margin of appreciation: Therapeutic abortion, reproductive 'rights' and the intriguing case of *Tysiç v. Poland*', (2008) 15 *European Journal of Health Law* 361.

Fundamental Rights has argued that criminalisation of abortion in all circumstances (or availability of abortion in overly restrictive circumstances) contravenes international human rights standards.[80] In fact, abortion is permitted within defined circumstances in all of the EU Member States,[81] but Ireland, Malta and Poland stand apart in terms of the narrowness of those circumstances.[82] Significantly, the EU Network has argued that 'abortion services are services in the meaning of Article 49 EC, which implies that the national law of each Member State may be in practice ineffective, or unable in fact to achieve its asserted objectives, due to the possibility for the person seeking to have access to this medical service to seek abortion in another Member State.'[83] Nonetheless, the Network confirms that, in its view, 'the different approaches adopted by the Member States…are legitimate and deserve to be respected within the limits [of international law]'.

The right to life is protected also by Article 2 of the Charter and the Explanations confirm that its scope should be the same as that provided for and protected by the ECHR. While the right to life has made only a cursory appearance in EC case-law thus far,[84] the factual circumstances of the Irish *X* case, latently predictable from *Grogan*, demonstrate the kind of conflict that could well have ended up before the Court of Justice.[85] In *X*, a fourteen year old pregnant rape victim, already in the UK for the purpose of having an abortion, became the

---

[80] See its Opinion n° 4-2005 on the right to conscientious objection and the conclusion by EU Member States of Concordats with the Holy See (December 2005, CFR-CDF Opinion 4.2005, para. 3.2.a). Interestingly, as the Network could not rely on the ECHR or ECtHR jurisprudence as such, it drew more widely from international human rights principles and, specifically, the UN Human Rights Committee in Communication No 1153/2003, *Karen Noelia Llantoy Huamán v. Peru* (CCPR/C/85/D/1153/2003). This very question would have come before the ECtHR in respect of Irish abortion law in *D v. Ireland* [2006] ECHR 26499/02. The applicant's complaint related to the non-availability in Ireland of an abortion for a pregnant woman in her situation (carrying a foetus with trisomy-18, an extremely serious and normally fatal (for the foetus, but with no threat to the life of the mother) genetic disorder); the complaint was dismissed on procedural grounds, however, as the applicant was found not to meet a fundamental precondition to ECtHR proceedings (exhaustion of all domestic remedies).

[81] See the report to the European Parliament by the Committee on Women's Rights *Report on Sexual and Reproductive Health and Rights* (A5-0223/2002).

[82] See generally, 2005 Annual Report of the EU Network of Independent Experts on Fundamental Rights, at http://ec.europa.eu/justice_home/cfr_cdf/doc/report_eu_2005_en.pdf, pp. 80-82.

[83] *Ibid*. p. 82.

[84] Case C-112/00 *Schmidberger* v *Austria*, judgment of 12 June 2003, not yet reported, para. 80.

[85] Essentially, abortion is lawful in Ireland only if it can be established that there is a real and substantial risk to the life of the mother; see Article 40.3.3° (inserted by Eighth Amendment to the Constitution Act, 1983), as interpreted by the Supreme Court in *Attorney General* v *X* [1992] 1 IR 1.

subject of a High Court injunction (sought by the Attorney General in his capacity as guardian of the Constitution, and drawing from the 'equal' rights to life of the mother and the unborn child protected by Article 40.3.3°) requiring her to return to Ireland and preventing her from leaving for nine months thereafter. The substantive interpretation of Article 40.3.3° was reversed in the Supreme Court, finding that the Constitution could encapsulate the life of the mother taking precedence when threatened.

The issue of the right to travel under EC law (to receive a service lawfully available in another Member State) was clearly relevant to the balancing task before the national courts, and this raises a critical question about the *range* of a fundamental boundary – can it govern the regulation of a right in an internal sense only, or can it generate an extra-territorial reach that defeats the Treaty freedoms? In the High Court – where, to recap, the girl was *not* permitted to travel – Costello J at least faced up to the difficult questions at play here, solving the dilemma by employing a public policy derogation. Interestingly, some *obiter* comments in the Supreme Court found that Ms X might have a right to travel under Irish constitutional law (drawing from the protection of liberty in Article 40.4), but the only judge to consider an EC right to travel (Finlay CJ) skirted the substantive issues by pointing instead to the practical impossibility of obtaining a timely preliminary ruling in the pressing circumstances of the case – arguably no longer an obstacle given the advent of accelerated and urgent preliminary reference procedures.[86]

Practical issues of timing again to one side, it is very probable that the ECtHR would have found *against* the Irish injunction had it been upheld by the Supreme Court, since ECHR case-law on abortion has promoted the life of the mother in situations of direct conflict. So, even without giving precedence to the economic 'right' to receive services[87] but allowing the derogation and then following *ERT*, or even taking fundamental rights into account as part of the substantive derogation review as advocated by Advocate General Jacobs, the Irish derogation would not necessarily pass muster on an ECHR-coloured EC rights review – this holds true even if the public policy being protected was deemed to be legitimate, and even if (though this is

[86] See in this edition, the contributions by S. Currie and C. Barnard respectively.

[87] As occurred in different but not wholly unrelated circumstances in the English Court of Appeal in *R.* v *Human Fertilisation and Embryology Authority* ex parte *Blood* [1997] 2 ALL ER 687 (in respect of written consent from the donor being necessary in the UK for artificial insemination, but not in Belgium – here, the fundamental boundary could contain internal regulation only and could not override freedom to travel and receive a service lawfully available in another Member State. In that function, it could even cancel out an unlawful neglect of donor consent within the State of origin. This point is returned to below.

unlikely looking at Advocate General van Gerven's comments about restricting travel in *Grogan*) the injunction was found to be proportionate.[88]

We do not yet know how constitutionalisation of the Charter might affect things. Article 51(1) could become a relieving out-clause, since the *X* case scenario does not really come within the 'implementation' of Community law on one view. The Explanations arguably suggest otherwise; how much weight will the Court give to them? Moreover, could an argument be made that in derogating, a Member State is necessarily involved in the 'implementation' of EC law in a broader sense – in the implementation of free movement principles, in the implementation of supremacy? Ironically, the EC-friendly approach to non-discrimination underpinning the action taken by the Attorney General in *X* – where he confirmed that he would seek equally to prevent a British national from leaving Ireland if it was established that she intended to return to Britain to have an abortion[89] – is more disturbing than reassuring.

The Irish legal situation changed in the aftermath of the *X* case. The Supreme Court decision itself introduced very limited circumstances in which abortion is lawful in Ireland.[90] As a result of strong public reaction after the original (absolutely restrictive) High Court decision, two amendments to Article 40.3.3° with strong free movement threads were accepted by referendum in November 1992.[91] The Irish government also secured a Protocol to the Maastricht Treaty,

---

[88] See O'Leary, S. (1992), 'Freedom of establishment and freedom to provide services: The Court of Justice as a reluctant constitutional adjudicator: An examination of the abortion information case', *ELRev*, Vol. 17(2), pp. 138-157; see also, Kingston J., Whelan, A., Bacik, I., (1997), *Abortion and the Law*, Dublin, Round Hall Sweet & Maxwell, p. 153, who point out that Costello J in the Irish High Court effectively ignored Advocate General van Gerven's suggestion in *Grogan* (at para. 29 of that Opinion) that restrictions on travel imposed on pregnant women might be disproportionate.

[89] See Kingston, Whelan and Bacik, *ibid*., p. 155.

[90] However, Kingston, Whelan and Bacik, *ibid* at pp. 28-29, argue that even protection for the right to life of the mother does not remove Irish abortion law from the scope of potential incompatibility with Article 2 ECHR, given a persisting lack of clarity evident in 'different nuances and emphases' in the judgments in the *X* case itself and subsequent case-law.

[91] While the original text of Article 40.3.3º remains in place, the following provisos have now been added: 'This subsection shall not limit freedom to travel between the State and another state. This subsection shall not limit freedom to obtain or make available, in the State, subject to such conditions as may be laid down by law, information relating to services lawfully available in another state.' The right to travel is thus confirmed as a matter of right; the right to information was regulated by legislation, effected via the Regulation of Information (Services Outside the State for Termination of Pregnancies) Act, 1995 (itself the subject of Supreme Court review in respect of its constitutionality (see *In re Article 26 and The Regulation of Information (Services Outside the State for the Termination of Pregnancy) Bill 1995*, [1995] 1 IR 1).

which provides that: '[n]othing in the Treaty on European Union, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in Ireland of Article 40.3.3° of the Constitution of Ireland.' Significantly, the wording of the Protocol signalled that this fundamental boundary was intended to regulate abortion in an *internal* sense only ('in Ireland'). If this remained in doubt, a Declaration was adopted by the High Contracting Parties to the TEU on 1 May 1992 which confirmed the territorial limitations of the Protocol.[92] On accession, Malta effectively mirrored the Irish position, as reflected in Protocol No 7 to the Treaty of Accession 2003.[93]

In effect, this sealed an internal boundary which sits well with Community law and reduces the possibility of conflict. Interestingly, however, the seal was effected not by the EC but by the people of Ireland and, to a lesser degree, in concert with the other Member States. It should not be presumed, though, that inter-State movement for the purpose of abortion is a specifically 'Irish problem'.[94] A (non-binding) 2002 European Parliament resolution called on Member States and (then) accession countries *not* to prosecute women who have undergone illegal (in a domestic sense) abortions – in other words, again calling for an internal ceiling on fundamental boundaries.[95] More recently, Poland and the United Kingdom have sought to create more general internal seals in respect of the (potential) application of the Charter of Fundamental

---

[92] Here, the Member States note that 'it was and is their intention that the Protocol shall not limit freedom to travel between Member States or, in accordance with conditions which may be laid down, in conformity with Community law, by Irish legislation, to obtain or make available in Ireland information relating to services lawfully available in other Member States.'

[93] The Protocol provides that: '[n]othing in the Treaty on European Union, or in the Treaties establishing the European Communities, or in the Treaties or Acts modifying or supplementing those Treaties, shall affect the application in the territory of Malta of national legislation relating to abortion.' The Maltese Protocol thus raises exactly the same questions relating to 'in the territory' as its Irish predecessor, seeming again to point to an 'internal' intention.

[94] See Forder, C.J. (1994), 'Abortion: A constitutional problem in European perspective', *MJ*, 1, pp. 57-100, p. 66, referring to an incident where a German woman was subjected to an internal examination on return from the Netherlands, where she had had an abortion; see also p. 80, where she points generally to the reality of movement of women from countries with more restrictive policies on abortion to those with less restrictive regimes. More recently, in December 2008, a threatened criminal prosecution by the Dutch authorities against a Dutch woman who had an abortion in Spain outwith the time limit for lawful abortion in the Netherlands was dropped; but she had before then been taken into custody and criminal charges had been made against her.

[95] European Parliament Resolution on Sexual and Reproductive Health and Rights, OJ 2002 C271 E/369, especially at para. 13.

Rights.[96] Can we accept internal application of fundamental boundaries in these instances *only* because it was expressly determined by or on behalf of the societies in question? The Irish Supreme Court, at least, seemed to favour that position, noting simply that the conflict between the 1992 constitutional amendment on the provision of abortion information might well be in 'direct conflict' with Article 40.3.3° but that this was a conflict of which the people of Ireland, when voting in the referendum, 'were aware'.[97]

Domestic laws on assisted suicide and euthanasia also raise difficult conceptual questions about the right to life in a free movement setting. At the blurred fringes of life, quality of life and death, domestic courts have struggled with cases on the removal of feeding tubes from persons in permanent vegetative states.[98] Perhaps more than any other question in this context, however, voluntary active euthanasia demonstrates very well the need for judicial resolution of difficult individual cases when more generalised legislative solutions are eschewed by regulators fearful of competing public sensitivities. It can be defined as 'the possibility of voluntarily inflicting death on a person who, under certain circumstances, has manifested such a wish.'[99] At present, voluntary active euthanasia is lawful in two Member States, the Netherlands and Belgium.[100] In *Pretty*, the ECtHR stressed that Article 2 ECHR cannot 'without a distortion of language, be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right of self-determination in the sense of conferring on an individual the

---

[96] See the Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom attached to the Lisbon Treaty (OJ 2007 C306/156).

[97] *In re Article 26 and The Regulation of Information (Services Outside the State for the Termination of Pregnancy) Bill 1995*, [1995] 1 IR 1, at 108-109.

[98] See, for example, in the UK, *Airedale NHS Trust* v *Bland* [1993] AC 789, and the discussion in Freeman, M. (2002), 'Denying death its dominion: Thoughts on the Dianne Pretty Case', *Medical Law Review*, 10, pp. 245-270, especially at 251-3.

[99] See 2002 Annual Report of the EU Network of Independent Experts in Fundamental Rights, at http://ec.europa.eu/justice_home/cfr_cdf/index_en.htm, p. 31.

[100] See the 2001 Law on Termination of Life on Request and Assisted Suicide (Review Procedures), the Netherlands, in force since 1 April 2002; and Law of 28 of May 2002 on euthanasia, Belgium, in force since 20 September 2002. See further, S. Gevers, 'Evaluation of the Dutch legislation on euthanasia and assisted suicide', (2007) 14 *European Journal of Health Law* 381; H. Nys, 'Physician assisted suicide in Belgian law', (2005) *European Journal of Health Law* 39. See also, the EU Network Report, *ibid*., pp. 32-34. Luxembourg is the third EU Member State which may soon legalise euthanasia in limited circumstances following the final passage of a bill into law, potentially triggering a constitutional crisis in relation to the powers of the monarch, given Grand Duke Henri's indication in December 2008 that he will refuse to sign the bill into law for reasons of conscience. Beyond Europe, the US states of Oregon and Washington also provide for lawful assisted dying within defined circumstances.

entitlement to choose death rather than life.'[101] The Court went on to suggest that 'it is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity.'[102] Reflecting the flexibility of the margin of appreciation, this indirectly confirms the potential legitimacy of Dutch and Belgian law while equally, in *Pretty* itself, the ECtHR could hold that the UK blanket ban on assisted dying was acceptable in terms of being proportionate and necessary in a democratic society.[103]

Thinking again, however, about different *margins* of appreciation, can the 25 Member States which do not currently permit euthanasia prevent one of their nationals from seeking that treatment Belgium or the Netherlands? The restrictions in both States are not set out expressly in terms of nationality but, rather, they attach *de facto* residence requirements through the duration and extent of the doctor-patient relationship that needs to exist in order for the act to be lawful. Complicated situations could arise between Belgium and the Netherlands too. For example, Dutch legislation provides for a specific penalty in cases where euthanasia is practised outside the conditions set down in law (twelve years imprisonment), but there is no specific penalty laid down in Belgian law. The Dutch system includes minors from twelve years onwards (parental consent being required for minors between twelve and fifteen years old), while Belgian law stipulates that only conscious adults can make a euthanasia request. The potential for conflict is real here; could a sixteen-year old Belgian national be prevented from establishing the necessary residence conditions in the Netherlands because of an expressed intention to die? The lines of case law not just on restrictions on entry/deportation but also on taking advantage of free movement benefits[104] suggests that Belgium could not refuse entry to a Dutch (or any other EU) national in these circumstances. Could Belgian parents who assisted their fourteen-year old child

---

[101] *Pretty*, para. 39; Morris observes that 'if anything, Article 2 is more likely to be invoked as an argument against a right to assisted suicide, such a right being incompatible with the state's obligation to protect life' ('Assisted suicide under the European Convention on Human Rights: A critique', (2003) 1 *EHRLR*, pp. 65-91 at 69-70).

[102] *Pretty*, para. 65.

[103] Reviving parallels with *Grogan*, the lack of rigour of the ECtHR assessmenthas, however, been criticised – see Morris, pp. 86 *et seq*.

[104] See Case C-370/90 *R* v *Immigration Appeal Tribunal and Singh*, ex parte *Secretary of State for the Home Department* [1992] ECR I-4265; and see again, *Akrich.*

be prosecuted by national authorities after the fact if they then return home? Or, could they or nationals of any other Member State in a similar situation raise EC law arguments in defence? Interestingly, Belgium (but not the Netherlands) has excluded through its implementation of the EAW the possibility of issuing a European arrest warrant in respect of a request pertaining to euthanasia (or abortion) that is lawful in Belguim.[105]

Interpreting an EC right to life in accordance with the ECHR will not resolve any of these situations. The paternalistic extra-territorial reach of national laws that seek to protect home nationals is a relatively untested question in the context of assisted death. There are clearly uncommon constitutional traditions at play here, as we saw above also in respect of Ireland and Malta on the regulation of abortion. Although the Director of Public Prosecutions in England seems not to pursue actions under s.2(1) of the Suicide Act 1961, the threat of unlawfulness nonetheless persists.[106] The recent judgment in England in *Purdy* does not really address very direct questions asked about the extent to which criminal liability might attach to family members who make travel arrangements for those who intend to travel to another state to die.[107] The ECtHR can test the value choices of States a propos the ECHR; but this cannot provide a solution where States travel down other value roads *vis-à-vis* each other.

By bringing these questions within the derogation-driven Court of Justice balancing function, an internal margin of appreciation or fundamental boundary can be maintained, but external choices remain possible. States may reflect national value judgments in their legal frameworks; and if these are compatible with the ECHR applying a margin of appreciation doctrine, then the application of these standards *within* that State can be protected. This device is similar to an

---

[105] Legislation of 19 December 2003; section 5(2) establishes that 'the offence of abortion under Article 350, paragraph 2, of the Criminal Code and the offence of euthanasia under the law of 28 May 2002 on euthanasia, are not considered to be covered by the concept of voluntary homicide'.
[106] Most recently in England, the DPP decided, notwithstanding the existence of 'sufficient evidence', not to prosecute the parents of Daniel James, who was accompanied to and died at the Dignitas clinic in Geneva; see http://news.bbc.co.uk/1/hi/england/hereford/worcs/7773540.stm
[107] *R (on the application of Debbie Purdy)* v.*DPP* [2008] EWHC 2565 (QB), (2008) 104 BMLR 281; it is assumed that this case related to travel to Switzerland, the only European country that extends lawful assisted death services to non-nationals and non-residents. See the annotation by K. Mason, 'Unalike as two peas?', (2009) 13 *Edinburgh Law Review*, forthcoming. It is interesting (and perhaps worrying) to note, however, that the High Court concluded (*contra* the approach of the ECtHR in *Pretty* and drawing instead on case law from the House of Lords about the application of Strasbourg jurisprudence) that Article 8(1) ECHR was not engaged in the circumstances of this case (see *Purdy*, paras. 42-46).

intense, constitutional application of mandatory requirements theory.[108] Thus in *Omega*, the 'right' decision was ultimately made in respect of imported services. But it would follow that the German authorities could not, for example, prevent German nationals from travelling to other States to participate in laser 'killing' games – the internal value judgment cannot reach externally. The internal unlawfulness of the action is also irrelevant at that point; a pluralist form of interpretation not necessarily anathema to national courts, thinking of the English Court of Appeal in *Blood*.

Similarly, then, the argument advanced here offers a potential critique of the judgments in *Laval* and *Viking Line*; if a fundamental boundary lens was applied to the internal significance of the social rights at stake, then that might well have defeated the freedoms of establishment and service at issue on a constitutionally enriched plane of analysis – not in the sense of domestic law defeating Community law, but one aspect of Community law taking precedence over another.

The second-level activities that caused so much controversy in *Grogan*, such as advertising activities unlawful in the home State but lawful in other EU Member States, are trickier on one view; but it is submitted that any such restrictions would have to pass a far sharper justification and proportionality test than that applied in *Grogan*. It is worth recalling that in *Open Door*, the ECtHR found against Irish information restrictions on the basis of (ECHR) freedom of expression, notwithstanding the competing (Irish) right to life of the unborn. Judgment in *Open Door* was delivered just over a year after the Luxembourg judgment in *Grogan*; who can say what might have happened if the judgment dates were reversed.

*Who is making the constitutional value judgment, and what does it say about primacy?*

Follwing *Grogan*, a more overt modification of primacy was advocated by Phelan. He argued that 'special type of rights embedded in national constitutions which are considered by national courts (a) to express basic principles concerning life, liberty, religion and the family; (b) to have as their interpretative teleology a national vision of personhood and morality; (c) to be fundamental to the legitimacy of the national legal system and the preservation of its concept of law' should be

[108] The language of mandatory requirements, since widened to questions of objective justification, was developed originally in the context of justifying restrictions on Article 28 EC in the *Cassis de Dijon* case (Case 120/78 *Rewe-Zentrale AG* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649).

outwith the ambit of primacy altogether.[109] Interestingly, he expressly excluded 'conflict with the necessary organisation of economic and social rights at the European level'. A generalised approach like that would rule out case-by-case analysis of the values being submitted for preserved national protection; it would rule out, for example, applying a free movement infused margin of appreciation to cases like *Laval* and *Viking*. What emerges instead from the argument outlined here is that notwithstanding the (probably enhanced) potential for diverse national values to endure, it is not necessarily a partial defeat for the principle of primacy. On one view, there is a strong parallel here with the conceptualisation of primacy more generally – is Community law taking precedence because the States allow it to do so, or because Luxembourg says that they must? This question has never really been resolved, but the system does tick along quite successfully on a functional basis with both 'sides' being able to think that they are right.[110]

What is especially interesting about *Omega* is that the Court tried only half-heartedly to recast the German particularity of human dignity as a general principle of Community law before revealing a State-centric approach in its proportionality analysis. There are two explanatory arguments that could be suggested in this context. The first is that the restricted free movement rights occurred in economic circumstances; would that suggest more leeway to the State can be tolerated than in situations where the personal movement rights of EU citizens are curtailed? But cases like *Laval* and *Viking* would not necessarily 'fit' with that thesis; so it is an insufficient explanation at best. A second argument is that, in this case, Germany wanted only to protect its *internal* constitutional space; it was not preventing its own nationals or traders established within its territory from leaving to engage in similar – but, elsewhere, lawful – activities in other States. Thus the case fits well with sealing the internal boundary; there was no restrictive extra-territorial ambition here. Free movement objectives are tempered to some extent – but compatibly with the primacy of Community law, not through a methodology that tramples over it.

---

[109] Phelan, D.R. (1992), 'Right to life of the unborn v. promotion of trade in services: The ECJ and the normative shaping of the European Union', *Modern Law Review*, Vol.55, pp. 670-689, p. 688. More generally, see also W. Phelan, 'Can Ireland legislate contrary to European Community law?', (2008) 33 *ELRev* 530.

[110] The codification of the primacy principle in the Constitutional Treaty did not survive the Lisbon revisions; and in this context, that is perhaps just as well, as the provision would have forced several States to accept expressly what they arguably cannot from the perspective of their own constitutional systems, even if they accept it implicitly through the daily commitments of EU membership.

**Conclusions**

For some time, I had a mechanically negative reaction to the results of the Irish abortion referendum in 1992; the 'Irish' solution – no easing of the law here, thank you; but please do feel free to go elsewhere – felt parochial, even if it was disarmingly honest about its duplicity. Over time, however, the sophistication of the solution is what has come to resonate much more strongly.

While the attempts expressly to adopt an EU constitution might have been seen as a normalising process *vis-à-vis* domestic standards of governance, perhaps we should instead accept – and articulate – an understanding that the character and value of EU constitutionalism are simply different. In this vein, this article has isolated a set of rights responsibilities that is unique to the EU. Moreover, if the dilemmas that were used to illustrate the arguments here are so difficult or sensitive that we simply refuse to deal with them through political processes (national or otherwise), can we really complain when the Court of Justice must so do in a case that comes before it?

The approach of the English Court of Appeal in *Blood* and the Treaty Protocols in respect of Irish and Maltese abortion law suggest that Member States might be more willing simultaneously to accommodate both national *and* EC rights and freedoms than we usually give them credit for, because they seem to endorse a desired sealing of fundamental boundaries in an internal sense only. This ties in with another idea expressed by Weiler and Lockhart: 'Part of the Community ethos, in our view, lies in the important civilizing effect resulting from the manner in which the Community forces individuals and states to confront and become tolerant of the other. Part of that civilizing confrontation is achieved through the intended inability of Member States, practical and legal, to screen off different social choices, legally sanctioned, in other Member States.'[111]

In this way, the legal expression of values is confined territorially. The Irish constitutional amendments adopted after the *X* case might seem contradictory, even a cop-out

[111] Weiler, J.H.H. and Lockhart, N.J.S., *supra* n. 17, II, p. 604. A similar view has been expressed by Forder, C.J., *supra* n. 50, p. 99: 'The difficulties and contradictions which are encountered by any country which tries to regulate its abortion law regardless of the laws of neighbouring countries is amply illustrated by the cases of Ireland and Germany. The presence of [EC] law and the ECHR mean that it is no longer possible to fossilise certain values within constitutional principles in the hope that these values will be safeguarded against development and change.'

given that a very restrictive prohibition on abortion remains alongside a blessing on the right to travel; but they make more sense in an external, pluralist EC context. Of course, supremacy concerns are accommodated in the Irish (and Maltese) resolution because the compromises were not enforced from 'above'. But if a Member State chooses an internal limitation to nationally-protected values, then surely it must yield also its power to take action against anyone who has exercised a related EC freedom and done nothing unlawful from the perspective of the host State.

Sacerdoti has put forward something of a counter-view, arguing that 'the national variation of the extent and definition of the single rights, although universally shared in principle, is a legitimate sign of the pluralism characterizing Europe, representing its historic legacy…It is a civil, social and religious pluralism which must make the most of differences and seek to protect minorities.'[112] But the two arguments are not mutually exclusive. The only limitation effected by an Community law solution is an extra-territorial one. By drawing from the ECtHR margin of appreciation to seal rights boundaries internally, pluralism of values can still be protected. Applying an EC ethos to the equation, and maintaining the EC function of derogation review, value pluralism is tempered by a multi-State doctrine of 'live and let live' – something specifically value-added in respect of the Community legal order and itself a pluralist solution.

It must be acknowledged that something *is* lost within this approach. A further flake of State sovereignty is undoubtedly shaved off. The paternalistic leaning that, in a positive sense, informs many national laws having extra-territorial effect would be undermined. There is no doubt either that retaining even this adapted form of derogation review entrusts the Court of Justice with a deep degree of confidence (an investment that can bear mixed dividends) to be able to distinguish appropriately between commendable preservation of national values and more pliable national standards that should legitimately give way to free movement law. Working out what should and should not be included within the preserved State value core is by no means straightforward. This would, though, put a reasonable onus on States to demonstrate the particular resonance of any challenged values; it also thereby provides further opportunity for meaningful engagement with Strasbourg jurisprudence.

But if free movement is supposed to mean something, if EU citizenship is supposed to mean something, if 'united in diversity' is supposed to mean anything; and if EC fundamental rights protection is supposed to mean something *else* by adding a discrete supranational purpose,

---

[112] Sacerdoti, G. (2002), 'The European Charter of Fundamental Rights: From a nation-state Europe to a citizens' Europe, *Columbia Journal of European Law*, 8, pp. 37-52 at 43.

then losing something in terms of the reach of national sovereignty and perhaps national constructions of morality seems, potentially, fair.