The EU Charter of Fundamental Rights as the Most Promising Way of Enforcing the Rule of Law against EU Member States

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The ambition of this paper is to show that the best method to enforce the rule of law against Member States is a creative re-interpretation of Article 51(1) of the EU Charter of Fundamental Rights (Charter, CFR), whereby the fundamental rights of the Charter shall be applicable also in purely domestic cases. In order to support our point, we will embed the argument in a Toynbeean approach, i.e. in a 'challenge and response' scheme: the rule of law should be perceived as a tool which is a response to the arbitrary use of state power (originally developed against absolutism). The concept's inherently anti-sovereigntist nature should prevail whenever we interpret a legal document (like the Charter) which was enacted in order to promote key aspects of the rule of law such as the promotion of fundamental rights. Currently, the most important historical challenge to the rule of law in Europe is the systematic dismantling of the rule of law (and democracy) in certain Member States for which the present paper attempts to offer a partial cure.

1. A Toynbeean Approach to Constitutional Ideas

Constitutional ideas can be seen in two different ways. Firstly, they can be seen as being derived from specific moral principles, such as freedom, equality or solidarity. Secondly, they can be viewed as being responses to social challenges. This paper follows the second track and it is our opinion that moral ideas can also be explained as being long term default responses to social challenges.[1]

In line with Toynbee, we see societies as regularly facing new challenges that they try to find the right solutions to.[2] By challenge, we refer to a new circumstance or problem that necessitates a new, creatively formulated, method to solve it. Such creativity can take the form of new inventions or the introduction of new ideas about how a society should be organised.[3] If a specific invention or new idea is not able to solve a particular problem (incorrect response), then the society (culture or nation) in question experiences either no progress or actual decline until the correct response is established (or loses its distinctive identity and will be dissolved in another society/culture/nation).

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[1] Richard A. Posner, *The Problematics of Moral and Legal Theory* (Harvard UP 1999) 17-38.

[2] Arnold J Toynbee, *A Study of History*, vol. 1 (OUP 1933) 271. While different aspects of Toynbee's work have been subject to justified criticism (especially the role of religion, the relationship between civilisations, certain concrete historical details), his basic scheme of challenge-and-response does seem to fit the historical facts. For an account of recent literature on Toynbee see Marvin Perry, *Arnold Toynbee and the Western Tradition* (Peter Lang 1996), especially 103-128; for a good introduction to his work see CT McIntire and Marvin Perry, 'Toynbee's Achievement', in: CT McIntire and Marvin Perry (eds), *Toynbee. Reappraisals* (U of Toronto P 1989) 3-31; for classic literature on him (and some of his own methodological essays) see MF Ashley Montagu (ed), *Toynbee and History. Critical Essays and Reviews* (Porter Sargent 1956).

[3] See András Sajó, *Limiting Government. An Introduction to Constitutionalism* (CEU Press 1999) 1-7 on constitutional ideas as expressions of what kind of past experiences the constitution-giver wanted to avoid.

At this point, a competent lawyer, driven by his/her instinct to look for definitions, may be asking himself/herself what is actually meant by the words 'society', 'no progress' or 'decline'. This is also the case with the idea of the rule of law,[4] which was originally invented as response to absolutism.[5] Over time definitions of the rule of law have evolved.[6] The only key element that has never been questioned is the *limitation of or fight against the arbitrary use of government power*.[7] In the following we will see how this idea of the rule of law is currently being challenged in some Member States and what the most promising way to deal with it would be.

2. A New Historical Challenge in Europe: Dismantling the Rule of Law in Member States

Recent events in Hungary and Romania proved that it is far from obvious that once a state became member of the EU it will follow the principles of the rule of law without any external enforcement mechanism.[8] This chapter is, however, not about these two countries but about the general legal problem which is convincingly put forward by Jan-Werner Müller who basically states that the Copenhagen criteria cannot efficiently be enforced against Member States (and their enforcement was deficient even against candidate countries).[9] Requirements of the thick concept of the rule of law can be systematically breached, and the European Union is unable to handle the situation efficiently. If, however, the EU does not want to lose its credibility, it has a duty to defend the rule of law (cf. Article 2 TEU) to the greatest possible extent, at least within Europe, and especially within the European Union.[10] This tension between the enforcement impotence of the EU on the one hand, and the moral and (implied) legal duty to enhance the rule of law within its territory, on the other hand, lies at the heart of this chapter.

The majority of the possible methods of enforcement that exist are reliant on political discretion (seclusion of the concerned political party within its European party family, Article 7 TEU, initiation of infringement procedures by the Commission), and therefore cannot be counted on to guarantee the aforementioned values. European Politicians may (and in a matter of fact actually do) conduct themselves in an opportunistic manner: they often down-play conflicts or even pretend that conflicts do not exist. It seems that European politicians have a

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[4] The expressions 'rule of law' and *Rechtsstaat* are used as synonymous in this chapter unless otherwise indicated.

[5] For more details see András Jakab, 'Breaching Constitutional Law on Moral Grounds in the Fight against Terrorism. Implied Presuppositions and Proposed Solutions in the Discourse on "the Rule of Law vs. Terrorism"' (2011) 9.1 *International Journal of Constitutional Law* 58-78, id., *European Constitutional Language* (CUP forthcoming).

[6] 'Rule of law' is often used in an expanded sense which includes the political ideology of the respective speaker or judge, cf. Joseph Raz, 'The Rule of Law and its Virtue' in *The Authority of Law* (Clarendon 1979) 210.

[7] In the US this abuse means abuse in the interest of particular interests instead of the aggregated interest of all citizens, see Christoph Möllers, *Die drei Gewalten* (Velbrück Verlag 2008) 29-35. In France the abuse was a danger from the monarchical executive. Legislature in US is conceived as representing lobbies or other particular interests, as opposed to France where legislature is the people's voice. Möllers *ibid.* 32, 35. Rule of law as opposed to arbitrariness Martin Krygier, 'The Rule of Law: Legality, Teleology, Sociology', in: Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Hart 2009) 45-70. As restriction of government discretion Brian Z. Tamanaha, 'A Concise Guide to the Rule of Law', in: Palombella and Walker *ibid.* 7-8.

[8] For more details see Armin von Bogdandy and Pál Sonnevend (eds), *Constitutional Crisis in the European Union. Theory, Law and Politics in Hungary and Romania* (Beck – Hart – Nomos 2015) 5-190.

[9] See Jan-Werner Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States?' (2015) 21.2 *European Law Journal* 141-160; Dimitry Kochenov, *EU Enlargement of the Failure of Conditionality* (Kluwer 2008).

[10] See Christophe Hillion's contribution in the present volume xxx.

tendency to turn a blind eye to such problems when faced with a major crisis within the EU which seems to them to be of more importance than issues of constitutionalism in one of the Member States. While it is obvious that we should expect European politicians to believe in the values of constitutionalism, liberty is based on distrust towards politicians.[11] A mechanism which places the enforcement of constitutionalism in the hands of politicians is a useful, but untrustworthy mechanism. Judicially guaranteed mechanisms represent the most trustworthy mechanisms for enabling those who are affected to enforce these values.[12]

In the following we are going to argue that the most promising way to enforce the rule of law against Member States in which governments have been hijacked by groups which work on dismantling the rule of law is to widen the application of the EU Charter of Fundamental Rights via a creative re-interpretation of its Article 51(1).

3. Existing Interpretations of Article 51(1) CFR

Article 51(1) CFR, which limits its scope as regards the Member States: it is applicable to them '*only* when they are interpreting Union law', is viewed as being probably the most important provision or '"keystone" of the Charter.'[13] Not only does this restrictive formulation appear to contradict the underlying philosophy that it is assumed inspires the Charter,[14] but it is also more restrictive than the former case law of the ECJ concerning the applicability of fundamental rights (conceptualised as fundamental principles of law).[15]

The explanatory memoranda do not really provide any clarification of the situation either:[16]

> As regards the Member States, it follows unambiguously from the case law of the Court of Justice that the requirement to respect fundamental rights defined in a Union context is only binding on the Member States when they act in the scope of Union law (judgment of 13 July 1989, Case 5/88 Wachauf [1989] ECR 2609; judgment of 18 June 1991, ERT [1991] ECR I-2925); judgment of 18 December 1997 (C-309/96 Annibaldi [1997] ECR I-7493). The Court of Justice confirmed this case law in the following terms: "In addition, it should be remembered that the requirements flowing from the protection of

[11] See Bojan Bugarič's contribution in the present volume xxx.

[12] As the key question of this paper concerns the relationship between the individual and the government, we will not concentrate on issues relating to the horizontal effect of fundamental rights. On these issues under the Charter, see Thomas von Danwitz and Katherina Paraschas, 'A Fresh Start for the Charter', (2012) 35 *Fordham International Law Journal* 1396, esp. 1423-1425.

[13] Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *European Constitutional Law Review* 375, esp. 377. According to Piet Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 *Common Market Law Review* 945, 954, it is paradoxical to have a general fundamental rights charter with a limited scope.

[14] Ricardo Alonso García, 'The General Provisions of the Charter of Fundamental Rights of the European Union', *Jean Monnet Working Paper* 4/02 http://www.jeanmonnetprogram.org/archive/papers/02/020401.pdf, 5.

[15] For a detailed comparison with former case-law, see Xavier Groussot, Laurent Pech and Gunnar Thor Petursson, 'The Scope of Application of Fundamental Rights on Member States' Action: In Search of Certainty in EU Adjudication', *Eric Stein Working Paper* 1/2011 http://www.era-comm.eu/charter_of_fundamental_rights/kiosk/pdf/EU_Adjudication.pdf. For the history of different draft versions of the CFR see Gráinne de Búrca, The drafting of the European Union Charter of fundamental rights, (2001) 26 *European Law Review* 126-138.

[16] Explanations relating to the Charter of Fundamental Rights (OJ 2007 C 303/17, 32). For a critical view on the rather confusing explanations, see Leonard FM Besselink, The Member States, the National Constitutions and the Scope of the Charter, 8 *Maastricht Journal of European and Comparative Law* 1 (2001) 68-80, esp. 76-78. Groussot, Pech and Petursson (n 15) 19 denounce the explanations to Art. 51 as 'a mixture of various formulas'.

> fundamental rights in the Community legal order are also binding on Member States when they implement Community rules...” (judgment of 13 April 2000, Case C-292/97, [2000] ECR 2737, paragraph 37 of the grounds). Of course this rule, as enshrined in this Charter, applies to the central authorities as well as to regional or local bodies, and to public organisations, when they are implementing Union law.

Three main interpretations can be found in the literature concerning Article 51(1) CFR: (a) A literal and rather restrictive approach which requires the actual existence of EU law in an area in order to trigger the application of the Charter.[17] This interpretation, however, does not only contradict the former case-law of the ECJ (as quoted above in the explanatory memoranda), but it is also in conflict with the Charter itself as Article 53 CFR explicitly states that the Charter cannot lead to a diminished level of fundamental rights protection.[18] If this interpretation were to be accepted, this would result in a lower level of fundamental rights protection than that which existed before the adoption of the Charter.

(b) Since *Åkerberg Fransson*,[19] it seems to be clear that the former literal interpretation does not mirror the actual legal situation any more.[20] In this judgment the scope of the Charter via interpretation was clarified and the widely held view in the literature that any material link and *potential* law-making are sufficient for the application of the Charter was accepted.[21] This view had also been previously promoted by AG Sharpston in *Ruiz Zambrano*:[22]

> Transparency and clarity require that one be able to identify with certainty what ‘the scope of Union law’ means for the purposes of EU fundamental rights protection. It seems to me that, in the long run, the clearest rule would be one that made the availability of EU fundamental rights protection dependent neither on whether a Treaty provision was directly applicable nor on whether secondary legislation had been enacted, but rather on *the existence and scope*

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[17] Steve Peers, ‘The Rebirth of the EU’s Charter of Fundamental Rights’, (2013) 13 *Cambridge Yearbook of European Legal Studies* 283, 298; Thomas von Danwitz and Katherina Paraschas, ‘A Fresh Start for the Charter’, (2012) 35 *Fordham International Law Journal* 1396, esp. 1409; Peter M Huber, ‘Unitarisierung durch Gemeinschaftsgrundrechte – Zur Überprüfungsbedürftigkeit der ERT-Rechtsprechung’, (2008) *Europarecht* 190, 196; Martin Borowsky, ‘Artikel 51 – Anwendungsbereich’ in Jürgen Meyer (ed), *Charta der Grundrechte der Europäischen Union* ((3rd ed., Nomos e.a. 2011) 642-667, esp. 653-654; Zsófia Varga, ‘Az Alapjogi Charta alkalmazási köre I’, (2013) 5 *Európai Jog* 17-28, 19 with further references. See also Paul Yowell, ‘The Justiciability of the Charter of Fundamental Rights in the Domestic Law of Member States’ in Peter M Huber (eds), *The EU and National Constitutional Law* (Boorberg 2012) 107-123, esp. 114-123.

[18] Carsten Nowak, ‘Grundrechtsberechtigte und Grundrechtsadressaten’ in F Sebastian M Meselhaus and Carsten Nowak (eds), *Handbuch der Europäischen Grundrechte* (Beck e.a. 2006), 212-254, esp. 244-245.

[19] Case C-617/10 *Åkerberg Fransson*, 26.02.2013. xxx

[20] Filippo Fontanelli, ‘Hic Sunt Nationes: The Elusive Limits of the EU Charter and the German Constitutional Watchdog’, (2013) 9.2 *European Constitutional Law Review* 315-334; Angela Ward, ‘Article 51 – Scope’ in Steve Peers e.a. (eds.), *The EU Charter of Fundamental Rights. A Commentary* (Hart 2014), 1413-1454, esp. 1433-1437. On the conflict between the wide Fransson doctrine and the strict approach of the German FCC to Art. 51 see Daniel Thym, ‘Separation versus Fusion – or: How to Accommodate National Autonomy and the Charter? Diverging Visions of the German Constitutional Court and the European Court of Justice’, (2013) 9.3 *European Constitutional Law Review* 391-419.

[21] Eeckhout (n 13) 993; Heidi Kaila, ‘The Scope of Application of the Charter of Fundamental Rights of the European Union in the Member States’ in Pascal Cardonnel e.a. (eds), *Constitutionalising the EU Judicial System* (Hart 2012), 291-315; Julianne Kokott and Christoph Sobotta, ‘The Charter of Fundamental Rights of the European Union after Lisbon’, *EUI Working Paper* 2010/6, 7 http://cadmus.eui.eu/bitstream/handle/1814/15208/AEL_WP_2010_06.pdf?sequence=3.

[22] Opinion of AG Sharpston in Case C-34/09 Ruiz Zambrano, delivered on 30 September 2010, para. 163.

> *of a material EU competence.* To put the point another way: the rule would be that, provided that the EU had competence (whether exclusive or shared) in a particular area of law, EU fundamental rights should protect the citizen of the EU *even if such competence has not yet been exercised*.

Also according to this interpretation, however, is the notion that the Charter cannot be triggered unless there is a link to the material scope of an EU competence.[23] This means that the application of the Charter is therefore still viewed as being collateral, and its rights are not viewed as being free-standing rights.[24] While some call for a further clarification of this interpretation in order to make its application easier by national judges, it is most likely in conformity with both the actual ECJ case-law[25] and the dominant opinion in the literature.[26]

(c) The emergence of a possible third, more liberal, interpretation which suggests that the Charter is also applicable outside of the scope of EU law was the result of recent events, especially in Hungary, Italy and Romania.[27] The legal justification given for such an interpretation is that union citizenship must entail a last guarantee of fundamental rights for cases of systemic failure in a Member State.[28] This Reverse *Solange* approach has been advanced by Armin von Bogdandy and his colleagues.[29] The approach has been met with criticism for a number of reasons: for being too dramatic and stigmatising (and therefore being in contradiction with the principle of mutual respect that is provided for in Article 4(3) TEU) instead of concentrating on the actual fundamental rights protection, for requiring a systemic failure of fundamental rights protection for the establishment of which the procedures necessarily contain a decision by a political body (thus leaving the fundamental rights protection at the mercy of politicians),[30] and also for using the *solange* formula which is considered to be a potential face-saving excuse for inaction.[31] In order to avoid these objections (but possibly resulting in others) we are going to develop a different approach in

[23] On the different definitions of the general concept 'scope of EU law' see Sacha Prechal e.a., 'The Principle of Attributed Powers and the "Scope of EU Law"' in Leonard Besselink e.a. (eds), *The Eclipse of the Legality Principle in the European Union* (Wolters Kluwer 2011), 213-247; Eeckhout (n 13) 993; Sharpston (n 22) para. 173.

[24] Expression borrowed from Groussot, Pech and Petursson (n 15) 22.

[25] Recently confirmed by C-206/13, Siragusa, on 6 March 2014, para 24.

[26] Martin Borowsky, 'Artikel 51 – Anwendungsbereich', in: Jürgen Meyer (ed.), *Charta der Grundrechte der Europäischen Union* (4th ed. Nomos e.a. 2014), 743-769, esp. 758-760; Emily Hancox, 'The meaning of "implementing" EU law under Article 51(1) of the Charter: Åkerberg Fransson', (2013) 50 *Common Market Law Review* 1411-1432, esp. 1418-1427; Filippo Fontanelli, 'National Measures and the Application of the EU Charter of Fundamental Rights – Does curia.eu Know iura.eu?', (2014) 14 *Human Rights Law Review* 231-265, esp. 263-265.

[27] See e.g., http://www.verfassungsblog.de/category/schwerpunkte/rescue-english/.

[28] For an early emergence of this idea in the context of free movement of persons, see Case C-380/05, Centro Europa [2008] ECR I-349, Opinion of AG Poiares Maduro, para 20-22.

[29] Armin von Bogdandy e.a., 'Reverse *Solange* – Protecting the Essence of Fundamental Rights against EU Member States', (2012) 49 *Common Market Law Review* 489-519. The concept has been used formerly in a similar sense (without a specific use of Union citizenship though) by Daniel Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States' (June 2008), 31. Available at http://ssrn.com/abstract=1147769.

[30] For a detailed explanation of the concept and of different procedures see Armin von Bogdandy and Michael Ioannidis, 'Systemic deficiency in the rule of law: What it is, what has been done, what can be done' (2014) 51.1 *Common Market Law Review* 59-96.

[31] Dimitry Kochenov, 'On Policing Article 2 TEU Compliance – Reverse Solange and Systemic Infringements Analyzed XXXIII' (2014) *Polish Yearbook of International Law* 145-170, 156.

this paper: an approach which would elevate, via a creative re-interpretation, the Charter into a real and fully-fledged bill of rights in the European Union.[32]

4. For a Creative Re-Interpretation of Article 51(1) CFR

If we aim for a fully-fledged value community which benefits all its citizens equally, then the Charter as such should gain full applicability in every case, even in purely domestic cases in domestic courts and even if there is no systemic failure of fundamental rights protection on a domestic level. This means that with the additional help of the supremacy of EU law (more precisely here: that of the Charter) fundamental rights based judicial review would be introduced all around Europe. The type of judicial review envisioned would be decentralised in the sense that local courts would be able to exercise it, but its unified application would be ensured by the preliminary procedure: it could therefore also be labelled semi-centralised judicial review.

Such an approach would enable the European Union to become a "community of fundamental rights" where nobody would be left behind. The idea of excluding a Member State because of fundamental rights violations is an appalling and unacceptable denial of a European moral community: the citizens of the excluded country would be left behind to suffer, whereas the rest of Europe would save itself.

This would be especially important in cases where, in a sacrilegious manner, violations of fundamental rights are entrenched in constitutions and where constitutional courts have been filled up with party soldiers who do not care about constitutional arguments. Ordinary courts have the advantage that there are many of them in every country, the personnel is consequently difficult to exchange along party political lines, and even one single ordinary judge is able to cry for help in the form of a preliminary reference to the ECJ.

In the following subsections, I am countering possible objections which concern partly the efficiency (incl. alternative routes for a better protection of fundamental rights), partly the (doctrinal or moral) justification of my proposal.

4.1 Doctrinal Triggers: Articles 2 and 7 TEU vs. Union Citizenship

The proposed re-interpretation contradicts both the literal meaning of Article 51(1) CFR, its current interpretation by the ECJ and most of the literature.[33] Consequently, in order to support this idea, it is necessary to provide some solid doctrinal arguments in support of its adoption. There seem to be two possible parallel ways to justify such an extensive interpretation of the scope of the Charter: one is to use the concept of Union citizenship, the other is to use Articles 2 and 7 TEU as triggers. While the two justifications do not exclude each other, the present author is of the opinion that the second option has more potential.

Union citizenship is generally viewed as consisting of a bundle of rights,[34] and as an "autonomous" legal status it also seems to replace the ideology of cross-border effects, as it

[32] It seems that after Opinion 2/13 ECJ, the ECHR is not becoming the bill of rights of the EU. Cf. Editorial comments: 'The EU's Accession to the ECHR – a "NO" from the ECJ!' (2015) 52.1 *Common Market Law Review* 1–15.

[33] Cf. Groussot (n 24) 23: 'it is simply wrong to affirm that natural and legal persons, following the entry into force of the Lisbon Treaty, have gained the right to institute judicial proceedings on the basis of any provision of the Charter, in any situation, against any national (or EU) public authorities.'

[34] Gianluigi Palombella, 'Whose Europe? After the constitution: A goal-based citizenship' (2005) 3 *International Journal of Constitutional Law* 357-382, esp. 377-382.

triggers the application of EU law even in cases where there is no cross-border element,[35] and has developed into being able to protect citizens from their own Member States.[36] A further step in the same direction would be to state that union citizenship triggers the application of the Charter.[37] However, this approach is a large departure from the traditional one which views the scope of the Charter as defined *ratione materiae*.[38]

Another way to justify the wide application while keeping the requirement of *ratione materiae* would be to use Article 7. Article 7 TEU provides that in the case of a 'clear risk of a serious breach' of the core values laid down in Article 2 TEU (which includes the respect for human rights) a special procedure can be initiated. Article 7 has never been applied but if we use the formula developed in Fransson ('if it is *capable of indirectly affecting* EU law')[39] then – with reference to Articles 2 and 7 read together – basically *all human rights violations* can trigger the application of Article 51(1) CFR.[40]

4.2 Formal Modification of Article 51(1) CFR?

While some probably agree with the reasoning behind our proposal, they may claim that without a formal modification of the Charter (and of TEU) it would be *contra legem*, and thus unacceptable.[41] In general, treaty revisions are cumbersome and slow processes,[42] and treaty revisions which lead to politicians losing some of their discretionary powers are especially difficult. A re-interpretation of existing treaty provisions is more realistic in such cases,[43] and

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[35] Peter Van Elsuwege, 'Shifting the Boundaries? European Union Citizenship and the Scope of Application of EU Law', (2001) 38 *Legal Issues of Economic Integration* 263-276 analysing Ruiz Zambrano (C-34/09 xxx). See also the opinion of AG Poiares Maduro in Case C-135/08 Rottmann [2010] ECR I-1449, para 23.

[36] Dimitry Kochenov, 'The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon?' (2013) 62 *International and Comparative Law Quarterly* 37-136, 135.

[37] Sara Iglesias Sánchez, 'Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?' (2014) 20 *European Law Journal* 464-481 arguing for an extension of the scope of the Charter in order to solve the problem of reverse discrimination. *Contra* Felix Schulyok, 'The Scope of Application of EU Citizenship and EU Fundamental Rights in Wholly Internal Situations', (2012) *Europarättslig Tijdskrift* 448-461.

[38] Marek Safjan, 'Areas of Application of the Charter of Fundamental Rights of the European Union: Fields of Conflict?', *EUI Working Papers – Law* 2012/22, http://cadmus.eui.eu/bitstream/handle/1814/23294/LAW-2012-22.pdf 2. Cf. on the dilemma Filippo Fontanelli, 'The European Union's Charter of Fundamental Rights two years later', (2011) 3.3 *Perspectives of Federalism* 40.

[39] On Åkerberg Fransson as symbolising the end of the possibility to deal with fundamental rights only based on domestic considerations see Daniel Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe' (2013) 50 *Common Market Law Review* 1267-1304, esp. 1303.

[40] Cf. on this possibility briefly Allan Rosas, 'When is the EU Charter of Fundamental Rights Applicable at National Level?' (2012) 19.4 *Jurisprudencija/Jurisprudence* 1269-1288, esp. 1282. The author rejected it partly for practical (case-load) reasons (1285).

[41] Viviane Reding, 'Observations on the EU Charter of Fundamental Rights and the future of the European Union', Speech/12/403 held at the XXV Congress of FIDE (Tallin, 31 May 2012) http://europa.eu/rapid/press-release_SPEECH-12-403_en.pdf 11; Carlos Closa, Dimitry Kochenov and JHH Weiler, 'Reinforcing Rule of Law Oversight in the European Union', *EUI Working Papers RSCAS* http://cadmus.eui.eu/bitstream/handle/1814/30117/RSCAS_2014_25_FINAL.pdf?sequence=3, 2014/25, 12, 17; Nóra Chronowski, 'Enhancing the scope of the Charter of Fundamental Rights?', (2014) 1 *JURA* 13-21. For the *ultra vires* argument see Jürgen Kühling, 'Fundamental Rights' in Armin von Bogdandy and Jürgen Bast (eds), *Principles of European Constitutional Law* (2nd ed. Hart e.a. 2009), 479-514, esp. 500-501.

[42] Carlos Closa, *The Politics of Ratification of EU Treaties* (Routledge 2013).

[43] András Jakab, 'Full Parliamentarisation of the EU without Changing the Treaties. Why We Should Aim for It and How Easily It Can be Achieved', *Jean Monnet Working Papers* 2012/3 http://www.jeanmonnetprogram.org/papers/12/documents/JMWP03Jakab.pdf; id., 'Why the Debate between Kumm and Armstrong is about the Wrong Question', *VerfBlog*, 20.06.2014, http://www.verfassungsblog.de/debate-kumm-armstrong-wrong-question.

besides the pragmatic reasons we have also tried to sketch a doctrinal justification for this step above.[44]

4.3 Efficiency

The above-described solution may be subject to objections relating to its efficiency from two opposing directions. The first objection concerns the fear that if fundamental rights protection is left in the hands of Member State courts, then this may not be an efficient way to protect fundamental rights as local courts may lack the necessary training or may simply be corrupt.[45] While this is a justifiable concern, it applies to the whole edifice of preliminary referencing which is generally considered as being one of the key mechanisms for ensuring the success of the ECJ and of EU law in general.[46]

The second objection is related to concerns that the ECJ would not be able to cope with an increased workload, which would likely be the result if a wider application of Article 51(1) CFR were to be accepted.[47] Once again this is a legitimate concern, but it is a general and ongoing issue and it would definitely be mistaken to reject fundamental rights cases *because* the ECJ is overloaded with (other) cases. Case-overload is not a legal argument.

4.4 The Nature of the Conflict Situation

It is often the case that when the EU takes an action it is commonly seen as reinforcing the idea that there is a large number of conflicts between EU and Member State interests and/values. In contrast to the majority of suggestions relating the solution of fundamental rights problems in Member States,[48] our suggestion is different as according to it the conflict will arise between a Member State government and a Member State court (the ECJ only becomes involved indirectly, via preliminary reference). It is much more difficult (although not impossible) to portray such situations as being a fight against Brussels bureaucracy. Generally, the imposition of formal sanctions against a state from the outside in order to change domestic human rights policies are to a large extent inefficient and tend to just reinforce the siege mentality within the country and hurt only those social groups that they are not supposed to.[49]

As recently acknowledged by Łazowski, there is a strong contrast between the usage of the Charter by the ECJ and by the European Commission: whereas the former has already referred to the Charter in 150 cases, the latter often uses the Charter in political rhetoric but it is reluctant to do so in actual infringement proceedings.[50] One is only able to speculate about the reasons why the Commission is not eager to refer to the Charter. One possible explanation

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[44] On the phenomenon that the ECJ steps in furthering the integration if politicians are unable reach an agreement, see JHH Weiler, 'The Transformation of Europe', (1991) 100 *Yale Law Journal* 2403-2483.

[45] Closa, Kochenov and Weiler (n 61) 17, 21.

[46] For a classic account see Karen Alter, 'The European Court's Political Power', (1996) 19 *West European Politics* 458-487.

[47] Rosas (n 60) 1285; Eike Michael Frenzel, 'Die Charta der Grundrechte als Maßstab für Mitgliedstaatliches Handeln zwischen Effektivierung und Hyperintegration' (2014) 51 *Der Staat* 1-29, esp. 26.

[48] See e.g. Jan-Werner Müller's proposal on a Copenhagen Commission: Jan-Werner Müller, 'Safeguarding democracy inside the EU - Brussels and the future of liberal order, 2012-2013', *Transatlantic Academy Paper Series*, No. 3 http://www.transatlanticacademy.org/sites/default/files/publications/Muller_SafeguardingDemocracy_Feb13_web.pdf.

[49] Cf. for such a formal sanction mechanism (systemic infringement procedure) Kim Lane Scheppele's chapter in this volume, xx.

[50] Adam Łazowski, 'Decoding the Legal Enigma: the Charter of Fundamental Rights of the European Union and infringement proceedings', (2013) 14 *ERA Forum* 573-587.

is simply risk avoidance: the Commission traditionally seems to prefer claims in which the chances of winning are very high and there are still uncertainties (although less so after the Fransson case) about the right interpretation of Article 51(1) CFR. However, to us another explanation seems to be more convincing: if the Commission were to give a narrow interpretation to Article 51(1) CFR then it would be difficult for the ECJ to expand on it; but if the Commission were to give a wide (or activist) interpretation then strong Member State resistance could be expected. So their strategy seems to be to purposely not get involved in the debate on the interpretation of Article 51(1) CFR and to hope for the best (or even to argue modestly for less, like in the Fransson case, the Commission even argued for the non-applicability of the Charter),[51] and rightly so: the value of the Charter can only be fully realised if the conflict situation is not between the Commission and the Member States, but rather between Member State courts (and individuals) vs Member State governments.

4.5 Competence Creep

An evident objection to the above is that in accordance with Article 6 TEU and Article 51(2) CFR, the Charter cannot be used to increase the competences of the EU.[52] However, if both Article 6 TEU and Article 51(2) CFR are interpreted in light of Article 2 TEU, then this restriction cannot affect the enforcement of the Charter by the courts. In addition, the principle of subsidiarity (also mentioned in Article 51 CFR) is only applicable in regards to legislative competence and therefore has no effect on judicial authority.[53] While it may be said that this is a new step in the direction of federalisation,[54] this is not the actual justification for, but rather a side effect of (or a price that we should be willing to pay for) the above re-interpretation of Article 51(1) CFR.[55]

4.6 Moral Authority

Our proposal does not mean that the ECJ would take over the role of the ECtHR. The two roles are and would remain quite different. First of all, in a large number of countries the ECHR does not have direct applicability and supremacy, so the domestic legal situation is fundamentally different. The ECtHR is thus in a weaker legal situation in most EU Member States. That being said, the ECtHR is definitely stronger on one account: concerning its moral authority. To secure the best result in the implementation of fundamental rights, the virtues of the two named courts could be combined if the ECJ were to fully rely on ECtHR case law wherever possible.[56] In general, the EU should rely on the authority of the Council of Europe, including the Venice Commission, as otherwise (economic or other) sanctions could be seen

[51] Łazowski (n 70) 585-586.
[52] On this phenomenon in general, but also specifically about the Charter, see e.g. Sacha Prechal, 'Competence Creep and General Principles of Law', (2010) 3 *Review of European Administrative Law* 5-22, esp. 16-20.
[53] Groussot (n 24) 23.
[54] For such worries based on the US experience see Allard Knook, 'The Court, the Charter, and the Vertical Division of Powers in the European Union', (2005) 42 *Common Market Law Review* 367-398, esp. 374-379. For a comparative perspective, see Mauro Cappelletti, *The Judicial Process in Comparative Perspective,* (Clarendon 1989), 395: 'there is hardly anything that has greater potential to foster integration than a common bill of rights, as the constitutional history of the United States has proved'. See also, on the centripetal force of any bill of rights, Luis María Díez-Picazo, 'Notes sur la nouvelle Charte des Droits fondamentaux de l'Union européenne', (2001) *Riv. Ital. Dir. Pubbl. Comunitario* 665-678, esp. 674.
[55] This new interpretation would give content to the otherwise currently legally useless opt-out protocol (Protocol No. 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom). For a view stating the (very limited) current relevance of Protocol 30, see Catherine Barnard, 'The EU Charter of Fundamental Rights: Happy 10th Birthday?' (2011) 24 *EUSA Review* 5-10, 8.
[56] Cf. Art. 52(3), Art. 53 CFR.

as being part of a political game or as a money saving measure, especially if enforcement is in the hands of the Commission. It would also help the ECJ to counter potential objections relating to a juridical *coup d'Etat* by the ECJ and reduce the credibility of any (abusive) reference to the protection of national constitutional identities,[57] if it were to rely on the moral authority of the Council of Europe and especially of the ECtHR.

The ECJ could give teeth to the ECtHR, as it could not only speed up enforcement but also ensure the efficiency of fundamental rights protection: the EU enforcement mechanisms are not just stronger (and financially usually more burdensome), but the EU-law-specific non-application of national law by Member State courts could simply stop the national measures from violating fundamental rights (as opposed to just buying them out, as it is the situation in ECHR cases).

5. "This is just not the law" – or the Nature of Leading Cases and the Values of European Integration

On the occasions we have presented the above argument, we have always been met by the simple objection that "this is just not the law" by one or two colleagues.[58] We are entirely aware that our interpretative suggestion contradicts the mainstream opinion about what the current status of the law is. But law is not a physical object that exists independently from us that we just have to recognise. Law is what courts make of it.[59]

Sooner or later the ECJ is going to receive a preliminary reference from a small countryside court in one of the EU Member States (be it a large or a small Member State), so it will be given the opportunity to make, without exaggeration, one of the biggest leading cases of modern constitutionalism.[60] A European *Marbury v. Madison* is yet to come,[61] which will transform the Charter into a real Charter for all European citizens, into a Charter which guarantees their freedoms even when domestic channels fail. It is inevitable that the ECJ will have to confront this historical challenge and it should not shy away from the task. Leading cases often seem impossible (or even doctrinally doubtful) at the time in which they are made, but if they comply with the general value system of a society at a given time (the *Zeitgeist*) and if they help the judiciary to enhance these values, then they later seem obvious and unquestionable. At one point the direct effect of directives was considered by many to be a *contra legem* interpretation of the EEC Treaty, that is, until it became a permanent feature of the case law of the ECJ. If we wish to give Article 51 of the Charter a meaning which does not deprive Union citizens of their fundamental rights, then the literal meaning of the provision should be seen as representing the minimal, and not the maximum, application of the Charter.

Every society is held together by certain values, which are at least rhetorically unquestionable. For example, in the Middle Ages, it was Christianity, and heretics had to face

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[57] Art. 4(2) TEU.

[58] For a *contra legem* objection explicitly against our suggestion see e.g. Closa, Kochenov and Weiler (n 61) 21.

[59] Cf. the constitutional-law proverb: 'The Constitution is what the judges say it is.' Charles Evans Hughes, *Speech at Elmira*, 3. May 1907, cited by Bernard Schwartz, *Constitutional Law* (Macmillan 1972), VII. For a similar view by Rudolf Smend, 'Festvortrag zur Feier des zehnjährigen Bestehens des Bundesverfassungsgerichts am 26. Januar 1962' in *Das Bundesverfassungsgericht* (Müller 1963), 23-37, 24: 'The Basic Law is now virtually identical with its interpretation by the Federal Constitutional Court.'

[60] As a matter of fact, the ECJ has already been presented with the opportunity to do so, but unfortunately it missed it. See Joined Cases C-488/12 to C-491/12 and C-526/12 Nagy and others (10. Oct. 2013, not yet published). But no doubt, new occasions will arise.

[61] We could also argue that van Gend en Loos or Costa/ENEL were already the Marbury v. Madison of European integration, so we just need *yet another* (and not "the") Marbury v. Madison. This is a fair observation, but it does not change the actual argument we are making.

serious consequences if they breached religious taboos. Since the end of WWII, in Western Europe, and since the end of communism in the whole of Europe, these integrating values have been the secular values of constitutionalism. The XXth century in Europe can also be viewed as being a period of experimentation and failure with what were considered as the time as being new secular taboo systems, like nationalism or socialism. Nowadays, democracy and the protection of fundamental rights (cf. the purposes of the Council of Europe) seem to be the only credible options when it comes to organising society in Europe. Of course there are never-ending debates about what these concepts actually mean.[62] But at the same time, there is a final institutionalised arbiter in Europe for these questions: the ECtHR. Or to put it differently: the Vatican is today in Strasbourg. There were and there will be heretic attempts to question these values, but if we want to believe that European integration has a chance, then we have to stop these attempts before it becomes too late. If it is allowed to happen in one EU Member State, then it will also be possible in another Member State and before you know it the European edifice which is built on these values will fall apart surprisingly quickly. Through the use of creative re-interpretation, the European constitution in its current form already presents opportunities to stop any dangerous tendencies. The ECJ can use the moral authority of the ECtHR in order to enforce the values of European integration, and via the preliminary procedure it can make all Member State courts into local agents who profess and enforce these values.

Obviously it is not sufficient for a court to simply refer to values when it makes a decision. A good lawyer always thinks in two layers: on the one hand, s/he tries to provide a doctrinal justification for the decision (cf. above the doctrinal triggers), but on the other hand, s/he has to make a decision which is acceptable from a social and/or moral point of view (cf. values of European integration).[63] Both of these general preconditions would be fulfilled by a brave judgment by the ECJ in the present situation.

6. What the ECJ Should Do

The history of the ECJ is full of activist moves where decisions were made which – to say the least – were not obvious from the text of the Treaties.[64] How was the Court able to get away with this? What common features can be derived from these successful instances of competence expansions?

(1) The arguments used in these cases were normally teleological arguments relying either on the main purpose of the European integration or on the purpose of specific rules/institutions. This is exactly the situation when expansively interpreting of Article 51(1) CFR, in light of the above: the purpose is to protect fundamental rights as a fundamental value according of Article 2 TEU. (2) Institutionally, it was generally the European Commission which first adopted a particular stance which was then followed by the ECJ followed it.[65] In our case, it means an explicitly stated aim of the Commission to abolish the limits of Article 51(1) CFR. This has already actually happened: Viviane Reding, then the commissioner responsible for justice, fundamental rights and citizenship, explicitly proposed this in her Tallinn speech.[66] (3) The third factor which makes expansions more likely is if political law-

[62] Cf. WB Gallie, 'Essentially Contested Concepts' (1956) 56 *Proceedings of the Aristotelian Society* 167–198.
[63] On Magnaud, *le bon juge*, see András Jakab, 'What Makes a Good Lawyer? Was Magnaud Indeed Such a Good Judge?', *Zeitschrift für öffentliches Recht* 2007, 275-287. Available at: http://ssrn.com/abstract=1918420.
[64] See e.g., Karen Alter, *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe* (OUP 2001).
[65] Eric Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 *The American Journal of International Law* 1-27.
[66] Reding (n 41), but she wanted to achieve this via a formal treaty amendment.

making seems to be inoperative.[67] This is also an obvious tick in the box: we only see the pretext of real action e.g. in the form of the so called rule of law mechanism[68] – the necessary majority by the Member States is obviously missing. (4) A usual method for expanding judicial competences is to establish the competence but not to use it, or to use it in a way which does not lead to conflict with any government. This was famously done in Marbury v. Madison, but also in Costa/ENEL in which 'the ECJ declared the supremacy of EC law' but 'found that the Italian law […] did not violate EC law'.[69] The first step here should also probably be a Costa/ENEL type of decision establishing the full applicability of the Charter without establishing its actual violation. (5) As a second step – after the establishment of the competence in a case without the establishment of a violation –, a violation also has to be established. For this second case, the more obvious a fundamental rights violation is and the more isolated the 'convicted' Member State, the more likely the judgment establishing the violation will be accepted by Member States.[70] We do not have to be pessimistic to predict that such cases can easily arrive at the ECJ in the near future. (6) Parallel to (4) and (5), in order to avoid becoming unnecessary involved in domestic politics concerning questions which are far from obvious, the ECJ would also need to develop a margin of appreciation doctrine, similar to the one of the ECtHR.[71] This would result in a situation where the ECJ would only be able to intervene in those cases where the common minimum level of fundamental rights protection was being violated. Concerning its deferential function it would be similar to the concept of 'systemic deficiency',[72] but the decision about this would remain with a judicial and not with a political body.

To sum up, all the cards are in the hands of the ECJ.[73] European institutions do not seem to want to stop this move by the ECJ, and Member States have no means to do so. Member State coalitions against ECJ judgments and pictures about a judicial Armageddon are highly unrealistic. As Marcus Höreth has put it:[74]

> … non-compliance by Member States was not perceived as a threat by the European Justices but rather a welcome opportunity to develop their judicial regime even further. Member-State non-compliance generates legal actions, followed by new rulings; non-compliance with important new rulings again generates new litigation and new findings of non-compliance, and so on.

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[67] Weiler (n 44).

[68] A new EU Framework to strengthen the Rule of Law, Communication from the Commission to the European Parliament and the Council, Brussels, 19.3.2014, COM(2014) 158 final/2.

[69] Karen Alter, 'Who are the "Masters of the Treaties"? European Governments and the European Court of Justice' (1998) 52.1 *International Organization* 121-147, 131.

[70] Cf. Groussot (n 24) 104: 'It must be remembered that the US Supreme Court's "legal coup" took place in rather unique historical circumstances – the persistent segregationist practices in Southern States – which required, in turn, a revolutionary expansion of the scope of the US Bill of Rights.' See also Marta Cartabia, 'Article 51 – Field of Application', in: William BT Mock e.a. (eds), *Human Rights in Europe* (Carolina Academic Press 2010), 315-321, 318-319: on similarities between certain interpretation of Art. 51 CFR and the US constitutional law 'doctrine of incorporation'.

[71] On the margin of appreciation doctrine as a special type of deference doctrine see Andrew Legg, *The Margin of Appreciation in International Human Rights Law*, Oxford, Oxford University Press 2012, 17-66.

[72] See Bogdandy, Ioannidis and Antpöhler xxx in András Jakab and Dimitry Kochenov, *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (OUP forthcoming).

[73] Marcus Höreth, 'Warum der EuGH nicht gestoppt werden sollte – und auch kaum gestoppt werden kann' in Ulrich Haltern and Andreas Bergmann (eds), *Der EuGH in der Kritik* (Mohr Siebeck 2012), 73-112. On the practical impossibility of the revision of ECJ rulings by Member States see Marcus Höreth, 'The least dangerous branch?' in Mark Dawson e.a. (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar 2013), 32-55, esp. 39-40.

[74] Höreth (n 93) 43-44.

If the European integration process fails, then it will not be because of a stronger protection of fundamental rights. It will either be for purely economic reasons or it will be because of anti-constitutionalist and illiberal attempts within some of the Member States.

With judicial statesmanship, patience for the right cases and a conscious strategy, the decisive move toward a community of fundamental rights can be achieved in the very near future.[75] For this purpose, the ECJ has to reassert its responsibility in both enhancing European integration and promoting the values of the European Union. If we look for the Toynbeean correct response to the current historical challenge of dismantling the rule of law in Member States, then this seems to be the only viable and therefore the necessary one.

7. Conclusion

There is an obvious tension between the enforcement impotence of the EU on the one hand, and the moral and (implied) legal duty to enhance the rule of law within its territory, on the other hand. This tension would not be disturbing if there were no currently emerging challenges within the EU which blatantly show this impotence. As treaty modification does not seem viable, and the ongoing inaction is slowly eating up the moral and institutional capital of the EU, the solution (like so many times in the history of Western constitutionalism) lies with the judiciary. The judiciary is the traditional guardian of the rule of law which should not be conceived as blindly following the black letter of the law, but as an idea which prohibits the arbitrary use of government power. Under the current institutional circumstances, *only* the ECJ can realistically respond to this challenge by daring to creatively re-interpret Article 51(1) which would make the Charter applicable also in purely domestic cases.

[75] Once achieved, some features of the ECJ judgments have to be re-thought. Especially their cryptic and shorty style has to become more discursive, and possibly dissenting opinions have also to be allowed in order to be more transparent and in order to give more substantive reasons for the decisions. For the former see Gráinne de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?', (2013) 20.2 *Maastricht Journal of European and Comparative Law* 168-184. The latter is actually nowhere explicitly regulated, Art. 35 of the Statute of the Court only provides for the secrecy of deliberations which does not exclude dissenting or parallel opinions. For a general anti-activist critique concerning the lack of transparency, incl. the lack of dissenting opinions see Hjalte Rasmussen, 'Plädoyer für ein Ende des judikativen Schweigens' in Haltern and Bergmann (n 93) 113-186. Dissenting opinions are an important method of control restraining a court, see Katalin Kelemen, 'Dissenting Opinions in Constitutional Courts' (2013) 14 *German Law Journal* 1359.