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Fully Binding EU Bill of Rights for the Member States – A Potential Tool in Constitutional Crisis Management*

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Setting the scene

The years of 2010s brought a frustrating crisis era to the European Union. There are still no adequate responses to the credit crunch, refugee crisis, exit striving of certain member states and the constitutional crises in Central Europe. In addition, the plenty of crisis veils somehow the backsliding of fundamental rights protection level in the states making an illiberal switch. As András Sajó assessed in 2003,

> The collapse of oppressive regimes in Eastern Europe raised high hopes. It was believed that the strong desire to get rid of communist authoritarianism and the wish to enjoy the advantages of a market economy would result in new societies committed to the rule of law and constitutionalism. It was also believed that the emerging societies would create institutions that would undo past injustices and be concerned about preventing the development of new injustices. Skeptics, on the other hand, argued that the social and economic conditions require a process of transition that does not favor such noble improvement, and that the cultural and structural traditions of these societies are not favorable to the rule of law and market fairness, nor are they sympathetic to human rights.[1]

Now it seems that defeatists were right. Ironically, those member states labelling themselves as illiberal are still highly relying on the benefits from the unique liberal value community that is committed to rule of law, democracy and human rights. In other words, the European Union is keeping to finance – on the basis of the mutual trust – these derogatory members as well. These governments gain from the deficiencies of European value protection system.
The Union was not inactive: to strengthen the rule of law in the EU, the European Commission put forward a new EU framework in March 2014[2] that was inspired by the experiences of the Hungarian constitutional crisis among others. In doing so, the Commission aimed to more effectively address any situation where "there is a systemic threat to the rule of law" within any member state. The framework is designed to complement existing means of protecting the EU's rule of law. These include infringement procedures limited to a breach of a specific provision of EU law pursuant to Article 258 of the Treaty on Functioning of the European Union (TFEU); and the "last resort" or "nuclear option"[3] preventive and sanctioning mechanisms provided for in

* The research was supported by the János Bolyai Research Scholarship of the Hungarian Academy of Sciences.
[1] András *Sajó:* Erosion and Decline of the Rule of Law in Post-communism: an Introduction, in András Sajó (ed.): *Out of and Into Authoritarian Law* (Kluwer Law International, the Hague, London, New York, 2003) x.
[2] Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM/2014/0158 final, 11 March 2014
[3] This exaggerated term was used by Manuel Barroso, former president of the European Commission. According to Armin von Bogdandy, this qualification was unwise and stuck. See Armin von *Bogdandy:* How to protect European Values in the Polish Constitutional Crisis, http://verfassungsblog.de/how-to-protect-european-values-in-the-polish-constitutional-crisis/

Article 7 of the Treaty on European Union (TEU). The purpose of the framework is to enable the Commission to find a solution with the EU country concerned so as to prevent the emergence of a systemic threat to the rule of law.

However, this is a soft and careful political tool of persuasion just being tested on Poland. To preserve the rule of law and to prove a systemic threat to EU values of Article 2 TEU[4] an effective legal instrument seems to be necessary that goes beyond the limited infringement procedures. The systemic threat cannot proved by member state based investigations, because the country threatening the common European values will cautiously and preliminary undermine the domestic checks and balances.

In my opinion, Article 7 procedures of the TEU should not be put aside being completely ineffective,[5] instead, they should be strengthened and underpinned with legal buttresses. And the European Union already has a legal means, the Charter of Fundamental Rights (Charter). The respect of fundamental rights and freedom is equally important value as the rule of law, thus their protection should go hand in hand. In other words, the rule of law cannot prevail without the rule of rights. The EU has already an enhanced constitutional mandate for the protection of fundamental rights, and the Charter is important feature of the architect.

The Charter of Fundamental Rights of the European Union has become part of the primary sources of Union law based on Article 6 (1) TEU. This reform has been of key importance from the aspect of the (constitutional) development of the Union. Ensuring the legal binding force of the Charter did not mean a change in the division of competences between the Union and the member states. This follows, on the one hand, from the guarantees relating to the field of application defined in Article 51 of the Charter and, on the other hand, from the statement made by the Court of Justice of the European Union (CJEU) that fundamental rights protection guaranteed by the Union cannot have the effect of extending the competences of the Community defined by the founding treaties,[6] which was also reinforced by the second subparagraph of Article 6(1) of the TEU. Thus to date the Charter does not replace the national systems for fundamental rights protection, instead it just complements them. The Charter addresses first and foremost the EU institutions. Member states are subject to their own constitutional bill of rights, and they have to respect the Charter only insofar as they apply Union law. This logic system is challenged sometimes by the CJEU on the one hand, by the ambiguous interpretation of the "acting within the scope of" criterion, and on the other hand by national courts whose questions in the preliminary ruling procedures seem to indicate an existing need for enhancing the scope of the Charter beyond the application of Union law. However, this soft, case law based expansion of scope is somehow uncertain.[7] Thus, the EU law still does not contain effective mechanism to compel member states to respect fundamental rights in general.

It is worth to mention that already in November 2013 the European Commission started to collect impulses and ideas which may contribute to shaping of the European Union's justice policy over the coming years. The forum of the debate on EU justice policies was the *Assises de la Justice*, and the discourse encompassed the potential development of civil, criminal and

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[4] Article 2 TEU: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the member states in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

[5] Balázs *Fekete* – Veronika *Czina*: Article 7 of the Treaty on European Union – is it really a nuclear weapon? http://hpops.tk.mta.hu/en/blog/2015/04/article-7-of-the-treaty-on-european-union

[6] Judgment of the Court of 17 February 1998 in Lisa Jacqueline Grant v South-West Trains Ltd., C-249/96 [ECR 1998, I-621]

[7] Michael *Dougan*: Judicial review of Member State action under the general principles and the Charter: defining the "scope of Union law". *Common Market Law Review* 52 (2015) 1201-1246.; Bernhard *Schima:* EU fundamental rights and Member State action after Lisbon: putting the ECJ's case law in its context. *Fordham International Law Journal* 38 (2015) 1097, 1113-1114.

administrative law, the rule of law and fundamental rights in the EU.[8] To stimulate the debate five discussion papers were made available. Discussion paper on Fundamental Rights posed the question whether the rights guaranteed in the Charter should be directly applicable in the member states in all cases, by abolishing the limitations of Article 51 of the Charter.[9] That time I already welcomed and urged the direct applicability of the Charter in the member states.[10] Amongst the interventions of the dialogue one can find the outlines of the rule of law mechanism, but the full direct effect of the Charter was not fostered.[11]
Thus in the present contribution I emphasise again the importance of the direct applicability by collecting some new arguments, and taking into consideration the deepening constitutional crisis in Central Europe. First I outline what I mean by the limited effect and scope of the Charter regarding its legislative effect and applicability. In the second part I argue for the removal of the legal limitations from the way of direct application, taking also its difficulties into account.

1 Limited effects and scope of the Charter

Despite its clear significance acknowledged by the jurisprudence, the Charter is not able to fulfil its task completely, unless it fully contributes to and serves as a basis for the harmonisation of common European standards of fundamental rights protection.

Limited legislative effect

Considering the limitations of the Article 6(1) second sentence of the TEU,[12] and Article 51(2) of the Charter[13] – which are in compliance with the liberal constitutional concept that fundamental rights norms do not attribute power, but merely limit the exercise of powers – the Union cannot directly influence the formation of the common standards, i.e. it has no legislative competences except of the treaty-based rights. In other words, the Commission can propose EU legislation that gives concrete effect to the rights and principles of the Charter only where the EU has competence to act under the TEU or the Treaty on the Functioning of the European Union (hereinafter: TFEU). This results that the Union content, effect and protection level of Treaty rights and Charter rights has been developed differently – in the former case by secondary legislation and by judicial way, in the latter only by case law.
The restrictive provisions contained in Article 6(1) of the TEU and Article 51(2) of the Charter give expression to the requirement that the Charter shall not extend the competences of the Union; in other words, Union legislation relating to fundamental rights shall continue to be based on specific legal grounds provided in the TEU or TFEU, the fundamental rights character of which is merely reinforced by the provisions of the Charter.
The second sentence of Article 6(1) confirms the conviction (or phobia in the case of some

[8] http://ec.europa.eu/justice/events/assises-justice-2013/discussion_papers_en.htm
[9] http://ec.europa.eu/justice/events/assises-justice-2013/files/fundamental_rights_en.pdf
[10] Nóra *Chronowski:* Enhancing the scope of the Charter of Fundamental Rights – problems of the limitations and advantages of directly applicable Charter rights with regard to the recent case law developments of the European Court of Justice and national courts. Discussion paper, http://ec.europa.eu/justice/events/assises-justice-2013/files/contributions/36.hungarianacademyofsciences__preliminary_contribution_assises_cfr_chronowski_en.pdf
[11] http://ec.europa.eu/justice/events/assises-justice-2013/interventions_en.htm
[12] Article 6(1) second sentence of the TEU: "The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties."
[13] Article 51(2) of the Charter: "The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties."

member states) that the restrictive interpretation of EU competences shall continue to be ensured. Regulation of such content may be found, for instance, in Article 4(1), Article 5(2), Article 6(2) second sentence of the TEU as well as in Protocol № 8[14] and the – legally non-binding – Declarations 1 and 2.[15] At the same time, the requirement of restrictive interpretation relating to Union competences and the exercise of these competences is unambiguously expressed and reinforced in the principle of transferred competences or subsidiarity (in particular Articles 4-5), therefore, it would not require further repetition. According to Pernice, the emphasis on restriction is surprising in the context of Article 6 also for the reason that fundamental rights, by their nature, are not of power-transferring but rather restrictive character, in other words, as regards their content, they appear as limiting the exercise of transferred competences (the power-restricting role of fundamental rights). This may also be formulated in the way that in so far as fundamental rights norms exclude the interference of public authorities with particular individual rights and freedoms, they constitute negative competences for the institutions concerned.[16]

Uncertain and limited horizontal effect

The limited effect of the Charter as a legal instrument has also led to differences in respect of vertical and horizontal effect of the Charter rights. The vertical effect of the fundamental rights stems from the historical function of the rights, which is to protect the individuals against the state organs and limit the public power. The horizontal effect of fundamental rights means that they prevail also between individuals; and influence or determine the legal relations of private actors. This horizontal or third party effect can be direct or indirect. According to the theory of indirect horizontal effect, the fundamental rights norm of the constitution is not applicable directly in private law relations; it is only used as an interpretative guide to determine private law relations among individuals inter se. The theory of direct horizontal effect represents that the fundamental rights enshrined in the constitution are applicable in the private relations of the individuals. This results that private or labour law contracts infringing fundamental rights are invalid. This idea would however transform the private law claims into human rights disputes, and the private law regulation would lose its function.[17]
Naturally it is true, that even in the member states' constitutional practice only the vertical effect of rights is inevitable and in the field of the horizontal effect the indirect version is accepted by most jurisdictions. Only the Portuguese and Greek constitutions allow direct horizontal effect. The European constitutional case law seems to differentiate between rights in respect of their direct or indirect horizontal effect.[18] It is worth to mention that the courts, even the CJEU are very careful with the recognition of indirect horizontal effect. See e.g. *Viking, Laval* (on right to collective action, allowing indirect horizontal effect) and *Dominguez* (on right to paid annual

[14] Protocol (№ 8) annexed to the Treaty of Lisbon relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms (OJ C 83, 30. 3. 2010, 273)
[15] Declaration № 1 concerning the Charter of Fundamental Rights of the European Union and Declaration № 2 on Article 6(2) of the Treaty on European Union, annexed to the Treaty of Lisbon (OJ C 83, 30. 3. 2010, 337)
[16] I. *Pernice:* The Treaty of Lisbon and Fundamental Rights, in S. Griller – J. Ziller (eds.): *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?* (Springer Verlag, Wien, 2008) 244.
[17] E. *Engle:* Third Party Effect of Fundamental Rights (Drittwirkung) *Hanse Law Review* (2009) 5 (2) 165-166., Verica *Trstenjak*: General Report: The Influence of Human Rights and Basic Rights in Private Law, in Verica Trstenjak – Petra Weingerl (eds.): *The Influence of Human Rights and Basic Rights in Private Law* (Springer International, Heidelberg – New York – Dordrecht – London 2016) 8-9.
[18] L.F.M. *Besselink:* General Report, in J. Laffranque (ed.): *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions* (Tartu University Press, Tallinn, 2012) 91-93.

leave, not granting clearly the horizontal effect) cases,[19] or the more recent *AMS* case (on worker's right to information).[20] Although certain rulings of the CJEU contain light indications of direct applicability of fundamental rights as general principles of EU law, and do not exclude the applicability of the rights "in all situations governed by EU law", the potential horizontal effect of Charter rights remains an open question.[21] Why would it be so important to give the chance to EU courts to clarify the horizontal effect of the Charter rights by making them fully binding? The EU has strongly committed[22] itself to promote the United Nations Framework Programme and Guiding Principles on Business and Human Rights,[23] but in the absence of a generally applicable bill of rights, the EU courts remain without means to contribute to the effective remedy system against the human rights violations of powerful private actors.

'Within the scope of' practice

The EU institutions are clearly bound by the Charter,[24] thus the CJEU has inevitable role in controlling the EU legislature's compliance with fundamental rights.[25]
The idea that member states are bound by the rights, freedoms and principles laid down by the Article 51(1) of the Charter[26] is implemented principally in the 'agency-situation' elaborated by the CJEU, at two levels: in a normative and administrative dimension. The normative level means the dimension when, during the transposition – or omitting the transposition – of Union law (directives) into the national law, the member state is bound by the fundamental rights during the adoption of normative decisions. The administrative level appears in the case of directly applicable Union law (regulations): in such a case the law of Union content is regarded formally as domestic law right away.[27] Furthermore, the respect of Charter rights has also been held by the CJEU to apply when a Member State derogates from a fundamental economic freedom guaranteed under EU law.[28]

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[19] See e.g. Viking, Laval and Dominguez cases (C-438/05 International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti, Judgment of the Court of 11 December 2007; C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, Judgment of the Court of 18 December 2007; C-282/10 Maribel Dominguez v Centre informatique du Centre Ouest Atlantique and Préfet de la région Centre, Judgment of the Court of 24 January 2012)

[20] In AMS case concerned the question of potential horizontal effect of the workers' right to information and consultation enshrined in Article 27 of the Charter. Against the opinion by Advocate General Cruz Villalón, the Court did not grant Article 27 and such effect. C-176/12 Association de médiation sociale v Union locale des syndicats CGT and Others, Judgment of the Court (Grand Chamber) of 15 January 2014

[21] Trstenjak *op.cit.* 9.

[22] http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/index_en.htm

[23] Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 21 March 2011

[24] Article 51(1) of the Charter: "The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity (…)"

[25] E.g. C-92/09 and C-93/09. Volker joint cases, Judgment of the Court of 9 November 2010

[26] Article 51(1) of the Charter: "The provisions of this Charter are addressed (…) to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties."

[27] M. *Borowsky:* Kapitel VII. Allgemeine Bestimmungen, in J. Meyer (ed.): *Kommentar zur Charta der Grundrechte der Europäischen Union* (Nomos, Baden-Baden, 2003) 567-572.

[28] See, inter alia, C-260/89 ERT, Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others, Judgment of the Court of 18 June 1991, para. 42 et seq.; C-112/00 Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich, Judgment of the Court of 12 June 2003, para 75.; and C-36/02 Omega Spielhallen-

Considering the CJEU case law related to Article 51(1) of the Charter, it is not clear, however, whether the phrase 'implementing Union law' has got a different meaning from 'acting within the scope of Union law' thus the margins of member states' obligation to apply the Charter rights remained ambiguous. In other words, the Charter binds the member states as well 'when implementing Union law', however, the CJEU understands this in a wider sense: member states have to respect the fundamental rights 'acting within the scope of' Union law.[29] Thus on the basis of the preliminary ruling of the CJEU (*Aziz Melki/Sélim Abdeli*), seemingly national courts of law may apply the Charter directly,[30] but only in those cases where any Union legal act is concerned. In purely domestic cases the national courts apply the bill of rights enshrined in the national constitution, and / or international human rights obligations of the given state. The extent and intensity of the latter activity is dependent on the monist or dualist approach of the national legal system. To date, the condition of the direct application of the Charter is the application of another Union legal norm.[31]

In the *Åkerberg Fransson* and *Melloni* cases[32] the Court has even equated 'implementation' and 'acting within the scope of' Union law, and has gone far beyond the textual meaning of 'implementation', but still remained in the framework of the wide literal interpretation. However, according to Lavranos, in these judgments "the ECJ interprets the scope of application of the Charter of Fundamental Rights, in particular Articles 51 and 53 of the Charter in a very extensive way. The judgments establish the supremacy of the Charter of Fundamental Rights over national (constitutional) law and the ECHR, thereby positioning the ECJ as the «Supreme Court of Fundamental Rights» in Europe."[33] Anyway, according to the commentaries, these were "ground-braking" decisions,[34] triggering the academic debate on the scope of the Charter and the role of the EU in the framework of the European fundamental rights protection. As to the limitations set up in Article 51(1)-(2) of the Charter, the CJEU ruled,

> the fundamental rights guaranteed by the Charter must therefore be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.[35]
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> Where, on the other hand, a legal situation does not come within the scope of European Union law, the Court does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction (…).[36]
>
> Where a court of a Member State is called upon to review whether fundamental rights are complied with by a national provision or measure which, in a situation where action of the

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und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn, Judgment of the Court of 14 October 2004, paras. 30-31

[29] K.L. *Mathisen:* The Impact of the Lisbon Treaty, in particular Article 6 TEU, on Member States' obligations with respect to the protection of fundamental rights (University of Luxembourg, Law Working Paper Series**,** Paper number 2010-01, 29 July, 2010) 20.

[30] C-188/10 and C-189/10. Aziz Melki (C-188/10) and Sélim Abdeli (C-189/10) joint cases, Judgment of the Court of 22 June 2010

[31] As Rosas pointed out, "(…) the real problem is not so much the applicability of the Charter as such but rather the applicability of *another* norm of Union law." A. *Rosas:* When is the EU Charter of Fundamental Rights Applicable at National Level? (2012) 19 (4) *Jurisprudence* 1269-1288.

[32] C-617/10 Åklagaren v Hans Åkerberg Fransson, Judgment of the Court of 26 February 2013; C-399/11 Stefano Melloni v Ministerio Fiscal, Judgment of the Court of 26 February 2013

[33] N. *Lavranos:* The ECJ's Judgments in Melloni and Åkerberg Fransson: Une ménage à trois difficulté (2013) 4 *European Law Reporter* 133.

[34] D. *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* 1268.

[35] C-617/10 Åkerberg Fransson, para. 21.

[36] C-617/10 Åkerberg Fransson, para. 22.

> Member States is not entirely determined by European Union law, implements the latter for the purposes of Article 51(1) of the Charter, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of European Union law are not thereby compromised.[37]

In these judgments the Court declared the *effet utile* of the Charter, and limited the choices of national courts, because they shall compare the national fundamental rights standards with the Charter standard even in those situations where the links to the Union law are indirect and partial. After all, this judge-made basis created by the CJEU is still fragile and uncertain, furthermore, it triggers the debate on the borderlines of the application of EU fundamental rights and their relations with the national fundamental rights protection systems.[38] The case by case elaborated scope of the Charter vis-à-vis member states creates even tensions between the CJEU and national constitutional courts, for whom the interpretation of fundamental rights is a cherished area and some of them clearly indicated the willingness for scrutinizing EU law in the protection of domestic standards and constitutional identity. The German Constitutional Court almost immediately and unanimously ruled that the *Åkerberg Fransson* judgment of the CJEU neither changes the *status quo* in respect the scope of the Charter, nor expresses a general view. The statements of the CJEU's decision shall be based on the distinctive features of the case, otherwise presumably it were considered *ultra vires* by the Constitutional Court. [39]
The possibilities of the national courts are also limited under the present formulation of Article 51(1), although – considering the increasing number of references to the Charter in preliminary rulings[40] – they would be willing to apply the Charter rights in a broader scope.[41] It is worthwhile to add that not all of the constitutional courts are reticent with the application of the Charter.[42]
Against this background, about one year after *Åkerberg Fransson* the CJEU tightened its former interpretation by re-setting a number of criteria that should be examined to establish whether national legislation "involves the implementation of EU law for the purposes of Article 51 of the Charter" in *Siragusa* case.[43] By doing so, the Court became cautious again and showed due deference towards national courts and national fundamental rights protection. The CJEU ruled, that

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[37] C-399/11 Melloni, para. 60., Åkerberg Fransson, para. 29.
[38] S.I. *Sánches:* The Court and the Charter: The impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental rights (2012) 49 (5) *Common Market Law Review* 1582.
[39] On the limits of the scope of application of EU fundamental rights see the judgment of the German Constitutional Court of 24 April 2013 on Counter-Terrorism Database Act (1 BvR 1215/07). See also Sarmiento *op. cit.* 1268., Schima *op. cit.* 1106. and D. *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* 395-398.
[40] The Commission stated: "The important implications of the Charter are to be seen in the increasing number of requests for a preliminary ruling of national jurisdictions received by the Court." COM(2013) 271 final, 2012 Report on the Application of the EU Charter of Fundamental Rights, 7.
[41] Besselink admitted that "… in some Member States the courts have referred to the Charter with such enthusiasm as to disregard whether the Charter could at all be considered applicable". Besselink *op. cit.* 108.
[42] The Austrian Constitutional Court "concluded that, based on the domestic legal situation, it follows from the equivalence principle that the rights guaranteed by the [Charter] may also be invoked as constitutionally guaranteed rights (…) and they constitute a standard of review in general judicial review proceedings in the scope of application of the Charter". Thus the alleged violation of the Charter may give rise to the competence of the Constitutional Court. U 466/11-18, U 1836/11-13, Austrian Constitutional Court Judgment of 14 March 2012, point 35
[43] C-206/13. Cruciano Siragusa v Regione Sicilia - Soprintendenza Beni Culturali e Ambientali di Palermo, Judgment of the Court (Tenth Chamber) of 6 March 2014

> [i]n order to determine whether national legislation involves the implementation of EU law for the purposes of Article 51 of the Charter, some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it.[44]

Regarding the EU fundamental rights protection, the CJEU clarified that it is not an objective in itself, but it has to serve the unity of EU law. In other words, the ground for fundamental rights protection is their basic value-character but to preserve the primacy of EU law.[45] Thus the Court refrained from connecting its rights protection activity with Article 2 TEU, and despite the clarifications the judgment clearly shows the fragility of the case law based scope of protection.

As to the way ahead, it is still worthwhile to consider Advocate General Sharpston's suggestion, which was formulated in his opinion to *Zambrano* case,

> 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 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*.[46]

2 Should the Charter bind the member states fully? Difficulties and advantages

In the second part, the difficulties and advantages of the direct applicability of the Charter shall be measured. Eliminating the limitations on the Union's competences and amending the scope of the Charter, the British and Polish 'opt-outs' from, and other member states concerns about the Charter – especially the fears for the constitutional identity and the level of national protection – must be considered. The respect of constitutional identity of the member states was implicitly confirmed by the CJEU,[47] but the member states may expect more explicit guaranties. However, clear advantages of these steps would be that (i) the Union could assume a more definite role in developing the common standards on fundamental rights, (ii) renitent member states endangering these standards might be controlled more effectively even directly by their national courts,[48] and (iii) they could evolve the effect of Article 2 TEU, or moreover, it can

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[44] C-206/13. Siragusa, para 25

[45] "It is also important to consider the objective of protecting fundamental rights in EU law, which is to ensure that those rights are not infringed in areas of EU activity, whether through action at EU level or through the implementation of EU law by the Member States. The reason for pursuing that objective is the need to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in such a way as to undermine the unity, primacy and effectiveness of EU law." C-206/13. Siragusa, paras 31-32.

[46] C-34/09 Gerardo Ruiz Zambrano v Office national de l'emploi (ONEM), Opinion of Advocate General Sharpston, delivered on 30 September 2010, para 163.

[47] See to this e.g. the Omega-judgment (C-36/02. Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn, Judgment of the Court of 14 October 2004) and the Sayn-Wittgenstein judgment (C-208/09. Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien, Judgment of the Court of 22 December 2010)

[48] See the actions taken by the Commission to ensure the respect of the Charter by Hungary, especially C-286/12 European Commission v Hungary, Judgment of the Court of 6 November 2012 (compulsory retirement of judges, prosecutors and notaries), where the national constitutional court avoided the application of the Charter.

contribute to the reform of Article 7 TEU, which remained a kind of political – and practically inapplicable – sanction of violating the Union values. The Charter with direct applicability beyond the scope of EU law – being the part of the primary sources of EU law – will have much stronger position than the European Convention on Human Rights (hereinafter: ECHR) whose applicability is dependent on the monist or dualist approach of the member states to international law. It could contribute to the creation of a European Fundamental Rights Area and guarantee the Union citizens an equal and calculable level of protection.[49]

Difficulties – are they really significant?

To make the Charter generally binding on member states and directly applicable by national courts, definitely an explicit amendment is necessary.[50] Viviane Reding, former Vice-President of the European Commission, EU Justice Commissioner also admitted,

> A very ambitious Treaty amendment – which I would personally favour for the next round of Treaty change – would be abolishing Article 51 of our Charter of Fundamental Rights, so as to make all fundamental rights directly applicable in the Member States, including the right to effective judicial review (Article 47 of the Charter). (…)This would open up the possibility for the Commission to bring infringement actions for violations of fundamental rights by Member States even if they are not acting in the implementation of EU law. I admit that this would be a very big federalising step. It took the United States more than 100 years until the first ten amendments started to be applied to the states by the Supreme Court.[51]

At this point it cannot be suppressed that serious concerns were raised on the scope of the Charter during the debate of the Lisbon Treaty. Member states offering the most active resistance were the Czech Republic, Poland and the United Kingdom. Finally, in a Protocol annexed to the Lisbon Treaty (to simplify: the Opt-Out Protocol),[52] the UK and Poland were granted exemption from respect for certain rights and principles. The real opt-out nature of this exemption is, however, questionable both from the aspects of form and content. From a formal aspect its authenticity is doubtful because the Opt-Out Protocol, itself, declares: the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles. Therefore, there is no regulative content from which exemption could be granted, since in a legal sense the Charter does not add new rights to the range of earlier rights and obligations.[53] On this basis, the opt-out does not have a genuine legal effect; it rather has the character of a clarification.[54] From the aspect of content the most important question is in what situations national courts or the CJEU may establish that the national law is in conflict with the fundamental rights of the Union. For

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[49] A. *Jakab:* Supremacy of the EU Charter in National Courts in Purely Domestic Cases. http://www.verfassungsblog.de/de/ungarn-was-tun-andras-jakab/#.Un652RAtb5R

[50] It is worth to note that the Charter is not part of the treaty, thus the formal amendment procedure is open to discussion. Sándor-Szalay and Mohay suggests the convention method for the amendment, which is defined by Article 48 of TFEU. Á. *Mohay* and E. *Sándor-Szalay:* Hungary, in J. Laffranque (ed.): *The Protection of Fundamental Rights Post-Lisbon: The Interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions* (Tartu University Press, Tallinn, 2012) 520.

[51] European Commission – SPEECH/13/677 04/09/2013, The EU and the Rule of Law – What next? http://europa.eu/rapid/press-release_SPEECH-13-677_en.htm

[52] Protocol (№ 30) annexed to the Treaty of Lisbon on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom (OJ C 83, 30. 3. 2010, 313)

[53] Pernice *op. cit.* 245.

[54] C. *Barnard:* UK's and Poland's Fundamental Rights Charter-'Opt-out, in S. Griller – J. Ziller (eds.): *The Lisbon Treaty. EU Constitutionalism without a Constitutional Treaty?* (Springer Verlag 2008) 276.

instance, shall the CJEU be entitled to question the validity of a piece of legislation of a member state with reference to conflict with the Charter and the violation of fundamental rights guaranteed by it? It is clear that the Court cannot annul laws of the member states; only national courts (constitutional courts) are competent to do so. At the same time, the CJEU may find – in proceedings for failure to fulfil an obligation or in the preliminary ruling procedure (Articles 258 and 267 TFEU) – that the national law is in conflict with Union law. The Czech Republic annexed a Declaration to the Treaties,[55] in which it emphasizes the limited binding force of the Charter on member states, the prohibition of extending the Union's competences and the importance of constitutional traditions common to the member states and that of international agreements. The similar declarations by Poland concern legislation relating to the sphere of family, public morality, family law, as well as the protection of human dignity and human integrity.[56] These declarations have no binding force, i.e., they do not grant exemption from the effect of the Charter in the way that the Opt-Out Protocol does. Altogether – even if the above reflected protocol and declarations are not completely convincing, they clearly indicate that – an amendment for enhancing the scope of the Charter is expected to be a harshly debated step by certain member states, thus cautious political preparation is necessary.
However, after the 2016 Brexit referendum in the UK – and despite the stress and uncertainties of the British exit negotiations of the next two years – a treaty reform seems to be inevitable in order to strengthen the common European identity of the remaining countries.

The constitutional identity of the member states is also a strong argument in the dispute on federal development of the EU. It might be a point of reference during the discussions that the extension of the scope of the Charter undermines the constitutional identity of the member states. However, besides affirming the shared values, the TEU also declares that the Union shall respect the national identities of its member states, as inherent part of their political and constitutional structures.[57] The definition emphasises the constitutional, political and state aspects, thus in this context the national identity can be understood (much more) as constitutional (than as a cultural) identity. One of the legally relevant questions in this respect is who will decide on the content of the constitutional identity of a member state and on the acts or measures of Union affecting or infringing that constitutional identity. It is clear that a relationship of cooperation between the national (constitutional) courts and the CJEU is necessary in case of such conflicts, the first to determine the constitutional identity case by case, and the latter to decide on the meaning of the relevant EU law in dispute. As it is based on the case law, the margin of appreciation is given on both sides, but the CJEU has confirmed in the *Omega* judgment the respect of the constitutional identity, when it gave preference to the German concept of human dignity against the freedom of services.[58] The obligation to respect the constitutional identity of the member states may even mean the restriction of a certain fundamental right, as it happened in the *Sayn-Wittgenstein* case, in which the republican identity

[55] Declaration № 53 by the Czech republic on the Charter of Fundamental Rights of the European Union
[56] Declaration № 61 – Declaration by the Republic of Poland on the Charter of Fundamental Rights of the European Union; Declaration № 62 – Declaration by the Republic of Poland concerning the Protocol on the application of the Charter of Fundamental Rights of the European Union in relation to Poland and the United Kingdom
[57] Article 4(2) of the TEU: "The Union shall respect the equality of member states before the Treaties as well as their *national identities*, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential state functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each member state."
[58] See the Omega-judgment of the CJEU (Case C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn) and the Lisbon-judgment of the Germen Federal Constitutional Court (BVerfG, Urteil des Zweiten Senats vom 30. Juni 2009, 2 BvE 2/08).

of Austria was considered stronger value than the free movement of citizens in respect of carrying the noble title.[59]
As a result of the multilevel European constitutional development, the constitutional traditions of the member states converged in their respective content and interpretation, while the single States managed to preserve their own constitutional identity. An EU member state is henceforth to a great extent free to decide on its own constitutional structure, which is the basis of its constitutional identity.

The introduction of the direct application of the Charter may reopen the debate on the relation of the Charter and the ECHR, the Strasbourg and Luxembourg courts. Analysing the existing text of the Charter, it can be stated that it provides for a satisfactory solution to this problem. The Charter takes the Convention as setting out the minimum level of protection, while making it clear that the Charter itself may provide for a more extensive level of protection. That solution is compatible with the Convention and reflects the principle of subsidiarity governing the relationship between the Convention and the national legal systems. It is furthermore intended to promote harmony between the two instruments and to avoid competition between them. The Charter expressly states that the meaning and scope of the Charter rights corresponding to the rights guaranteed by the Convention should be interpreted consistently with Convention rights.[60] Article 53 of the Charter contains a 'horizontal' clause on non-reversal,[61] which involves the recognition of the other legal mechanisms, in particular national constitutions and the international texts on the protection of human rights and fundamental freedoms, from the time that they are ratified by the member states. On the basis of this recognition, the principle used is that of the most favourable provision: the level of protection guaranteed by the Charter may not be lower than the level offered by the provisions of the texts cited, within their respective fields of application. These provisions of the Charter and the approximated case law of the two European Courts trigger the integration of the European human rights standard.
Although the CJEU in opinion 2/2013 rejected the draft agreement on the accession of the EU to the ECHR presuming that it would "upset the underlying balance of the EU and undermine the autonomy of EU law",[62] the Strasbourg court in 2016 proved its openness to dialogue again, and in *Avotiņš* judgment[63] for the first time applied the Bosphorus-presumption[64] to a case concerning obligations of mutual recognition under EU law. This suggests that the European Court of Human Rights (ECtHR) is still confident in the development of the European human rights area.

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[59] See the Sayn-Wittgenstein judgment (C-208/09. Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien, Judgment of the Court of 22 December 2010) and Besselink *op. cit.* 72.
[60] J-P. *Costa:* The Relationship between the European Convention on Human Rights and European Union Law – A Jurisprudential Dialogue between the European Court of Human Rights and the European Court of Justice. Lecture at the King's College London, 7 October 2008, in Background Documentation. Fundamental Rights Protection in EU Law under the Lisbon Treaty, ERA Trier, 22-23 April 2010
[61] Article 53 of the Charter: "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."
[62] Opinion 2/13 of the Court (Full Court) of 18 December 2014 on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms and Compatibility of the draft agreement with the EU and FEU Treaties
[63] Avotiņš v. Latvia (Application no. 17502/07) Judgment of 23 May 2016. See also Stian Øby *Johansen:* EU law and the ECHR: the Bosphorus presumption is still alive and kicking - the case of Avotiņš v. Latvia http://eulawanalysis.blogspot.hu/2016/05/eu-law-and-echr-bosphorus-presumption.html
[64] The presumption of equivalent protection of ECHR rights by the EU, even though the EU is not a party to the ECHR, in Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland (Application no. 45036/98) Judgment of 30 June 2005

Advantages

The discussion paper suggests the direct applicability of the Charter by the national courts 'outside the scope' of the Union law. Thus the national courts can apply – and parties can refer to – the Charter even in purely domestic cases, independently from the application of another EU norm. There are two potential versions for the extension of the scope of the Charter. The modest version is – in accordance with Advocate General Sharpston's cited proposal – to prescribe that member states have to apply the Charter in all fields where the Union has competence to act, irrespectively to the fact whether the competence was exercised by the Union or not. Of course, this version might re-open the debate on the exact division of competences between the EU and the member states. A bolder step would be the removal of any limitation and creating the full direct applicability of the Charter in any situations where Union citizens are concerned.

By the extension of its scope, the Charter norms will acquire inevitable and full primary law character, as it reads from Article 6(1) of the TEU. It does not mean that the individuals would get direct access to the CJEU in fundamental rights cases, i.e. the direct applicability of the Charter would neither create a rival human rights jurisdiction parallel to the ECtHR, nor allow this way a potential forum shopping. The amendment of the competences and procedure of the CJEU is not necessary. The elimination of the "only when they are implementing Union law" criterion simply means that the national courts have to apply beyond their domestic bill of rights the Charter as well, seek a harmonised interpretation and can ask for a preliminary ruling under the Article 267 of the TFEU. As it was mentioned above, the level of protection is provided for by the guarantees of Article 53 of the Charter, which refers – amongst other legal sources – in particular to the constitutions of the member states. As Sarmiento demonstrates, it is more than a simple minimum standard clause, because the CJEU has construed it as a kind of conflict of laws rule for those cases in which both EU and domestic fundamental rights can be applicable.[65]

The preliminary rulings on Charter rights may be useful on the one hand even to the ECtHR when it interprets the ECHR in comparison with the Charter. On the other hand these kind of judgments of the CJEU may serve as a legal evidence to the European Commission when it enters into a treaty infringement procedure or considers the application of Article 7 of the TEU. To date Article 7 is a harshly criticized as practically inapplicable norm, because it calls for the clear and present danger of the violence of the EU values for the initiation of the Council's procedure and decision. It can be presumed that in practice it would mean multitudinous or at least numerous proceedings and/or omissions leading to foreseeable and certain violation of Article 2 of TEU in a given member state. As Article 7 has never been applied, it also allows the presumption that the actors are very cautious and circumspect with initiating such procedure, because it cannot be legally supported sufficiently when exactly the violation happens, i.e. there is no due evidence procedure prescribed by the primary law. The number of preliminary ruling procedures, content of the questions put by the national courts and the decisions of the CJEU related to the Charter rights and the domestic law may clearly indicate if the respect of common EU values become doubtful in a certain member state. Hungarian and Polish constitutional crises point that despite a range of Venice Commission opinions and ECtHR judgments the EU is still not able and willing to intervene in the absence of legal basis.

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[65] Sarmiento *op. cit.* 1288-1289.

This short proposal can of course be criticized for being utopian or fairly illusory, and can even be labelled as completely unrealistic to date. One must however bear in mind that the EU sometimes did not spare the efforts to enter into projects surrounded by scepticism. In the early 1990's no one thought that a decade later a convention would be called with the mandate of creating a constitution for Europe. The Treaty on the European Constitution failed, but several of its achievements survived and were introduced by the Lisbon Treaty in a more or less modest way. The Charter is definitely the part of the recent evolution of EU law as it conceived in June 1999 by the decision of Cologne European Council,[66] lived its foetal life during the work of Fundamental Rights Convention and was born on 7 December 2000, when the Presidents of the Council, the Parliament and the Commission proclaimed it as an inter-institutional document. The European courts started to bring up the child, but it still lived its childhood until the Lisbon Treaty, which introduced it as a primary source of EU law. I do not think that the Charter's evolution came to an end by acquiring the legally binding force under the present formulation. It is more like a beginning, and it is never in vain thinking ahead for Europe, and work on rendering the existing fundamental rights more effective for the benefit of individuals.
To date, the European institutions try to empathise the importance of the rule of law, and are a bit cautious with promoting the fundamental rights policies. However, it is worthwhile to consider what András Sajó pointed out on the relationship of these constitutional values:

> Given the juridicization of human rights, rule of law and human rights expectations have become significantly intertwined. Human rights are served by the rule of law legal system. In terms of politics and policies human rights and the rule of law have developed an intimate relationship. Human rights are enforced with the instruments of the rule of law and are thus limited by the restricted reach thereof.[67]

[66] 150/99 REV 1 Presidency Conclusions, Cologne European Council, 2-4 June 1999, point 44-45
[67] András *Sajó:* Introduction – Universalism with Humility, in A. Sajó (ed.): *Human Rights with Modesty: The Problem of Universalism* (Springer Science+ Business Media Dordrecht, 2004) 1-2.