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Two Ways of Completing the European Fundamental Rights Union: Amendment to vs. Reinterpretation of Article 51 of the EU Charter of Fundamental Rights

András JAKAB,* and Lando KIRCHMAIR**

Abstract

The aim of this Article is to show that the enforcement of Article 2 of the Treaty on European Union ('TEU') values vis-à-vis Member States could benefit from the application of the EU Charter of Fundamental Rights ('CFR') also in instances where the current interpretation of Article 51(1) CFR prevents this. This would be the case if the CFR were also applicable to purely domestic cases, eg—but not only—with regard to fundamental rights-relevant violations related to the values enshrined in Article 2 TEU. In this case, the European Court of Justice, which has already partly taken this path recently, could prevent the violation of core EU values. The most important historical challenge to those values in Europe today is the systematic dismantling of the rule of law and democracy in certain Member States. It is the very purpose of fundamental rights to provide answers to such dangers. When one speaks of the rule of law and democracy, one necessarily also means fundamental rights. This Article thus advocates an EU which perceives itself as a complete fundamental rights union. While the traditional interpretation of Article 51(1) CFR had a balanced division of competence between the EU and its Member States in mind, the disregard of Article 2 TEU values triggers a *clausula rebus sic stantibus*: the neat federal balance can only be upheld if both ends stick to the original promise made. It demonstrates two ways of completing the European fundamental rights union: treaty revision, on the one hand, and reinterpretation of Article 51 CFR, on the other hand. Both ways have in common that only a complete fundamental rights union can establish a system of fundamental rights protection that is uniform and thus equality-preserving in cases where national fundamental rights fail to provide sufficient protection.

* Prof. Dr. *iur*., Professor of Constitutional and Administrative Law at the University of Salzburg.

** Prof. Dr. *iur.*, Deputy Professor of National and International Public Law with a focus on the Protection of Cultural Heritage at Bundeswehr University Munich and Co-PI of the European Constitutional Court Network Project at the University of Salzburg.

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I. INTRODUCTION: THE RULE OF LAW CRISIS IN THE EUROPEAN UNION HAS REACHED A NEW LEVEL OF ESCALATION

The conflict over compliance with the rule of law in some EU Member States has reached a new level of escalation with the decision of the Polish Constitutional Court on 7 October 2021. The Polish Constitutional Court has now clearly stated that Union law does not take precedence over (Polish) national constitutional law. On the contrary, the attempt of the European Court of Justice ('ECJ') to 'interfere' in the Polish judiciary would violate (according to the Polish Constitutional Court) the rule of supremacy of the Polish Constitution (in relation to Union law) and the rule that sovereignty must be preserved in the process of European integration.[1] Less noticed, however, not less problematic, the Hungarian Constitutional Court has reasoned, that the Hungarian government is constitutionally empowered to disapply EU law if it considers that EU law would violate Hungarian constitutional identity.[2] Due to these events and the preceding developments, 'the functioning of the EU legal order itself is in jeopardy'.[3]

Similarly, recent events in Hungary and Romania have proven that it is by no means self-evident that once a state has joined the EU, it will follow the principles of the rule of law without external enforcement mechanisms.[4] However, this Article is not about these three countries specifically, but about the general problem that was convincingly put forward by Jan-Werner Müller when he essentially stated that the Copenhagen criteria cannot be effectively enforced against Member States (and their enforcement even against candidate countries was poor).[5] In particular, the Article focuses on the requirements of the concept of the rule of law, which

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[1] Polish Constitutional Court, Judgment of 7.10.2021, K 3/21. For an impressive rebuke by 27 retired judges of the Polish Constitutional Court, cf 'Statement of Retired Judges of the Polish Constitutional Tribunal' (*Verfassungsblog*, 10 October 2021), https://verfassungsblog.de/statement-of-retired-judges-of-the-polish-constitutional-tribunal/.

[2] Decision 32/2021 on the Joint Exercise of Powers (XII. 20.) AB (Hungarian Constitutional Court 10 Decembere 2021). Cf for an analysis, A Vincze, 'Unsere Gedanken sind Sprengstoff – Zum Vorrang des Europarechts in der Rechtsprechung des ungarischen Verfassungsgerichts' (2022) 49(1–8) *Europäische Grundrechte Zeitschrift* 13.

[3] Editorial Comments, 'Clear and Present Danger: Poland, the Rule of Law & Primacy' (2021) 58 *Common Market Law Review* 1635, p 1648.

[4] For more details, see L Pech and K L Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3; P Bogdanowicz and M Taborowski, 'How to Save a Supreme Court in a Rule of Law Crisis: The Polish Experience' (2020) 16(2) *European Constitutional Law Review* 306; A von Bogdandy and P Sonnevend (eds), *Constitutional Crisis in the European Union. Theory, Law and Politics in Hungary and Romania* (Hart/Beck, 2015). Generally, see K Y Albrecht, L Kirchmair, and V Schwarzer (eds), *Die Krise des demokratischen Rechtsstaats im 21. Jahrhundert* (Archiv für Rechts und Sozialphilosophie Beiheft, 2021).

[5] See J-W Müller, 'Should the EU Protect Democracy and the Rule of Law inside Member States?' (2015) 21(2) *European Law Journal* 141; D Kochenov, *EU Enlargement and the Failure of Conditionality* (Kluwer, 2008).

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are being systematically breached. So far, the European Union is apparently unable to sufficiently protect the value of the rule of law. However, if the EU does not want to lose its credibility, it has the duty to defend the rule of law (cf Article 2 of the Treaty on European Union ('TEU')) within the European Union.[6] This tension between the EU's lack of enforcement capacity on the one hand, and the (implicit) legal obligation to strengthen the rule of law common to all Member States on the other, is the focus of this Article.

The majority of the methods available for the enforcement of the values contained in Article 2 TEU are based on political discretion (exclusion of the political party concerned from its European party family; Article 7 TEU, initiation of infringement proceedings by the Commission; the new rule of law mechanism) and therefore contribute, if at all, only to a limited extent and thus not sufficiently to securing the values mentioned.

European politicians, or rather politicians of EU Member States, find it difficult or are unwilling to intervene decisively. Often opportunistic considerations take hold, and conflicts are ignored or at least played down. Other issues, such as economic ones, seem to be more urgent than the admittedly elusive questions of constitutionalism and its dismantling in one of the Member States. However, we must also expect European politicians to believe in the fundamental values of the European Union (Article 2 TEU) and—if necessary—to defend them. 'Fundamental values cannot be compromised'.[7] And yet they are compromised to such an extent that one can seriously question whether these values will be complied with in all Member States without supranational support.[8] A mechanism that places value enforcement in the hands of politicians is a useful mechanism but is not sufficient in itself. The potential of legal mechanisms is different to that of political ones. They are not accused of having an ideological agenda—or at least not to the extent that political processes are accused of having one—in spite of the currently inflated rhetoric of Polish politicians who have even—note the irony given the subsequent war of aggression of Russia against Ukraine—fantasised that the Commission would risk World War III as an accusation against EU institutions engaging in the rule of law crisis if it would not greenlight the Polish recovery plan.[9] Judicially guaranteed mechanisms represent the most trustworthy mechanisms for enabling those who are affected to enforce these values. While the newly introduced rule of law mechanism[10]—recently

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[6] See C Hillion, 'Overseeing the Rule of Law in the EU' in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press, 2016).

[7] Editorial Comments, note 3 above, p 1648.

[8] See B Bugarič, 'Protecting Democracy inside the EU' in *Reinforcing Rule of Law Oversight in the European Union*, note 6 above; C Möllers and L Schneider, *Demokratiesicherung in der Europäischen Union* (Mohr Siebeck, 2018); L Kirchmair, 'Demokratische Legitimität, die EU-Rechtsstaatlichkeitskrise und Vorüberlegungen zu einer transnationalen Gewaltengliederung' (2019) 6 *Zeitschrift für praktische Philosophie* 171.

[9] See P M Kaczyński, 'Polish PM Says Commission Risks "World War III"' (*Euractiv*, 26 October 2021), https://www.euractiv.com/section/politics/short_news/polish-pm-says-commission-risks-world-war-iii/.

[10] Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget, OJ 2020, LI 433/1.

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triggered against Hungary—is an important step into the right direction, this mechanism alone is insufficient. Even though there is an obligation on the European Commission to launch the procedure if its preconditions are fulfilled, the Commission is unwilling to do so, most importantly against Poland.[11] This breach of EU law by the very organ which is supposed to be the guardian of EU law (Article 17 TEU) reconfirms again the constitutionalist suspicion that enforcement mechanisms need to be entrusted with judicial and not with political organs.[12] And this is exactly the solution that we are proposing here in this Article.

II. THE RULE OF LAW CRISIS AS A PROBLEM AND THE COMPLETE FUNDAMENTAL RIGHTS UNION AS A RESPONSE

The achievements of modern constitutionalism can be seen in several ways. For the purposes of our contribution, we understand them here as answers to societal challenges.[13] Consequently, ideas such as the need to base fundamental rights interventions not only on a legal basis, but also on a proportionality test, can be explained as answers to societal challenges that have developed over the years.[14]

In line with *Toynbee*, we regularly see societies facing new challenges for which they try to find the right solutions.[15] By challenge, we refer to a new circumstance or problem that requires a new method for its resolution.[16] This can take many forms, for example through new inventions or the introduction of new ideas to deal with particular social (order) problems. Seen in this light, the idea of the rule of law can be

[11] Cf, the still pending case C-657/21 European Parliament v European Commission.

[12] See the Kelsen-Schmitt debate on the guardian of the constitution in English: L Vinx (ed), *The Guardian of the Constitution* (Cambridge University Press, 2015).

[13] See also P Kirchhof, 'Der Antwortcharakter der Verfassung' in M Anderheiden, R Keil, S Kirste, and J P Schaefer (ed.), *Gedächtnisschrift für Winfried Brugger* (Mohr Siebeck, 2013) p 450. See for a different understanding of the 'answer character of the constitution' in Austrian constitutional law scholarship, A Jakab, 'Verfassungsrechtliche Argumentation' in A Jakab (ed), *Methoden und theoretische Grundfragen des österreichischen Verfassungsrechts* (Verlag Österreich, 2021), p 214.

[14] R A Posner, *The Problematics of Moral and Legal Theory* (The Belknap Press of Harvard University Press, 1999), pp 17 ff. In relation to the given example, M Thaler, *Grundlagen und Entwicklung von Verfassungs – und Verwaltungsrecht*, 5th ed. (Facultas Verlags, 2020), pp 45 ff.

[15] A Toynbee, *A Study of History, Vol. 1* (Oxford University Press, 1934), p 271. Although some aspects of Toynbee's work (especially the role of religion, the relationship between civilisations, or certain historical details) have been rightly criticised, his basic model of challenge and response seems to fit the historical facts. For a recent review of Toynbee's work, see M Perry, *Arnold Toynbee and the Western Tradition* (Peter Lang, 1996), especially pp 103–28. A good introduction to his work is provided by C T McIntire and M Perry, 'Toynbee's Achievement' in C T McIntire and M Perry (eds), *Toynbee. Reappraisals* (University of Toronto Press, 1989), pp 3–5. For classic literature and some of his methodological essays, see here: A Montagu (ed), *Toynbee and History. Critical Essays and Reviews* (Porter Sargent, 1956).

[16] On such constitutional ideas that previous constitution makers wanted to avoid, see A Sajó, *Limiting Government. An Introduction to Constitutionalism* (Central European University Press, 1999), pp 1 ff.

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understood as the original answer to absolutism.[17] Over time, various definitions of the rule of law have developed.[18] The one key element that has never been questioned is the restriction or combating of the arbitrary use of state power.[19]

In the following, we will argue in favour of a specific judicial enforcement of the rule of law against Member States in which governments have been hijacked by groups working to dismantle the rule of law.[20] We will argue that in order to overcome the crisis of the rule of law, an essential step would be to enable persons in affected Member States to invoke the application of the EU Charter of Fundamental Rights ('CFR') whenever a violation of Article 2 TEU values in Member States provides ground for fundamental rights violations and thus the scope of protection is applicable;[21] in other words, even if the restriction of the scope of protection occurs exclusively through national measures. In this way, individuals could independently counter the erosion of the rule of law. While the traditional interpretation of Article 51(1) CFR had a balanced division of competence between the EU and its Member States in mind, the disregard of Article 2 TEU values in some Member States provides for the application of the *clausula rebus sic stantibus*: the neat federal balance of a full fundamental rights protection can only be upheld if both ends stick to the original promise. If this standard is violated in a Member State, the EU must close the *lacunae* in order to ensure the fundamental rights union in Europe.

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[17] For more details see A 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 *I-CON* 58; A Jakab, *European Constitutional Language* (Cambridge University Press, 2016).

[18] Rule of law is often used in an expanded sense, which includes the political ideology of the respective speaker or judge, cf J Raz, 'The Rule of Law and its Virtue' in J Raz (ed), *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979).

[19] In the United States, this abuse means abuse in the interest of particular interests instead of the aggregated interest of all citizens, see C Möllers, *Die drei Gewalten* (Velbrück Wissenschaft, 2008), pp 29–35. In France the abuse was a danger from the monarchical executive. The U.S. legislature is conceived as representing lobbies or other particular interests, as opposed to France where the legislature is the people's voice. See Möllers, ibid, pp 32, 35. For an understanding of the rule of law as the opposite of arbitrariness, see M Krygier, 'The Rule of Law: Legality, Teleology, Sociology' in G Palombella and N Walker (eds), *Relocating the Rule of Law* (Bloomsbury, 2009). B Z Tamanaha, 'A Concise Guide to the Rule of Law' in *Relocating the Rule of Law* ibid, at 7-8, understands it as a restriction of government discretion.

[20] For an overview of the possible responses of constitutional law in general and the relationship between democracy and the rule of law in particular, see A Jakab, 'What Can Constitutional Law Do against the Erosion of Democracy and the Rule of Law? On the Interconnectedness of the Protection of Democracy and the Rule of Law' (2020) 6 *Constitutional Studies* 5.

[21] We do not think that this is the only (magical) way to address this crisis. Hence there are other important steps that are not rendered meaningless even if the approach advanced here were successful. See, for instance, A Jakab and L Kirchmair, 'How to Develop the EU Justice Scoreboard into a Rule of Law Index: Using an Existing Tool in the EU Rule of Law Crisis in a More Efficient Way' (2021) 22 *German Law Journal*936.

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This is what we mean when we speak of a complete European fundamental rights union. In most cases, the buzzwords 'fundamental rights community' ('Grundrechtsgemeinschaft' in German)[22] or 'fundamental rights union' ('Grundrechtsunion' in German)[23] express nothing more (but also nothing less) than that the EU is 'more than just a huge economic area'.[24] Common to this understanding is that fundamental rights simultaneously protect individuals from arbitrary exercise of state power and represent 'the expression of a common European conviction of fundamental rights, a European value system'.[25] While the ECJ in its case law initially defined the concepts of legal community ('Rechtsgemeinschaft' in German)[26] and now the legal union ('Rechtsunion' in German),[27] in this Article we understand the concept of a complete fundamental rights union as the realisation of unrestricted, so-called 'free fundamental rights', ie fundamental rights that apply equally to all citizens of the Union also in purely national constellations if this is necessary due to a violation of Article 2 TEU values at the national level.[28]

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[22] Cf G Hirsch, 'Die Europäische Union als Grundrechtsgemeinschaft' in G Iglesias (ed), *Mélanges en hommage à Fernand Schockweiler* (Nomos, 1999), pp 177, 187; C Grabenwarter, 'Auf dem Weg in die Grundrechtsgemeinschaft?' (2004) 31 *Europäische Grundrechte Zeitschrift*563, p 564 (arguing for a favourable position on an understanding of the term 'implementation' in Art. II-51 (1) TCE, which also affirms the application of Community fundamental rights when acts of the Member States have been adopted in order to restrict a fundamental freedom). Cf for a discussion of this with further references to case law, D Scheuing, 'Zur Grundrechtsbindung der EU-Mitgliedstaaten' (2005) 40 *Europarecht* 162; cf also for a general use of the term 'fundamental rights community' ('Grundrechtsgemeinschaft'), M Kotzur, 'Eine Bewährungsprobe für die Europäische Grundrechtsgemeinschaft. Zur Entscheidung des EuG in der Rs. Yusuf u.a. gegen Rat, Europäische Grundrechtezeitschrift 2005, S. 592 ff' (2006) 33 *Europäische Grundrechte Zeitschrift*1925; however, see also ibid, 'Der Schutz personenbezogener Daten in der europäischen Grundrechtsgemeinschaft. Die korrespondierende Verantwortung von EuGH, EGMR und mitgliedstaatlichen Verfassungsgerichten' (2011) 38 *Europäische Grundrechte Zeitschrift*105, pp 110, 114 (speaking of a constitution of community fundamental rights ('*gemeineuropäischen Grundrechtsverfassung*') that is comprised of the fundamental rights of the Member States, the European Convention on Human Rights and the CFR).

[23] See T Kingreen, 'Grundrechtsverbund oder Grundrechtsunion? Zur Entwicklung der subjektiv-öffentlichen Rechte im europäischen Unionsrecht' (2010) 45 *Europarecht* 338, p 354 (discussing the judgments *Mangold* and *Maruko*) understands by the term fundamental rights union that the EU sets its own fundamental rights standards. Cf S Griller, 'Vom Diskriminierungsverbot zur Grundrechtsgemeinschaft? Oder: Von der ungebrochenen Rechtsfortbildungskraft des EuGH' in M Akyürek, D Jahnel, and G Baumgartner (eds), *Staat und Recht in europäischer Perspektive. Festschrift Heinz Schäffer* (Manz, 2006), p 203 (for an—albeit critical—similar use of the term 'fundamental rights community detention' ('Grundrechtsgemeinschaft') as here).

[24] P Terhechte, *Konstitutionalisierung und Normativität der europäischen Grundrechte* (Mohr Siebeck, 2011), p 1.

[25] Ibid, p 3, with further reference to T Schmitz, 'Die Charta der Grundrechte der Europäischen Union als Konkretisierung der gemeinsamen europäischen Werte' in D Blumenwitz, D Murswiek and G Gornig (eds), *Die Europäische Union als Wertegemeinschaft* (Duncker & Humblot, 2005), p 73; cf C Calliess, 'Europa als Wertegemeinschaft – Integration und Identität durch europäisches Verfassungsrecht?' (2004) 59 *JuristenZeitung* 1033.

[26] *Les Verts v Parlament*, C-294/83, EU:C:1986:166, para 23.

[27] *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, C-64/16, EU:C:2018:117, para 31.

[28] T Kingreen, note 23 above, p 354.

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III. THE SCOPE OF APPLICATION OF THE CHARTER OF FUNDAMENTAL RIGHTS: ARTICLE 51(1) CFR AND THE PREVAILING DOCTRINE

Article 51(1) CFR is a central provision—the 'keystone', so to speak—of the CFR.[29] It standardises its scope of application and restricts it vis-à-vis the Member States. It applies to them, according to the wording of the norm, '*only* when they are interpreting Union law'.

Essentially, and quite briefly, three variants of interpretation of Article 51(1) CFR can be distinguished:

A literal and rather restrictive approach presupposes the actual existence of Union law in the area in question ('implementation') in order to invoke the application of the Charter.[30] Such a restrictive understanding of Article 51(1) CFR, which would limit the application of the fundamental rights of the Union exclusively to this kind of 'implementation' of Union law, does not only seem to contradict the underlying philosophy of the Charter,[31] but is also more restrictive than the case law of the ECJ on the applicability of fundamental rights (conceived as general principles of law) before the entry into force of the CFR.[32] This scepticism towards this restrictive interpretation is also fuelled by a look at the explanations to the CFR:[33]

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[29] K Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 *European Constitutional Law Review* 375, p 377. According to P Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 *Common Market Law Review* 945, p 954, it is paradoxical to have a general Charter of Fundamental Rights with a limited scope of application.

[30] S Peers, 'The Rebirth of the EU's Charter of Fundamental Rights' (2013) 13 *Cambridge Yearbook of European Legal Studies* 283, p 298; T von Danwitz and K Paraschas, 'A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights' (2017) *Fordham International Law Journal* 1396, p 1409; P Huber, 'Unitarisierung durch Gemeinschaftsgrundrechte – Zur Überprüfungsbedürftigkeit der ERT-Rechtsprechung' (2008) 43 *Europarecht* 190, p at 196; M Borowsky, 'Artikel 51 – Anwendungsbereich' in J Meyer (ed), *Charta der Grundrechte der Europäischen Union*, 3rd ed (Nomos, 2011), pp 653–54; Z Varga, 'Az Alapjogi Charta alkalmazási köre I' (2013) *Európai Jog* 17, p 19 (with further references). See also P Yowell, 'The Justiciability of the Charter of Fundamental Rights in the Domestic Law of Member States' in P Huber (ed), *The EU and National Constitutional Law* (Boorberg, 2012), pp 114 ff.

[31] See R A García, 'The General Provisions of the Charter of Fundamental Rights of the European Union' (Jean Monnet Working Paper 4/2002), p 5, www.jeanmonnetprogram.org/archive/papers/02/020401.pdf.

[32] For a detailed comparison with the preceding case law, cf X Groussot, L Pech, and G 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), www.era-comm.eu/charter_of_fundamental_-rights/kiosk/pdf/EU_Adjudication.pdf. On the history of the various drafts of the CFR, see G de Búrca, 'The Drafting of the European Union Charter of Fundamental Rights' (2001) 7 *European Law Review* 126.

[33] Explanations on the Charter of Fundamental Rights (OJ EU 2007 C 303/17). For a critical assessment of the rather confusing explanations, cf L Besselink, 'The Member States, the National Constitutions and the Scope of the Charter' (2001) 8 *Maastricht Journal of European and Comparative Law* 68, pp 76–78. X Groussot, L Pech, and G Petursson, note 32 above, p 19, denounce

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> 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 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.

This interpretation is therefore not only contrary to the previous case law of the ECJ (as cited above in the explanations), but also contradicts the Charter itself, since Article 53 CFR explicitly states that the Charter may not lead to a lower level of protection of fundamental rights (than that guaranteed in particular by 'Union law', the European Convention on Human Rights ('ECHR') and the constitutions of the Member States).[34] If this interpretation were to be accepted,[35] this would lead to a reduced level of fundamental rights protection than was the case before the adoption of the Charter.[36]

In *Åkerberg Fransson*[37] the ECJ rebuked voices that advocated for the previously described restrictive interpretation of Article 51(1) CFR.[38] This judgment clarified

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(F'note continued)
the explanations on Article 51 CFR as a mixture of different formulas (originally: 'a mixture of various formulas').

[34] C Nowak, 'Grundrechtsberechtigte und Grundrechtsadressaten' in F Heselhaus and C Nowak (eds), *Handbuch der Europäischen Grundrechte* (Helbing & Lichtenhahn, CH Beck, LexisNexis, 2006), pp 244–45.

[35] P Eeckhout, note 29 above, p 993; H Kaila, 'The Scope of Application of the Charter of Fundamental Rights of the European Union in the Member States' in P Cardonnel, A Rosas, and N Wahl (eds), *Constitutionalising the EU Judicial System* (Bloomsbury, 2012); J Kokott and C Sobotta, 'The Charter of Fundamental Rights of the European Union after Lisbon' (EUI Working Paper 2010/6), p 7.

[36] See for an analysis of the ECJ case law on Article 51 (1) CFR before *Fransson*, which comes to the conclusion that the Court of Justice until then—albeit with brief and sometimes misleading justifications—had essentially already wanted to follow up its case law on the binding force of fundamental Union rights in the form of principles on the Member States, B Pirker, *Grundrechtsschutz im Unionsrecht zwischen Subsidiarität und Integration* (Nomos, 2018), pp 335 ff, espec 339.

[37] *Åklagaren v Åkerberg Fransson*, C-617/10, EU:C:2013:105.

[38] F Fontanelli, '*Hic Sunt Nationes*: The Elusive Limits of the EU Charter and the German Constitutional Watchdog' (2013) 9 *European Constitutional Law Review* 315; A Ward, 'Article 51 – Scope' in S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights. A Commentary*, 2nd ed (CH Beck, Hart, Nomos, 2021), pp 1578–81. On the tension between the broad *Fransson* doctrine and the strict approach of the BVerfG, cf 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 *European Constitutional Law Review* 391.

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the scope of application of the Charter through interpretation and adopted the widely held view in the literature:

> Since 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.[39]

A similar, albeit—depending on the interpretation—somewhat more generous view was also previously held by AG Eleanor Sharpston in *Ruiz Zambrano*:

> 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.*[40]

Also in the sense of this interpretation, the prevailing idea is that the application of the Charter were only given when there was a connection to the 'scope of Union law' (*Fransson*) or a 'material Union competence' (AG Sharpston in *Ruiz Zambrano*).[41] This means that the application of the Charter continues to be seen as a safety net and its rights are not seen as 'freestanding rights'.[42] Subsequently, the ECJ—in a slightly weakened form compared to the opinion of AG Sharpston in *Ruiz Zambrano* quoted above—made a further clarification, which means that

> the concept of 'implementing Union law', as referred to in Article 51 of the Charter, presupposes a degree of connection between the measure of EU law and the national

[39] *Åkerberg Fransson*, note 37 above, para 21; interestingly, this statement was introduced with a reference to the wording of Article 51 (1) CFR (para 17: 'implementing European Union law') and a confirmation of the previous case law (para 18), which had stated that the CFR would be applicable 'in all situations governed by European Union law' (para 19). For a detailed analysis, see Pirker, note 36 above, pp 339 ff.

[40] AG E Sharpston in *Ruiz Zambrano v Office national de l'emploi*, C-34/09, EU:C:2010:560, para 163. Critical, M Dougan, 'Judicial Review of Member State Action under the General Principles and the Charter: Defining the "Scope of Union Law"' (2015) 52 *Common Market Law Review* 1201, pp 1226–29.

[41] On the different definitions of the concept of 'scope of application of EU law', cf S Prechal, S de Vries, H van Eijken, 'The Principle of Attributed Powers and the "Scope of EU Law"' in L Besselink, F Pennings, and S Prechal (eds), *The Eclipse of the Legality Principle in the European Union* (Kluwer, 2011); P Eeckhout, note 29 above, p 993; AG E Sharpston in *Zambrano*, note 40 above, para 173.

[42] See X Groussot, L Pech, and G Petursson, note 32 above, p 22 with further references.

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> measure at issue which goes beyond the matters covered being closely related or one of those matters having an indirect impact on the other.[43]

Thus, there must be a 'a certain degree of connection above and beyond the matters covered' between the member states' measure and a rule of European law for the Charter to be applicable. In the case law of the ECJ, a certain degree of connection means more than merely an indirect connection, as just cited.[44] The prevailing opinion in the literature probably also agrees with this.[45]

IV. TWO WAYS OF COMPLETING THE FUNDAMENTAL RIGHTS UNION

A. *Pursuing a Treaty Revision*

A straightforward way to complete the fundamental rights union would be a treaty revision, which amends Article 51(1) and discharges 51(2) CFR.[46] The current

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[43] *Julián Hernández and Others v Reino de España and Others*, C-198/13, EU:C:2014:2055, para 34.

[44] *Fransson* to a certain extent also confirming *Cruciano Siragusa v Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo*, C-206/13, EU:C:2014:126, para 24; see also the concretising statement in the *Julián Hernández*, note 43 above, para 35, 'that fundamental European-Union rights could not be applied in relation to national legislation because the provisions of EU law in the area concerned did not impose any specific obligation on Member States with regard to the situation at issue in the main proceedings'. Cf also the overview of the case law in C F Germelmann and J Gundel, 'Die Entwicklung der EuGH-Rechtsprechung zum europäischen Verfassungs – und Verwaltungsrecht im Jahr 2020' (2021) *Bayerische Verwaltungsblätter* 583, 589, eg with further reference to the decision in *TJ v Balga Srl*, C-32/20, EU:C:2020:441, para 26. In Case *Commission v Hungary*, EU:C:2020:792, C-66/18, para 213, the ECJ has also held that Member States also implement Union law when they fulfil obligations under international agreements (in this case GATS) that are also part of Union law. This also applies to measures taken by Member States that restrict fundamental freedoms (para 214 with further references). To be sure, the case law is complex and diverse. See, eg, furthermore *TSN*, C-609/17 and C-610/17, EU:C:2019:981 and the analysis provided by M Tecqmenne, 'Minimum Harmonisation and Fundamental Rights: A Test-Case for the Identification of the Scope of EU Law in Situations Involving National Discretion?' (2020) 16 *European Constitutional Law Review* 493, p 505, summarising 'that the relationship between the national and EU standards of fundamental rights protection is structured along the lines of the distribution of powers between the EU and its member states in that policy area'. For yet another overview categorising the case law, see A Ward, note 38 above, pp 1576 ff.

[45] H Jarass, *GRCh. Charta der Grundrechte der Europäischen Union*, 4th ed. (CH Beck, 2021), Art 51, para 24; cf M Borowsky, 'Artikel 51 – Anwendungsbereich' in J Meyer (ed), *Charta der Grundrechte der Europäischen Union*, 4th ed. (Nomos, 2014), pp 758–60; E Hancox, 'The Meaning of "Implementing" EU Law under Article 51(1) of the Charter: *Åkerberg Fransson*' (2013) 50 *Common Market Law Review* 1411, pp 1418–27; F 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, pp 263 ff. Cf for a comprehensive and comparative law analysis, see also B Pirker, note 36 above, pp 488 ff.

[46] See generally AG E Sharpston in *Zambrano*, note 40 above, paras 163–73 on the requirement of treaty change of her suggestion presented above. Even though Article 48 TEU speaks only of 'the treaties', this includes any primary EU law, hence also the Charter. See in this vein, M Klamert, 'Article 48 TEU' in M Kellerbauer, M Klamert, and J Tomkin (eds), *Commentary on the EU Treaties and the*

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German government, for instance, seems to be fond of such an endeavour when it explicitly states in its coalition contract: 'We want the rights under the EU Charter of Fundamental Rights to be enforceable before the ECJ in future even if a Member State acts within the scope of its national law'.[47] A possible new formulation of Article 51 CFR could be the following: 'The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States as far as necessary for the enforcement of the values enshrined in Article 2 of the Treaty on European Union'. This would clearly express the purpose of the amendment and would also conform to the principle of subsidiarity.

Treaty revisions, however, can be long-winded affairs.[48] Hence, while a reform, to be safe in this case according to an ordinary revision procedure (Article 48 TEU), would bring the benefit of an unquestionable methodological status, it provides no relieve in the short or mid-term future. It is also questionable why autocratising Member States would be ready to ratify such an amendment, and for a successful amendment the consent of all Member States is necessary.

We are, however, of the opinion, that there is also an alternative way to proceed. As Joseph Weiler convincingly demonstrated almost forty years ago when reconstructing the legal history of the European integration: whenever the political channels are under blockade, the ECJ is in the best position to give the necessary push to the process, sometimes with activist moves in its case law.[49] We think that we are exactly in such a situation.

B. A Different Take on Interpreting Article 51(1) CFR

We want therefore to reflect here on whether the interpretation referred to above is set in stone or whether the emergence of a further development of the interpretation of Article 51(1) CFR is possible.[50] The further development we have in mind aims to ensure that the 'implementation of Union law' is not understood formalistically, but

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(F'note continued)
Charter of Fundamental Rights. A Commentary (Oxford University Press, 2019), para 5; D-E Khan, 'Artikel 48 EVU' in R Geiger, D-E Khan, M Kotzur, and L Kirchmair (eds), *EUV/AEUV Vertrag über die Europäische Union Vertrag über die Arbeitsweise der Europäischen Union. Kommentar*, 7th ed (C. H. Beck, forthcoming 2022), para 2.

[47] Koalitionsvertrag zwischen SPD, Bündnis 90/Die Grünen und FDP, 'Mehr Fortschritt wagen. Bündnis für Freiheit, Gerechtigkeit und Nachhaltigkeit', p 132, https://www.bundesregierung.de/resource/blob/974430/1990812/04221173eef9a6720059cc353d759a2b/2021-12-10-koav2021-data.pdf?download=1 (in German: 'Wir wollen, dass die Rechte aus der EU-Grundrechtecharta vor dem EuGH künftig auch dann eingeklagt werden können, wenn ein Mitgliedstaat im Anwendungsbereich seines nationalen Rechts handelt'.).

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

[49] J H H Weiler, 'The Transformation of Europe' (1991) 100 *Yale Law Journal* 2403.

[50] See M Dougan, 'Judicial Review of Member State Action under the General Principles and the Charter: Defining the "Scope of Union Law"' (2015) 52 Common Market Law Review 1201, p 1210 (generally stating in relation to the interpretation of Article 51(1) CFR that 'the wider the

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rather factually. Contrary to initial intuition, there are also possibilities to justify such an interpretation in legal terms. It has already been argued that Union citizenship must include a final guarantee of fundamental rights in cases of *systemic* failure in a Member State.[51] This was pointedly depicted in the image of a reversed *Solange* jurisprudence (however, explicitly outside of the scope of Article 51 CFR).[52]

Even though this approach built upon a different doctrinal basis than our suggestion, it is important to address some of the criticism this approach has met in so far as this pertains the broader picture rather than the doctrinal basis: (1) it would throw the baby out with the bathwater and stigmatise the 'affected' Member States (and thus also contradict the principle of loyalty according to Article 4(3) TEU) instead of concentrating on the actual protection of fundamental rights. (2) A systemic failure of the protection of fundamental rights would in turn require procedures for its protection, the establishment of which necessarily presupposes a decision by a political body (which, however, places the protection of fundamental rights at the mercy of politics).[53] (3) The use of the *Solange* formula, in turn, is seen as a potentially face-saving excuse for inaction.[54] To avoid these objections, we will sketch a different approach in this Article:[55] an approach which, through a reinterpretation, would elevate the Charter to a genuine and fully fledged fundamental rights document in the European Union if at the national level the fundamental rights protection is hampered

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(F'note continued)
Court's definition [of the scope of Union law], the more compelling we are entitled to expect its justification to be').

[51] For a first formulation of this idea in the context of the free movement of persons, cf AG P Maduro in *Centro Europa 7 Srl v Ministero delle Comunicazioni e Autorità per le garanzie nelle comunicazioni und Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni*, C-380/05, EU:C:2007:505, paras 20 ff.

[52] A von Bogdandy, M Kottmann, C Antpöhler, J Dickschen, S Hentrei, and M Smrkolj, 'Reverse *Solange* – Protecting the Essence of Fundamental Rights against EU Member States' (2012) 49 *Common Market Law Review* 489. The concept had previously been used in a similar way, albeit with a focus on EU citizenship, by D Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States' in J L Dunoff and J P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009). For an update, see A von Bogdandy and L Spieker, 'Countering the Judicial Silencing of Critics: Article 2 TEU Values, Reverse Solange, and the Responsibilities of National Judges' (2019) 15 *European Constitutional Law Review* 391; A von Bogdandy and L Spieker, 'Protecting Fundamental Rights Beyond the Charter: Repositioning the Reverse Solange Doctrine in Light of the CJEU's Article 2 TEU Case Law' in M Bobek and J Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart, 2020).

[53] For a detailed explanation of the approach and the different procedures, see A von Bogdandy and M Ioannidis, 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done' (2014) 51 *Common Market Law Review* 59.

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

[55] This approach is a further development of A Jakab, 'Application of the EU CFR by National Courts in Purely Domestic Cases' in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press, 2017).

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due to violations of Article 2 TEU.[56] We make the case for a reinterpretation of Article 51(1) CFR that ensures the application of the Charter in such cases which thus completes the European fundamental rights union.

V. FOR A REINTERPRETATION OF ARTICLE 51(1) CFR

If we strive for a fully fledged community of values from which all citizens would equally benefit, then the Charter should in any case, ie also in purely domestic cases, be fully valid at the domestic level and be applied by national courts, even if there is no systemic failure of fundamental rights protection but 'only' a violation of an Article 2 TEU value. Accordingly, Union fundamental rights protection would still depend on a certain degree of connection between the activity of the Member States and a norm of Union law; however, we understand this connection in such a way that no reduction of fundamental rights protection should occur due to specific competences. In other words, all Member States must always respect the fundamental rights of the CFR and cannot rely on an exclusive competence of a Member State to justify a violation of fundamental rights.[57] The certain degree of connection criterion would on the one hand be based on the fact that the EU has ubiquitous influence far beyond its competences. For example, subsidies do not only have an impact in the EU's area of competence. In Poland or Hungary, the dismantling of the rule of law is financed with EU taxpayers' money.[58] It is therefore short-sighted if the certain degree of connection is seen in a formalistic way only 'in all situations governed by EU law but not outside such situations'.[59] With this formalistic understanding of 'implementation', the Court of Justice 'has no power to examine the compatibility with the Charter of national legislation lying outside the scope of EU law'.[60] On the other hand, the degree of connection would be established if a Member State violates a core value on which the EU is based, which includes any violation without the necessity of a systemic deficiency. This ensures respect for the principle of equality as not specific Member States are stigmatised but any Member State which violates core EU values faces the application of the CFR, not after a political evaluation of the situation, for instance, in the realm of the Article 7 TEU procedure, but according to judicial standards.

This means that a comprehensive fundamental rights-based judicial supervisory authority would be introduced throughout Europe. The type of judicial control envisaged would be decentralised in the sense of being exercised by the national courts,

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[56] It seems that after Opinion 2/13 of the ECJ, the ECHR will not become the 'Bill of Rights' of the EU. Cf Editorial Comments 'The EU's Accession to the ECHR – a "NO" from the ECJ!' (2015) 52 *Common Market Law Review* 1.

[57] H Jarass, note 45 above, para 20, refers in this regard to the exclusion of this intended effect in *Åkerberg Fransson*, note 37 above, para 22, to avoid a circular argument.

[58] See R D Kelemen, 'The European Union's Authoritarian Equilibrium' (2020) 27 *Journal of European Public Policy* 481.

[59] *Robert Pfleger and Others*, C-390/12, EU:C:2014:281, para 33.

[60] Ibid.

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which—similar to the case law of the European Court of Human Rights ('ECtHR')—would have a margin of appreciation, whereby compliance with the core of fundamental rights would be monitored by the ECJ. However, their uniform application would be guaranteed by the preliminary ruling procedure.[61] One could therefore also call a protection of fundamental rights understood in this way semi-centralised judicial control.

Such an approach would enable the European Union to become a complete fundamental rights union in which no one would be left behind. In this vein, no citizen would be excluded from the community of values due to violations of fundamental rights by a Member State in purely national constellations. This would be of no small significance, since fundamental violations of basic rights in Europe are a frightening and at the same time unacceptable denial of the European community of values. The citizens of the Member State excluded from the protection of fundamental rights are thus left behind with all the associated consequences, while the rest of Europe saves itself.

Standing up for these citizens is especially important when fundamental rights violations are enshrined in Member State constitutions in an almost sacrilegious manner and constitutional courts are staffed with party soldiers who do not care about constitutional arguments and values. Ordinary courts would have the advantage that there are many of them in each country, the personnel is therefore more difficult to replace in terms of party politics and only over a longer period of time, and also a single ordinary judge can ask the ECJ for help in the form of a preliminary ruling if Union fundamental rights are in some way unjustifiably restricted by national measures.

In the following subsections, we address possible objections, some of which concern efficiency (including alternative ways to better protect fundamental rights), and some of which concern (doctrinal) reasoning.

A. Articles 2 and 7 TEU (and to Some Extent also Union Citizenship or the Right to an Effective Remedy) Would Support a Generous Understanding of the 'Certain Degree of Connection' Formula Understood as an Unrestricted Application of Article 51(1) CFR

The interpretation put forward here contradicts both the literal meaning of Article 51 (1) CFR, its current interpretation by the ECJ, and the majority of the literature.[62]

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[61] Thus, even in the case of hijacked Member State supreme courts, lower courts would be allowed to submit preliminary references; and supreme courts would have to submit preliminary references in terms of the Cilfit doctrine (*Srl CILFIT and Lanificio di Gavardo SpA v Ministero della Sanità*, C-283/81, EU:C:1982:335; cf *Consorzio Italian Management e Catania Multiservizi and Catania Multiservizi*, C-561/19, ECLI:EU:C:2021:799).

[62] Cf, eg A Schwerdtfeger, 'Art. 51 GRCh' in J Meyer and S Hölscheidt (eds), *Charta der Grundrechte der Europäischen Union*, 5th ed. (Nomos, 2019), para 36; X Groussot, L Pech, and G Petursson, note 32 above, p 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'.

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Consequently, it is necessary to present some solid arguments in support of it. There seem to be three parallel ways to justify such a broad interpretation of the scope of the Charter: first, the use of the concept of citizenship of the Union; second, taking Article 47 CFR seriously; and third, the use of Articles 2 and 7 TEU as connecting factors. Although these justifications are not mutually exclusive, we believe that the final option has most potential.

Union citizenship is generally seen as a set of rights[63] and, as an 'autonomous' legal status, also seems to replace the requirement of cross-border reference,[64] as the application of EU law is also affirmed in cases without a cross-border element and has evolved to protect citizens from their own Member States.[65] A further step in the same direction would be to state that Union citizenship triggers the application of the Charter.[66] This approach, however, differs greatly from the traditional approach, which considers the scope of the Charter as a delimited *ratione materiae*.[67]

The right to an effective remedy enshrined in Article 47 CFR has a long tradition in EU law and is accepted as general principle of EU law 'which underlies the constitutional traditions common to the Member States'.[68] It pre-dates the Charter of Fundamental Rights and has an accessory nature. Enforcing the compliance with fundamental rights necessitates an effective remedy.[69] This logic might drive a reinterpretation of the limits of competence allowing those limits to expand as part of an

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[63] G Palombella, 'Whose Europe? After the Constitution: A Goal-Based Citizenship' (2005) 3 *I-CON*, pp 377–82.

[64] P Van Elsuwege, 'Shifting the Boundaries? European Union Citizenship and the Scope of Application of EU Law' (2011) *Legal Issues of Economic Integration* 263, analysing *Zambrano*, note 40 above. See also AG P Maduro in *JankoRottmann v. Freistaat Bayern*, C-135/08, EU: C:2009:588, para 23.

[65] D 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 & Comparative Law Quarterly* 37, p 135.

[66] S 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 (arguing for an extension of the scope of the Charter to address the problem of reverse discrimination). But see F Schulyok, 'The Scope of Application of EU Citizenship and EU Fundamental Rights in Wholly Internal Situations' (2012) *Europarättslig Tijdskrift* 448. Cf also S Griller, 'Unionsbürgerschaft als grundlegender Status' in W Schroeder and W Obwexer (eds), *20 Jahre Unionsbürgerscahft. Konzept, Inhalt und Weiterentwicklung des grundlegenden Status der Unionsbürger* (EuR-Beiheft, 1/2015), espec p 25 (calling this a small step for the ECJ but a big one for the Union).

[67] M Safjan, 'Areas of Application of the Charter of Fundamental Rights of the European Union: Fields of Conflict?' (EUI Working Papers – Law, 2012), p 2, http://cadmus.eui.eu/bitstream/handle/1814/23294/LAW-2012-22.pdf. On the dilemma, see F Fontanelli, 'The European Union's Charter of Fundamental Rights Two Years Later' (2011) *Perspectives on Federalism* 22, pp 40 ff.

[68] See *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, 222/84, EU: C:1986:206, para 18, in relation to measures of Member States. Cf T Lock and D Martin, 'Article 47' in M Kellerbauer, M Klamert, and J Tomkin (eds), *Commentary on the EU Treaties and the Charter of Fundamental Rights. A Commentary* (Oxford University Press, 2019), para 2.

[69] *Johnston*, note 68 above, para 14.

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'inherent' fundamental rights logic within the Charter. Hence, if a fundamental right of the Charter is violated by a Member State, and no effective remedy is provided in that Member State, Article 47 CFR could be interpreted to trump a traditional reading of Article 51(1) CFR, at least in cases of blatant fundamental rights violations. The reason against such a self-standing application of Article 47 CFR is similar to the reason mentioned before in relation to the first approach. Article 47 CFR in conjunction with, for instance, Article 19(1) TEU as applied by the ECJ, might, however, be a much stronger approach.[70]

Another way to justify the broad application while maintaining the *ratione materiae* requirement would be to invoke Article 7 TEU.[71] Article 7 TEU provides that a special procedure may be initiated in the event of a 'serious and persistent breach' of the fundamental values set out in Article 2 TEU (which also includes respect for human rights). The early warning procedure of Article 7 TEU regarding the determination of a 'clear risk of a serious breach' of Article 2 TEU values has so far been applied against both Poland (2017)[72] and Hungary (2018)[73] but without any bite. However, if we take the formula developed in *Fransson* and subsequent case law,[74] then—with reference to Article 2 in conjunction with Article 7 TEU—the application of Article 51(1) CFR would basically be triggered in the case of any violation of fundamental rights.[75]

B. A Reinterpretation of Article 51(1) CFR Is Inefficient

The solution described above could be objected to in terms of its efficiency from two opposing directions. The first objection would concern the fear that if the protection of fundamental rights would be placed in the hands of the courts of the Member States, this may not be an effective way to protect fundamental rights, as local courts

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[70] See for further details text in note 94 below.

[71] For a convincing argument in favour of this variant, see already A von Bogdandy, 'Grundrechtsgemeinschaft als Integrationsziel?' (2002) 56 *JuristenZeitung* 157, p 158.

[72] The European Commission has for the first time identified a 'clear risk of a serious breach of the rule of law' due to the 'judicial reform' in Poland and therefore made a proposal to initiate proceedings on 20 December 2017 (COM(2017) 0835 final - 2017/0360).

[73] On 12 September 2018, the EP adopted a resolution calling on the Council—by 448 votes in favour, 197 against and 48 abstentions—to declare that there is a risk of a violation of Article 2 TEU-values in Hungary. 2017/2131(INL) OJ 2019, C 433, p 66; on the legality of not taking into account abstentions for the purpose of achieving the two-thirds majority pursuant to Article 354 AEUV, see *Hungary v Parliament*, C-650/18, EU:C:2021:426.

[74] *Julián Hernández*, note 43 above. On the fact that *Åkerberg Fransson* represents the end of the possibility of being able to refer only to national points of view with fundamental rights, cf 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* 1267, p 1303.

[75] See A Rosas, 'When Is the EU Charter of Fundamental Rights Applicable at National Level?' (2012) *Jurisprudencija/Jurisprudence* 1269, p 1282. The author rejected this for practical reasons (high workload) (p 1285).

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may not be sufficiently trained or may simply be corrupt.[76] While this is a legitimate concern, it applies to the whole essence of the preliminary reference mechanism, which is considered one of the key mechanisms for the success of the ECJ and European law in general.[77] While the gatekeeping role of national courts could make the reinterpretation less than perfect, we nevertheless think that through this *additional* means many individuals would be empowered, and at least some courts and some judges would actually make use of this possibility. As long as there are at least some independent judges (which is typically the situation in hybrid regimes), this additional option would be helpful.

The second objection relates to concerns that the ECJ would not be able to cope with an increased workload, which would probably occur if an unrestricted application of Article 51(1) CFR were to be accepted.[78] This is also a justified concern, not only in the context of the topic under discussion. Nevertheless, it would be wrong to reject fundamental rights cases because the ECJ is overloaded with (other) cases. This is simply not a legal argument, which should be of little weight, especially when Article 2 TEU values are at risk. Furthermore, just like in all cases when EU law is applied, the bulk of the work would be done by national judges, and not by the ECJ.

In addition, even in those Member States in which we have witnessed a violation of Article 2 TEU values, not all fundamental rights are violated constantly. We suggest the application of only those CFR fundamental rights that in the concrete situations are necessary for the protection of Article 2 TEU values—ie solely as a subsidiary solution.

C. Member State Conflicts Against the Background of the CFR

When the EU takes action, it is often seen as an indicator that there are multiple conflicts between the interests and values of the EU and those of the Member States. However, an application of the CFR as proposed here would be different from most proposals to address fundamental rights problems in Member States,[79] since, in the context of what is being presented here, the conflict would arise between a government of a Member State and a court of a Member State (the ECJ would only intervene indirectly through the preliminary reference procedure). It is therefore unlikely (though not impossible) that such situations would be presented as a fight against the Brussels bureaucracy. Meanwhile, imposing formal sanctions from outside on a state

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[76] C Closa, D Kochenov, and J H H Weiler, 'Reinforcing Rule of Law Oversight in the European Union' (EUI Working Papers RSCAS, 2014), pp 17, 21, http://cadmus.eui.eu/bitstream/handle/1814/30117/RSCAS_2014_25_FINAL.pdf?sequence=3.

[77] For a classic position, see K Alter, 'The European Court's Political Power' (1996) 19 *West European Politics* 458.

[78] A Rosas, note 75 above, p 1285; E M Frenzel, 'Die Charta der Grundrechte als Maßstab für Mitgliedstaatliches Handeln zwischen Effektivierung und Hyperintegration' (2014) 53 *Der Staat* 1, p 26.

[79] See, eg, the proposal for a Copenhagen Commission: J-W Müller, 'Safeguarding Democracy Inside the EU - Brussels and the Future of Liberal Order, 2012–2013' (2013) *Transatlantic Academy Paper Series*, www.transatlanticacademy.org/sites/default/files/publications/Muller_SafeguardingDemocracy_Feb13_web.pdf.

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to change domestic fundamental rights policy is largely ineffective, tends to reinforce the sense of siege within the Member State and ultimately only hits the wrong social groups.[80]

D. Creeping Assumption of Competence

Critical voices could argue that the suggested interpretation is not covered by the typical methods of legal interpretation as it contradicts the explicit wording of Article 51 (2) CFR stating that '[t]he Charter does not extend the field of application of Union law beyond the powers of the Union'.[81] Some hold, in addition, that the rationale of Article 51(1) CFR is that all instances when Member States act as 'agents' of Union law shall be comprised by EU fundamental rights.[82] However, instead of a fixation on a grammatical interpretation of what is covered by the word 'implementation', a teleological reading along the lines of the *effet utile* principle must not only take into account the historical intention of the drafters of this provision, but also the changed circumstances since then. Similarly, like the *clausula rebus sic stantibus*, the blatant disregard for fundamental values of EU law enshrined in Article 2 TEU, including fundamental rights violations in EU Member States these days, destabilises the entire Union legal order. For instance, a purely national violation of the fundamental rights of free media and free elections impact the autonomy of the EU legal order as national politicians become also European politicians and actors that undermine the liberal values of Article 2 TEU. Hence, a teleological reading of the term 'implementation' in Article 51(1) TEU ensures the unrestricted application of European fundamental rights in order to safeguard the unhampered implementation of EU law.[83]

Another obvious objection is that, according to Article 6 TEU and Article 51(1) CFR, the Charter should not be used to extend the competences of the EU.[84]

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[80] For a formal sanction mechanism (systemic infringement procedures), see K L Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions' in C Closa and D Kochenov (eds), *Reinforcing Rule of Law Oversight in the European Union* (Cambridge University Press, 2016).

[81] For an overview of critical voices of the ECJ's dynamic approach to legal interpretation generally, see T Horsley, 'Reflections on the Role of the Court of Justice as the "Motor" of European Integration: Legal Limits to Judicial Lawmaking' (2013) 50 *Common Market Law Review* 931, pp 937 ff. For the clear qualification that '[t]he Charter does not apply to MS activities expressly excluded from the scope of EU law', see T Lock, 'Article 51' in M Kellerbauer, M Klamert, and J Tomkin (eds), *Commentary on the EU Treaties and the Charter of Fundamental Rights* (Oxford University Press, 2019), para 8.

[82] See F Fontanelli, 'Implementation of EU Law Through Domestic Measures After *Fransson*: The Court of Justice Buys Time and "Non- preclusion" Troubles Loom Large' (2014) 39 *European Law Review* 682, p 684.

[83] While being sceptical about an ideologically driven harmonisation of EU fundamental rights, also E Spaventa, 'Should We "Harmonize" Fundamental Rights in the EU? Some Reflections about Minimum Standards and Fundamental Rights Protection in the EU Composite Constitutional System' (2018) 55 *Common Market Law Review* 997, p 1022, understands them as a 'safety net'.

[84] On this phenomenon in general and with regard to the Charter in particular, see S Prechal, 'Competence Creep and General Principles of Law' (2010) 3 *REALaw* 5, pp 16–20.

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However, if both Article 6 TEU and Article 51(2) CFR are interpreted in the light of Article 2 TEU, this limitation cannot affect the judicial enforcement of the Charter. Furthermore, the principle of subsidiarity (also mentioned in Article 51 CFR) is only applicable with regard to legislative competence and therefore has no impact on judicial authorities.[85] Thus we would be at a further step in the direction of federalisation.[86] However, this would not be the actual justification, but rather a side effect (or a price we should be prepared to pay) of the reinterpretation of Article 51(1) CFR outlined here.

VI. WHAT THE ECJ HAS ALREADY DONE AND COULD STILL DO

The history of the ECJ is marked by activism, in which decisions were taken that—to say the least—were not directly apparent from the text of the Treaty.[87] How did the Court get away with it? What common features can be derived from these progressive decisions?

(1) The arguments used in these cases were mostly teleological in nature, based either on the main purpose of European integration or on the purpose of specific regulations/institutions. The same would apply to the interpretation of Article 51(1) CFR sketched here: the protection of fundamental rights is intended as a value under Article 2 TEU.

(2) Institutionally, it was usually the European Commission that initially adopted a certain position, which was then followed by the ECJ.[88] In our case, this would be the Commission's explicitly stated aim to abolish the limits of Article 51(1) CFR. This has already actually happened: Viviane Reding, then Commissioner for Justice, Fundamental Rights and Citizenship, explicitly proposed this in her speech in Tallinn.[89]

(3) The third factor that makes dynamic decisions more likely is a malfunctioning legislative body.[90] This is also an obvious tick in the box: we see only the pretext of

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[85] X Groussot, L Pech, and G Petursson, note 32 above, p 23.

[86] See Torres Pérez, 'The Federalizing Force of the EU Charter of Fundamental Rights' (2017) 15 *ICON* 1080, p 1087, stating that 'marking the boundaries of the Charter is at the core of constitutional bargaining over EU federalism'. For concerns based on US experience, see A Knook, 'The Court, the Charter, and the Vertical Division of Powers in the European Union' (2005) 42 *Common Market Law Review* 367, pp 374–79. For a comparative perspective, see M Cappelletti, *The Judicial Process in Comparative Perspective* (Clarendon Press, 1989), p 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, for the centrifugal force of whatever Bill of Rights, L M Díez-Picazo, 'Notes sur la nouvelle Charte des Droits fondamentaux de l'Union européenne' (2001) *Rivista italiana di diritto pubblico comunitario* 665, p 674.

[87] See, eg, K Alter, *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe* (Oxford University Press, 2001).

[88] E Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 *American Journal of International Law* 1.

[89] V Reding, 'Observations on the EU Charter of Fundamental Rights and the future of the European Union', *Speech/12/403 FIDE Congress* (Tallin, 31 May 2012), http://europa.eu/rapid/press-release_SPEECH-12-403_en.pdf, although it wanted to achieve this goal by formally amending the contract.

[90] J H H Weiler, note 49 above.

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real action, eg in the form of the so-called rule of law framework [91]—the necessary majority of Member States is obviously missing.

(4) A common method of developing jurisdiction is to establish it but not claim it, or to use it in a way that does not conflict with a government. This famously happened in *Marbury v Madison*, but also in *Costa/ENEL*, where 'the ECJ declared the supremacy of EC law' but 'found that the Italian law […] did not violate EC law'.[92] The first step here could probably also be a decision in the format of *Costa/ENEL*, in which the full applicability of the Charter would be established without proving an actual violation.

We have already seen a similar step—albeit limited in consequence to judicial independence—taken by the ECJ in the case of *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, where the ECJ held that the material scope of Article 19(1) second subparagraph TEU applies in the '"the fields covered by Union law", irrespective of whether the Member States are implementing Union law, within the meaning of Article 51 (1) of the Charter'.[93] Albeit Poland was not a party in this case, the ECJ clearly had the Polish situation in mind when emphasising the importance of the principle of effective judicial protection enshrined in Article 19 (1) TEU in conjunction with Article 47 CFR.[94]

(5) In a second step—after establishing jurisdiction in a case without a finding of a violation—a violation would have to be established. The more obvious a violation of fundamental rights is and the more isolated the 'convicted' Member State is, the more likely the judgement establishing the violation will be accepted by the Member States.[95] We do not have to be pessimistic to predict that such cases could easily reach the ECJ in the near future.

The ECJ then applied the principle laid down in the *Associação* case just mentioned also 'against Poland', stating that while it is for the Member States, under the second subparagraph of Article 19(1) TEU, to 'establish a system of legal remedies and procedures ensuring effective judicial review in the fields covered by EU law',[96] the ECJ went on to say that

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[91] A new EU framework to strengthen the rule of law, COM(2014) 158 final/2, *Communication from the European Commission to the European Parliament and the Council*.

[92] K Alter, 'Who Are the "Masters of the Treaties"? European Governments and the European Court of Justice' (1998) 52 *IO* 121, p 131.

[93] *Associação Sindical*, C-64/16, paras 29, 190.

[94] Ibid, para 35.

[95] X Groussot, L Pech, and G Petursson, note 32 above, p 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 M Cartabia, 'Article 51 – Field of Application' in W B T Mock and G Demuro (eds), *Human Rights in Europe* (Carolina Academic Press, 2010), pp 318–19 (on similarities between some interpretations of Article 51 CFR and the 'doctrine of incorporation' of US constitutional law).

[96] *Commission v Poland*, C-619/18, EU:C:2019:531, paras 48–50; cf *Commission v Poland*, C-791/19, EU:C:2021:596, paras 52–53.

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> [t]he principle of the effective judicial protection of individuals' rights under EU law thus referred to in the second subparagraph of Article 19(1) TEU is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, […] which is now reaffirmed by Article 47 of the Charter.[97]

With this, the ECJ has taken an important step in the right direction towards protecting the rule of law by standing up for the independence of the judiciary.

The scope of the problems that can be achieved by means of Article 19(1) TEU in conjunction with Article 47 CFR is, however, limited. While other fundamental provisions of the TEU, such as Article 10(1) TEU, could be activated to deal with further problem areas, we aim at a complete protection of fundamental rights, which would also have a spill-over effect on potential future violations, such as those of freedom of the press and media. The step taken by the ECJ in the *Repubblika* ruling is noteworthy.[98] In *Repubblika v Il-Prim Ministru*, the ECJ linked a preliminary ruling by a Maltese court on judicial independence to the promise made at the time of accession to the EU under Article 49 TEU that the Union would be founded on the Article 2 TEU values and thus the obligation of Member States (they 'are thus required to ensure') to avoid any violation of these values.[99] With this, the ECJ has made Article 2 TEU justiciable to a certain extent.[100]

(6) In parallel to (4) and (5), the ECJ could also develop a discretionary doctrine similar to that of the ECtHR.[101] This would lead to the ECJ only having to intervene in cases where the common minimum level of fundamental rights protection would be violated. Such a doctrine would be similar to the concept of 'systemic deficiency',[102] since both provide a margin of manoeuvre, so to speak. The important difference, however, is that the decision on the limits of the margin of manoeuvre would remain with the judiciary and not with a political body, according to what has been argued here.

In summary, all the cards would be in the hands of the ECJ.[103] In all likelihood, the European institutions will not want to stop such a move by the ECJ. Rather, they

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[97] *Commission v Poland*, C-619/18, note 96 above, para 52.

[98] *Repubblika v Il-Prim Ministru*, C-896/19, EU:C:2021:311, paras 60 ff.

[99] Ibid, para 64.

[100] For an analysis, see M Leloup, D Kochenov, and A Dimitrovs, 'Non-Regression: Opening the Door to Solving the "Copenhagen Dilemma"? All the Eyes on Case C-896/19 *Repubblika v Il-Prim Ministru*' (RECONNECT Working Paper No 15, June 2021).

[101] On the exercise of discretion as a special case of the 'deference doctrine', see A Legg, *The Margin of Appreciation in International Human Rights Law* (Oxford University Press, 2012), pp 17 ff.

[102] See A von Bogdandy, C Antpöhler, and M Ioannidis, 'Protecting EU Values' in A Jakab and D Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press, 2017), pp 218–33.

[103] M Höreth, 'Warum der EuGH nicht gestoppt werden sollte – und auch kaum gestoppt werden kann' in U Haltern and A Bergmann (eds), *Der EuGH in der Kritik* (Mohr Siebeck, 2012), pp 73–112. On the quasi-impeachability of the ECJ's judgments, see M Höreth, 'The Least Dangerous Branch?' in M

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appear paralysed and would probably be happy if someone other than themselves were to pull the coals out of the fire. The Member States, after all, have no possibility of doing so. Coalitions of Member States against ECJ rulings and threats of a judicial Armageddon are highly unrealistic. As Marcus Höreth put it:[104]

> 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.

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

With judicial statesmanship, patience for the right cases and a deliberate strategy, decisive steps towards a complete fundamental rights union could be achieved in the near future. To this end, the ECJ would have to live up to its responsibility both in promoting European integration and the values of the European Union. If we are looking for the right *Toynbee*-response to the current historical challenge of dismantling the rule of law in the Member States, this seems to be an essential component.

VII. CONCLUSION

Every society is held together by certain values that are, at least rhetorically, indisputable. Since the end of World War II in Western Europe and since the end of communism throughout Europe, the secular values of constitutionalism have had an integrative function. The twentieth century in Europe can also be seen as a time of experimentation and failure with the then new secular taboo systems such as nationalism or socialism. Democracy and the protection of fundamental rights seem to be the only credible options for shaping society in Europe today. Of course, there are endless debates about what these concepts actually mean.[105] But the difficulty of defining the values mentioned in Article 2 TEU should not lead to a situation where these values are simply ignored. There have been and will continue to be attempts to question these values, but if we want to believe that European integration has a chance, we must stop these attempts before it is too late. If it is allowed in one EU Member State, it will be allowed in another and in no time at all the European edifice that rests on these values will crumble surprisingly quickly. Inaction contributes to the erosion of the EU's moral and institutional capital. The apparent tension between the EU's enforcement weakness on the one hand, and its (implicit) legal

(F'note continued)

Dawson, B De Witte, and E Muir (eds), *Judicial Activism at the European Court of Justice* (Edward Elgar, 2013), pp 39–40.

[104] M Höreth, 'The Least Dangerous Branch?', note 103 above, pp 43–44.

[105] W B Gallie, 'Essentially Contested Concepts' (1956) *Proceedings of the Aristotelian Society* 167.

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obligation to strengthen the rule of law on its territory on the other hand, has serious consequences.

An application of the CFR if Article 2 TEU values are violated by Member States would give the European Union the possibility to put a stop to dangerous tendencies. The ECJ could thus enforce the values of European integration and, through the preliminary ruling procedure, turn all courts of the Member States into local actors that profess and enforce these values. An important part of the solution lies (as so often in the history of the Western constitutional state) with the judiciary. The judiciary is the traditional guardian of the rule of law, which should not be understood as blind adherence to the law, but as a powerful institution whose task is, among other things, to put a stop to the arbitrary use of state power. Under the current institutional circumstances, much of the responsibility lies with the ECJ, which could rise to the challenge by taking further steps towards completing the European fundamental rights union, which could ultimately make the Charter applicable in purely domestic cases if necessary.

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