Federalization through Rights in the EU

A Legal Opportunities Approach

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Abstract

While academic contributions abound on the reach and impact of the European Union (EU) system of fundamental rights protection, and notably on the desirability of a more or less extensive control of Member States' actions in light of the rights protected by the EU Charter of Fundamental Rights, there have been few attempts to explain the dynamics of integration-through-rights in the EU. This article proposes an explanatory framework inspired by a legal opportunities approach, which emphasizes the relevance of national and EU legal opportunities, and interactions between them, in determining the actual scope and pace of federalization through rights in the EU. It suggests that the weaker the legal opportunities for fundamental rights protection are at the domestic level, the greater the federalizing pressure is, and call for more empirical comparative studies to test this framework out.

Keywords: EU Charter of Fundamental Rights, Federalization, Integration, Legal change, Legal opportunities, Litigation, Scope of application.

A Introduction

> [T]here 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 proven.[1]

In the European Union (EU), the protection of fundamental rights came about as the result of interactions between EU and national courts. The principle of respect for fundamental rights, as well as the standards and purview of human rights protection have, eventually, been codified in the EU treaties and the EU Charter of Fundamental Rights (the Charter). Under the current regime, unlike

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1 M. Cappelletti, *The Judicial Process in Comparative Perspective*, Wotton-under-Edge, Clarendon, 1998, p. 395.

other federal-type polity, the protection of fundamental rights is only partially federalized, as the scope of application of EU fundamental rights provisions is qualified. Indeed, the Charter applies to Member States only when they 'implement' EU law. This implies that federal (*i.e.* EU) institutions and national courts as ordinary courts for the application of EU law can control Member States' respect for the Charter only when these act within the scope of EU law. Outside this, merely political mechanisms are available to protect human rights against Member States, which have proven, so far, largely ineffective. The scope of application of the EU federal 'Bill of Rights' is defined differently by political and judicial actors at both the EU and the national levels and is widely debated in academic circles. Still, we know relatively little about the dynamics that impact on policy and judicial actors' positions on the scope of the Charter. This article, informed by legal analyses and drawing on socio-legal and political science scholarship, proposes a conceptual framework for understanding variations in the scope and pace of 'federalization through rights' in the EU, based on interactions between legal opportunities at the EU and national levels. It suggests that, provided certain conditions are met, the weaker the legal opportunities for fundamental rights protection are at the domestic level, the greater the federalizing pressure is.

The article, first, summarizes the evolution of the EU system of fundamental rights protection and identifies gaps in the scholarly understanding of what determines federalization through rights in the EU. It then proposes and exposes a conceptual framework based on interactions between EU and national legal opportunities, which can help explain the pace and scope of the EU's fundamental rights supervision over Member States' actions. Outlining key aspects of EU legal opportunities, it develops a general argument as to the main dynamics of federalization through rights, before calling for more comparative empirical analyses of national legal and judicial structures and attitudes, as well as Charter-based litigation patterns.

B The Evolution of the EU System of Fundamental Rights Protection and Federalization through Rights in the EU

The EU system of fundamental rights protection, which has become a core element of European integration, has generated a wealth of legal analyses. These focus merely on judicial developments at the EU level, offering assessments rang-

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ing from criticism to praise.[2] The scope and desirability of federalization through rights in the EU are among the most discussed and contested issues.[3]

I From 'the Missing' to a Core EU Value

The protection of fundamental rights featured prominently in early post-WWII European ideals. However, the failure of the more ambitious political integration projects and the low-key functional approach pursued in the 1950s within the European Communities, focused on sectoral and market integration, left fundamental rights guarantees aside. Member States were entrusted with ensuring respect for fundamental rights, under the supervision of the Council of Europe's institutions, notably the Strasbourg-based European Court of Human Rights (ECtHR), which was to enforce the minimum standards laid down in the European Convention on Human Rights (ECHR).[4]

However, soon enough, pressure mounted on what is now the Court of Justice of the European Union (CJEU) to ensure that EU institutions, and Member States when they act as the long-arm of the EU, respect human rights. Eventually, the CJEU established that EU institutions, as well as Member States, when acting within the scope of EU law, should respect fundamental rights as a general princi-

2 For key contributions, *see* Ph. Alston & J.H.H. Weiler, 'An "Ever Closer Union" in Need of a Human Rights Policy', *European Journal of International Law*, Vol. 9, No. 4, 1998, p. 658-723; J. Coppel & A. O'Neill, 'The European Court of Justice: Taking Rights Seriously?', *Legal Studies*, Vol. 12, No. 2, 1992, p. 227-239; J.H.H. Weiler & N.J.S. Lockhart, '"Taking Rights Seriously" Seriously: The European Court and Its Fundamental Rights Jurisprudence-Part 1', *Common Market Law Review*, Vol. 32, 1995, p. 51; A. von Bogdandy, 'The European Union as a Human Rights Organization-Human Rights and the Core of the European Union', *Common Market Law Review*, Vol. 37, 2000, p. 1307; A. Williams, *EU Human Rights Policies: A Study in Irony*, Oxford, Oxford University Press, 2004. Moreover, dedicated chapters on EU human rights are now a standard feature of EU law textbooks, such as P. Craig & G. de Búrca, *EU Law: Text, Cases, and Materials*, 6th ed., Oxford, Oxford University Press, 2015.

3 *See*, notably, P. Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question', *Common Market Law Review*, Vol. 39, 2002, p. 945; K. Lenaerts & J. A. Gutiérrez-Fons, 'The Constitutional Allocation of Powers and General Principles of EU Law' *Common Market Law Review*, Vol. 47, 2010, p. 1629; A. Knook, 'The Court, the Charter, and the Vertical Division of Powers in the European Union', *Common Market Law Review*, Vol. 42, 2005, p. 367; K. Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights'. *European Constitutional Law Review*, Vol. 8, No. 3, 2012, p. 375-403; D. Sarmiento, 'Who's Afraid of the Charter; The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe', *Common Market Law Review*, Vol. 50, 2013, p. 1267; A. Ward, 'Article 51 – Field of Application', *in* S. Peers, T. Hervey, J. Kenner & A. Ward (Eds.), *The EU Charter of Fundamental Rights: A Commentary*, Baden-Baden, Nomos, p. 1456-1497; A. von Bogdandy, M. Kottmann, C. Antpohler & J. Dickschen, 'Reverse Solange-Protecting the Essence of Fundamental Rights against EU Member States', *Common Market Law Review*, Vol. 49, 2012, p. 489; E. Spaventa, 'Federalisation versus Centralisation: Tensions in Fundamental Rights Discourse in the EU', *in* M. Dougan & S. Currie (Eds.), *50 Years of the European Treaties: Looking Back and Thinking Forward*, Oxford, Hart Publishing, 2009; 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', *European Constitutional Law Review*, Vol. 9, No. 3, 2013, p. 391-419.

4 *See* G. de Búrca, 'The Evolution of EU Human Rights Law', *in* P. Craig & G. De Búrca, *The Evolution of EU law*, 2nd edn., Oxford, Oxford University Press, 2011, p. 465-498.

ple of law.[5] Over the years, it developed a substantial judge-made catalogue of EU fundamental rights.

The EU political actors followed suit. Successive Treaty revisions, starting with Maastricht (1992), strengthened the principle of respect for fundamental rights in the EU (Art. 6 TEU) and upgraded it to the status of a core EU value (Art. 2 TEU). They confirmed it as a condition of accession (Art. 49 TEU) and empowered the EU political institutions to intervene and impose sanctions on Member States for systemic violations of human rights (Art. 7 TEU).[6]

The judge-made EU law doctrine of fundamental rights protection as a general principle of law was codified into the EU Charter of Fundamental Rights, drafted by a special convention in 2000.[7] First adopted only as a political declaration, owing to the notorious resistance of one Member State, it finally obtained primary status and became legally binding with the coming into force of the Treaty of Lisbon in 2009 (Art. 6(1) TEU). Its scope of application is, nonetheless, strictly limited. It is applicable to EU institutions and bodies and to Member States 'only when they implement' EU law (Art. 51(1) of the Charter), and it cannot expand EU competences (Art. 51(2) of the Charter).

Despite the growing prominence of the principle of respect for fundamental rights in the EU legal framework, and its increased political relevance in the process of European integration, the CJEU, for long, displayed a marked reluctance to invalidate EU measures, in particular legislative acts, on human rights grounds.[8] In recent years, in particular since the Charter has become legally binding, the CJEU has started to exercise a more robust scrutiny over compliance by the EU legislators and executives with fundamental rights, especially in the fields of non-discrimination, and the protection of civil liberties, such as due process and privacy, notably in the sensitive context of the fight against terrorism.[9] However, in this article, which is concerned with federalization through rights, we focus on the scope and intensity of EU judicial control over Member States' compliance with the rights laid down in the Charter.

5 Case 29/69, Erich Stauder *v. Stadt Ulm, ECLI*:EU:C:1969:57; 11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, ECLI*:EU:C:1970:114; Case 4/73, J. Nold, *Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities, ECLI*:EU:C:1975:114; Case *5/88*, *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft, ECLI*:EU:C:1989:321; Case C-260/89, *Elliniki Radiophonia Tileorassi Anonimi Etairia* (ERT *AE*), ECLI:EU:C:1991:254; Case C-309/96 *Daniele Annibaldi v. Sindaco del Comune di Guidonia and Presidente Regione Lazio, ECLI*:EU: *C*:1997:631.

6 The Treaty also requires the EU to accede to the ECHR, *see* Art. 6(2) TEU. However, the draft agreement was ruled as incompatible with EU law by the CJEU in 2014, which stalled the process of accession Opinion 2/13 18 December 2014, ECLI:EU:C:2014:2454.

7 G. de Búrca, 'The Drafting of the EU Charter of Fundamental Rights', *European Law Review*, Vol. 26, No. 2, 2001, p. 126-138.

8 *See, e.g.* Weiler & Lockhart, 1995, p. 51; Williams, 2004.

9 For an overview on recent developments, *see* Craig & De Burca 2011, Chap. 11; in relation to surveillance and data protection, *see* M.-P. Granger & K. Irion, 'The Court of Justice and the Data Retention Directive in Digital Rights Ireland: Telling off the EU Legislator and Teaching a Lesson in Privacy and Data Protection', *European Law Review*, Vol. 39, No. 4, 2014, p. 835-850.

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II Federalization through Rights in the EU: A 'Work in Progress'

Federalization through rights has both institutional and substantive dimensions. In the EU context, its institutional dimension consists in the process through which supervision over the EU and Member States' respect for human rights is increasingly exercised by federal-level institutions, that is the EU's judicial organ (the CJEU) and, to a lesser extent, the EU's central political organs (essentially the European Commission, but also the European Parliament, Council of Ministers and European Council). Given the limited effectiveness of existing political control mechanisms, the article de facto focuses on the judicial aspects of 'institutional federalization', and centres around the role of the CJEU and European Commission. The substantive dimension relates to the process through which control over the respect for fundamental rights is increasingly based on federal standards, *i.e.* those laid down in the Charter, general principles of law and dedicated EU legislation. At the current stage of development, the degree of federalism around rights achieved in the EU is more limited than in other federal-type systems, such as the United States or Germany.[10]

In the EU, where a situation is characterized as one in which a Member State is implementing EU law, the applicable standards are the Charter and general principles of EU law (Art. 6(1) TEU, Art. 51 of the Charter). The bulk of the respect for EU human rights norms is entrusted to national courts, in the context of domestic litigation against public or private measures violating those norms (decentralized enforcement). These are supported by the CJEU, which can, through preliminary rulings mechanism, confirm that Member States' authorities acted in violation of EU norms and clarify the implications. Alternatively, the European Commission can launch infringement proceedings under Article 258 TFEU (centralized enforcement), against Member States' acts that fall foul of EU human rights.

When Member States are not implementing EU law, though, the applicable standards are determined by national constitutions, subject to the minimum requirements of the ECHR. They are enforced through national courts, with a possibility for individuals to 'take their case to Strasbourg', once domestic remedies have been exhausted. Outside the scope of EU law, when Member States fail to live up to their human rights commitments, the EU institutions have only limited tools. The central formal mechanism is Article 7 TEU introduced by the Treaty of Amsterdam, and further developed following the Austrian 'Haider affair'.[11] This enables EU institutions to intervene preventively in case of a 'clear risk of serious breach' of Article 2 TEU values, as well as to determine the existence of a

10 However, the process through which federalization around rights is shaping in the EU evokes parallels with American historical developments, *see* Cs. I. Nagy, 'Do European Union Member States Have to Respect Human Rights? The Application of the European Union's Federal Bill of Rights to Member States', *Indiana International and Comparative Law Review*, Vol. 27, No. 1, 2017, pp. 1-13

11 *See* M. Merlingen, C. Mudde & U. Sedelmeier, 'The Right and the Righteous? European Norms, Domestic Politics and the Sanctions against Austria', *Journal of Common Market Studies*, Vol. 39, 2001, p. 59-77; W. Sadurski, 'Adding a Bite to a Bark: The Story of Article 7, EU Enlargement, and Jorg Haider', *Columbia Journal of European Law*, Vol. 16, 2009, p. 385.

'serious and persistent breach' and impose sanctions, such as the withdrawal of voting rights, on deviant Member States. However, it can be triggered only in case of systemic problems, and it is not apt to tackle individual violations of human rights. Moreover, the high political thresholds required to activate sanctions against a Member State seriously undermine its effectiveness.[12]

The salience of the problem became more pronounced over recent years, as a number of Member States, notably Hungary and Poland, are backsliding into 'illiberal democracies', thereby calling into question their commitments to Article 2 TEU values. In this context, the issue of the EU's capacity to enforce fundamental rights on recalcitrant Member States has gained prominence among scholars[13] and has brought the question of federalization through rights back to the fore.

The issue is also on the policymakers' table. To address the shortcomings of the current treaty framework, the Commission, in 2014, developed a new informal 'Rule of Law' Mechanism, to be deployed in case of threats to rule of law, including systemic disregard of human rights, in a Member State.[14] This new mechanism was activated against Poland in 2016 over concerns concerning, notably, judicial independence, but produced little effects.[15] Members of the European Parliament also initiated enquiries, issued reports and supported studies and measures aimed at exposing breaches of EU values by certain Member States and pressuring them to conform to European norms, while the Council opted for a more cautious approach.[16] These have proved largely ineffective so far. Eventually, on 20 December 2017, having exhausted the dialogue possibilities, the Commission resigned itself to initiating an Article 7 procedure against Poland.[17] How-

12 For a recent analysis, *see* L. Besselink, 'The Bite, the Bark and the Howl – Article 7 TEU and the Rule of Law Initiative', *in* A. Jakab & D. Kochenov (Eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford, Oxford University Press, 2017, p. 128-144.

13 *See* contributions in C. Closa & D. Kochenov (Eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge, Cambridge University Press, 2016; L. Pech & D. Kochenov (Eds), 'The Great Rule of Law Debate in the EU', *Journal of Common Market Studies*, Vol. 54, No. 5, 2016, pp. 1043-1104; P. Bárd, S. Carrera, E. Guild & D. Kochenov, 'An EU mechanism on Democracy, the Rule of Law and Fundamental Rights', *CEPS Paper in Liberty and Security No 91*, 2016; A. Jakab & D. Kochenov (Eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford University Press, 2017.

14 European Commission, Communication on a 'A new EU Framework to strengthen the Rule of Law', 11 March 2014, COM(2014) 158 final.

15 *See, e.g., Z. Szente*, 'Challenging the Basic Values – the Problems of the Rule of Law in Hungary and the Failure of the European Union to Tackle Them', *in* A. Jakab & D. Kochenov (Eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford University Press, 2017; M.-P. Granger, O. Salat & A. Śle dzińska-Simon, 'Securing respect for civil rights by EU member states, within and beyond the scope of application of EUlaw', *in* H. de Waele, M.-P. Granger & S. de Vries (Eds.), *Civil Rights and EU Citizenship: Challenges at the Crossroads of the European, National and Private Sphere. Interdisciplinary Perspectives on EU Citizenship Series*, Vol. 6, Cheltenham, Edward Elgar (forthcoming).

16 For an assessment of the robustness and effectiveness of these various 'Rule of Law' initiatives, *see* the contributions in Pech & Kochenov, 2016, p. 1043-1104.

17 European Commission, Rule of Law: The Commission acts to defend judicial independence in Poland, 20 December 2017, press release, available at: http://europa.eu/rapid/press-release_IP-17-5367_en.htm.

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ever, Hungary's support for Poland means that the procedure is unlikely to result in any sanction.

In this context of political paralysis, pressure is mounting on courts to 'do something' to ensure respect for human rights in the Member States. While there are many questions concerning the desirability and effectiveness of an increased (EU) judicial control over Member States' actions that affect human rights,[18] there is less academic engagement with the factors and dynamics of federalization around rights.

C The Mysterious Dynamics of Federalization through Rights in the EU

While the dynamics of 'integration-through-law' have been subject to intense scrutiny and offered a fertile playground for competing theoretical explanations, we know relatively little about what determines 'integration-through-rights' in the EU, that is, the extent to which the EU and national courts uphold Charter rights against Member States.

I Legal Scholarship on the Development of the EU System of Fundamental Rights – Forgetting the Litigants

Legal scholars who study the evolution of EU human rights law tend to focus on the critical analysis of legal texts and reasoning or normative arguments. Their works, nonetheless, regularly refer to broader contextual factors that influence the development of the EU fundamental rights framework. They have described how the CJEU's doctrines of supremacy and direct effect, combined with the use of the preliminary reference procedure (Art. 267 TFEU) as an EU law enforcement

18 For academic calls in that direction, *see* A. von Bogdandy, M. Kottmann, C. Antpohler & J. Dickschen, 'Reverse Solange-Protecting the Essence of Fundamental Rights against EU Member States', *Common Market Law Review*, Vol. 49, 2012, p. 489; K.L. Scheppele, 'Enforcing the Basic Principles of EU Law through Systemic Infringement Actions', *in* C. Closa & D. Kochenov (Eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge, Cambridge University Press, 2016, p. 105-132; D. Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make it a Viable Rule of Law Enforcement Tool', *Hague Journal on the Rule of Law*, Vol. 7, No. 2, 2016, p. 153-174; A. Jakab, 'The Application of the Charter of Fundamental Rights by National Courts', *in* A. Jakab & D. Kochenov (Eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford, Oxford University Press, 2017, pp. 252-262. On the risks the 'judicialization' of rule of law protection may raise, *see* M. Blauberger & D. Kelemen, 'Can Courts Rescue National Democracy? Judicial Safeguards against Democratic Backsliding in the EU', *Journal of European Public Policy*, Vol. 24, No. 3, 2017, p. 321-336.

device,[19] triggered constitutional courts' resistance, which, in turn, exerted pressure on the CJEU to review EU measures against human rights' standards. Indeed, the German constitutional court, in particular, which had received a strong constitutional mandate to ensure the protection of fundamental rights, refused to surrender to the unconditional authority of EU law, so long as the EU did not provide for suitable fundamental rights protection (the so-called *Solange* doctrine).[20] Consequently, the CJEU confirmed that the EU upheld fundamental rights as general principles of EU law and checked EU measures against them. Eventually, national (constitutional) courts came to acknowledge that the EU system of fundamental rights protection had developed significantly, to a level equivalent to that offered by national constitutions, and agreed to relinquish the daily monitoring of the compatibility of EU measures and national implementing acts with fundamental rights, entrusting it to the CJEU.[21] They, however, retained the option to resume control, when national fundamental rights would be under threat, in particular if they form part of the national constitutional identity (by reference to Art. 4(2) TEU), or where an EU act or CJEU decision is *ultra vires*.[22]

More recent developments, including the Court's initial reluctance to refer to the Charter and its contemporary use of it, at times timorous and at other times more daring, to sanction both EU and Member States' violations of fundamental rights, though well documented and criticized, have not generated much systematic investigation.[23] Speculations abound as to the motives of the Court's inconsistent jurisprudence. For example, in 2013, the Court went for a relatively expansive interpretation of the scope of Article 51(1) of the Charter in the

19 Case 6/64, *Flaminio Costa v. ENEL*, ECLI:EU:C:1964:66; Case 106/77, *Amministrazione delle Finanze dello Stato v*. Simmenthal *SpA* (Simmenthal *II*), ECLI:EU:C:1978:49; Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratis der Belastingen, ECLI*:EU:C:1963:1. For seminal 'law-in-context' accounts of this constitutionalization process, *see* J.H.H. Weiler, 'The Transformation of Europe', *Yale Law Journal*, Vol. 100, No. 8, 1991, p. 2403-2483; J.H.H. Weiler, 'A Quiet Revolution: The European Court of Justice and Its Interlocutors', *Comparative Political Studies*, Vol. 26, No. 4, 1994, p. 510-534; G.F. Mancini, 'The Making of a Constitution for Europe', *Common Market Law Review*, Vol. 26, 1989, p. 595; E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', *American Journal of International Law*, Vol. 75, No. 1, 1981, p. 1-27.

20 *See, e.g.*, Solange I (Internationale Handelsgesellschaft) (Case 2 BvL 52/71) [1974].

21 *See, e.g.*, Solange II (Wünsche Handelsgesellschaft), Decision of 22 October 1986, BVerfGE 73, 339.

22 *See* BVerfG, Judgment of the Second Senate of 30 June 2009 – 2 BvE 2/08 – paras. (1-421), available at: www.bverfg.de/e/es20090630_2bve000208en.html. For an overview of the relationship between the CJEU and the German Constitutional Court, *see* F. Mayer, 'Defiance by a Constitutional Court – Germany', *in* A. Jakab & D. Kochenov (Eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford, Oxford University Press, 2017, p. 403-421. For a recent analysis of the evolving attitude of national constitutional courts towards EU law in the context of the protection of fundamental rights and compliance, *see* D. Piqani, 'The Role of National Constitutional Courts in Issues of Compliance', *in* M. Cremona (Ed.), *Compliance and the Enforcement of EU Law*, Oxford, Oxford University Press, p. 132-156.

23 But see, for an attempt at conceptualizing it, M. Dougan, 'Judicial Review of Member State Action under the General Principles and the Charter: Defining the "Scope of Union Law"', *Common Market Law Review*, Vol.52, No. 5, 2015, p. 1201-1245.

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ruling.[24] The German constitutional court promptly reacted and contested the potentially far-reaching implications of *Akerberg Fransson* for national autonomy.[25] The Luxembourg's judges' more cautious and circumscribed approach in later cases could be attributed to a Court's desire to appease their Karlsruhe colleagues.[26] Studies that go beyond legal analysis to include contextual factors highlight the EU and national courts as the key protagonists.[27] It is, nonetheless, widely accepted, thanks to political science and socio(legal) scholarship, that public and private litigants, be they individuals or organizations, and lawyers, have played a key role in the process of legal integration in Europe,[28] and their role in the development of EU fundamental rights case law therefore deserves some investigation.

II Political Sciences and the Scope of Application of the Charter – The Rule of Law Turn (Away)

Existing legal accounts of the development of the EU system of fundamental rights' protection, focused on an analysis of the Charter and CJEU case law and legal reasoning, do not engage in systematic assessments of the contextual factors that trigger Charter-based litigation before national and EU courts and thus influence legal developments of EU law. Social and political scientists are, by training, inclined to ask 'why' questions, what leads them naturally to investigate the social and political dynamics of particular case-law developments. They have, over the years, put forward elaborate explanations for the 'constitutionalization' of the EU legal order, and the federalization process that ensues. However, they have not yet investigated the specific dynamics of integration-through-rights in the EU.

24 Case C-617/10, *Hans Åkerberg Fransson*, ECLI:EU:C:2013:280.

25 FCC, judgment of 24 April 2013, 1 BvR 1215/07, *Counter-Terrorism Database*. *See* Thym, 2013, p. 391-419.

26 *See, e.g.* C-198/13, *Víctor Manuel Julian Hernández and Others v. Reino de España (Subdelegación del Gobierno de España en Alicante)*, ECLI:EU:C:2014:691.

27 On the role of national courts in the application of the Charter, *see* L. Burgorgue-Larsen (Ed.), *La Charte des Droits Fondamentaux saisie par les juges en Europe/The Charter of Fundamental Rights as apprehended by judges in Europe*, Paris, Pedone, 2017.

28 On the role of private litigants in the process of European integration, *see* W. Mattli & A.-M. Slaughter, *Constructing the European Community Legal System from the Ground Up: The Role of Individual Litigants and National Courts No. 6*, Jean Monnet Chair, 1996; A.S. Sweet & T. Brunell, 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community', *American Political Science Review*, Vol. 92, 1998, p. 63. On the role of the Commission lawyers, *see* E. Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution', *American Journal of International Law*, Vol. 75, No. 1, 1981, p. 1-27; M. Rasmussen, '*Revolutionizing European Law: A History of the Van Gend en Loos Judgment*', International Journal of Constitutional Law, Vol. 12, No.1, 2014, p. 136-163. On the prominent role played by a particular activist lawyer in the development of EU non-discrimination law, *see* R. Cichowski, 'Judicial Rulemaking and the Institutionalization of European Union Sex Equality Policy', *in* A.S. Sweet, W. Sandholtz & N. Fligstein (Eds.), *The Institutionalization of Europe*, Oxford, Oxford University Press, 2001, p. 117. On the role of civil society and interest groups in the legal mobilization of EU law, *see* C. Harlow & R. Rawlings, *Pressure through law*, London, Routledge, 2013.

Political science works that sought to explain the CJEU's adoption and domestic reception of the principles of supremacy or direct effect acknowledge the relevance of legal factors (*e.g.* the nature of EU law, litigation patterns, the role of precedent and legal reasoning) but emphasize the importance of 'socio-political' variables, such as institutional preferences, the dynamics of the EU political decision-making processes, the nature of interactions between courts and socialization patterns as factors that impact on integration-through-law and judicialized governance in the EU.[29] They have, however, not (yet) offered systematic explanations of EU and national courts' positions on the application of EU human rights standards to Member States. The political science literature has generated important insights into the dynamics of compliance with EU law, which stress the essential role played by legal and political mobilization of societal actors but have not closely studied the application and interpretation of EU law by national courts, included in cases involving fundamental rights.[30] Recent EU Rule of Law scholarship is, for its part, concerned more with exposing the nature of the threats to the rule of law and democracy, and explaining the (in)action of political actors, and their effects, than with addressing the integrative aspects of rights' protection in the EU.[31]

Political sciences analyses bear relevance in explaining federalization through rights in the EU, but the distinctive features of the European fundamental rights landscape (*e.g.* overlapping and competing human rights frameworks) and changing socio-political contexts (*e.g.* the rise of anti-elitism, populism and anti-European sentiment) call for a more specific assessment and possible adjustments of existing theoretical frameworks.

D A Legal Opportunities Perspective – Going to the Roots of Federalization through Rights

The 'opportunity' framework, originally developed by the social movements literature to explain policy changes, has been adapted by socio-legal scholars to

29 *See*, notably, A.-M. Slaughter, A.S. Sweet & J.H.H Weiler (Eds.), *The European Court and National Courts: Doctrine & Jurisprudence: Legal Change in Its Social Context*, Oxford, Hart Publishing, 1998; K.J. Alter, *Establishing the Supremacy of European Law: The Making of an International Rule of Law in Europe*, Oxford, Oxford University Press, 2001. For reviews of political sciences' analyses of the dynamics of legal integration, *see* A.S. Sweet, 'The European Court of Justice and the Judicialization of EU Governance', *Living Reviews in European Governance*, Vol. 5, No. 2, 2010, p. 14-22; *see also* C. Carrubba & M. Gabel, 'International Courts: A Theoretical Assessment', *Annual Review of Political Sciences*, Vol. 20, 2017, p. 55-73; R. Daniel Kelemen & S. K. Schmidt, 'Introduction – The European Court of Justice and Legal Integration: Perpetual Momentum?', *Journal of European Public Policy*, 2012 , Vol. 19, No. 1, p. 1-7.

30 For a similar observation, *see* L. Conant, 'Compliance and What EU Member States Make of It', *in* M. Cremona (Ed.), *Compliance and the Enforcement of EU Law*, Oxford, Oxford University Press, 2012, p. 1-30.

31 *See, e.g.*, A. Batory, 'Defying the Commission: Creative Compliance and Respect for the Rule of Law in the EU', *Public Administration*, Vol. 94, No. 3, 2016, p. 685-699; U. Sedelmeier, 'Political Safeguards against Democratic Backsliding in the EU: The Limits of Material Sanctions and the Scope of Social Pressure', *Journal of European Public Policy*, Vol. 24, No. 3, 2017, p. 337-351.

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explore the dynamics of court-driven policy reform.[32] As briefly exposed earlier, the process of federalization through rights in the EU remains largely a court-driven process. But, courts are reactive institutions. They respond to disputes brought before them by litigants and their legal counsels. Therefore, an approach that emphasizes the opportunities for mobilizing courts to ensure Member States' compliance with EU fundamental rights appears particularly suited to explaining the development of human rights protection in the EU and its federalizing dimension.

I Legal Opportunities Components

Legal opportunities include various components: substantive aspects, procedural and institutional dimensions, material conditions and, finally, institutional receptiveness.[33] Substantive aspects concern primarily legal standards. In our case, the key variable is the degree of protection respectively afforded by EU and national human rights standards.[34] Where the EU provides for stronger protection for rights, in general, or for a particular right, individuals, activist lawyers and civil society actors who work to promote that right are more tempted to invoke EU law instead of national law, and to bring matters within the scope of EU law, thereby pushing for greater federalization through rights.[35] Conversely, where national law offers better protection, litigants are likely to stay within the confines of the national legal system, thereby not causing much federalizing pressure.[36] In the specific context of the EU human rights regime, one can identify another key 'contingent' element: the interpretation of the scope of EU law. Indeed, as

32 *See* E.A. Andersen, *Out of the Closet and into the Courts: Legal Opportunity Structure and Gay Rights Litigation*, Ann Harbor, University of Michigan Press, 2005. For application in the EU context, *see* C. Hilson, 'New Social Movement: The Role of Legal Opportunity', *Journal of European Public Policy*, Vol. 9, 2002, p. 238-255; R. Cichowski, *The European Court and Civil Society: Litigation, Mobilization and Governance*, Cambridge, Cambridge University Press, 2007; R.E. Case & T.E. Givens, 'Re-engineering Legal Opportunity Structures in the European Union? The Starting Line Group and the Politics of the Racial Equality Directive', *Journal of Common Market Studies*, Vol. 48, No. 2, 2010, p. 221-241; L. Vanhala, 'The Paradox of Legal Mobilization by the UK Environmental Movement', *Law and Society review*, Vol. 47, No. 3, 2012, p. 523-556.

33 Hilson 2002, Case & Givens 2010, p. 221-241.

34 For a comparative study on the range of civil rights that receive protection across selected EU Member States and where there are 'deficiencies', *see* H. Van Eijken & S. de Vries 'The Legal Framework for Civil Rights Protection in National and International Context (Deliverable 7.1)', *Barriers Towards EU Citizenship* (2015), available at: https://zenodo.org/record/16530/files/Deliverable_7.1_final.pdf, and M.-P. Granger & O. Salat, *Report Exploring the Mechanisms for Enforcing Civil Rights with a View to Identifying the Barriers*, 2016, Barriers Towards EU Citizenship, doi:10.5281/zenodo.46835.

35 For an illustration in the context of the promotion of LGBT rights through activation of EU citizenship free movement rules, *see* U. Belavusau & D. Kochenov, 'Federalizing Legal Opportunities for LGBT Movements in the Growing EU', *in* K. Slootmaeckers, H. Touquet & P. Vermeersch (Eds.), *The EU Enlargement and Gay Politics*: *The Impact of Eastern Enlargement on Rights, Active and Prejudice*, Basingstoke, UK Palgrave McMillan, 2016, p. 69-96.

36 Art. 53 of the Charter of Fundamental Rights suggests that Member States can afford higher standards. However, lower EU standards must prevail when their application would undermine the supremacy, effectiveness and autonomy of EU law. *See* Case C-202/04, *Stefano Macrino and Claudia Capodarte v. Roberto Meloni*, ECLI:EU:C:2013:107.

exposed above, it determines whether the EU Charter applies or not, and thus whether the EU institutions (notably the CJEU and the Commission) have jurisdiction to ensure Member States' respect for fundamental rights. The CJEU, the Commission and national courts have adopted different and varying interpretations on this.[37]

The procedural and institutional dimensions relate mainly to the accessibility and suitability of the judicial systems at the national and EU levels. They include issues such as standing to challenge particular measures and other conditions of admissibility (time limits, the definition of justiciable acts, etc.), the range of judicial or non-judicial remedies available and the conditions under which these are granted, the capacity of the judicial system to process claims rapidly and effectively and so on.[38] The possibility of class actions and the legal capacity of non-governmental organizations (NGOs) to litigate human rights issues where individuals are unable or unwilling to litigate are also important.[39]

The material dimension is about resources – not only financial means but also human and organizational ones. In order to see policy change through, litigants must engage and sustain litigation over time.[40] Concerned individuals or NGOs fighting for human rights must garner organizational support for strategic litigation. They also need to have access to strong legal expertise, either in-house or through hired lawyers, which requires financial resources, recruitment capacity and professional connections. Legal training and the organization of the legal profession must also be 'fit for purpose'. Where human rights lawyers, or lawyers to whom victims of human rights violations or NGOs turn to for support, have little familiarity with EU law or the Charter, they are unlikely to 'spot' potential EU cases, and thus to mount Charter-based suits. The EU itself can play a role in offering or supporting awareness raising or training programmes to lawyers to

37 On the recent interpretation of the scope by the CJEU (and the Commission), *see* B. van Bockel & P. Wattel, 'New Wine into Old Wineskins: The Scope of the Charter of Fundamental Rights of the EU after Åkerberg Fransson', *European Law Review*, Vol. 38, 2013, p. 866-883; E. Hancox, 'Meaning of Implementing EU Law under Article 51(1) of the Charter: Akerberg Fransson', *Common Market Law Review*, Vol. 50, 2013, p. 1411-1432; E. Spaventa, 'The Interpretation of Article 51 of the EU Charter of Fundamental Rights: The Dilemma of Stricter or Broader Application of the Charter to National Measures', Project Report. European Parliament, 2016, Brussels, available at: www.europarl.europa.eu/RegData/etudes/STUD/2016/556930/IPOL_STU(2016)556930_EN.pdf; Dougan, 2015, p. 1201-1245. On the interpretation of Art. 51(1) CFR by national courts, *see* Burgorgue-Larsen 2017.

38 For a comparative study of judicial mechanisms available to enforce and protect civil rights in the EU, *see* Granger & Salat 2016.

39 *See, e.g.*, Case & Givens 2010, p. 221-241.

40 M. Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change', *Law & Society Review*, Vol. 9, No. 1, 1974, p. 95-160.

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encourage Charter-based litigation.[41] Legal aid schemes, as well as *pro bono* programmes and other forms of support to public interest or human rights litigation,[42] can support aggrieved individuals, engaged citizens or NGOs who lack sufficient resources.

Finally, the structural opportunities listed above are unlikely to trigger legal or policy change if institutional actors, and notably courts, at both the EU and the national levels, are not receptive to Charter-based arguments.[43]

II The Added Value of a Legal Opportunities Framework for Understanding Federalization through Rights

Studying the evolving interactions between EU and national legal opportunities can help explain pressure towards federalization through rights (even if federalization does not eventually occur). The logic suggests that when legal opportunities for the protection of fundamental rights are (more) limited at the domestic level, litigants are attracted by, or pushed towards, EU standards and mechanisms, thus creating dynamics of centralization (federalization) of human rights' protection. Charter-based litigation, would be expected to increase, provided that certain conditions are fulfilled (*e.g.* minimum of awareness and familiarity with the EU legal system and its operation among litigants, human rights NGOs and legal professionals, accessibility of judicial review procedures, national courts' receptiveness to Charter-based claims and their willingness to refer matters to the CJEU). Where national judicial systems no longer 'perform' in this way, for example when judicial independence is under threat, individuals and NGOs may turn to EU institutions as a last resort. This further engages institutional federalization, as the European Commission, in particular, will be under pressure to initiate proceedings against non-compliant Member States (Art. 260 TFEU). Faced with the 'appeal' to EU norms and mechanisms, EU institutions may respond positively, thereby increasing the scope and intensity of EU control over the respect for fundamental rights by Member States and further opening legal opportunities at the EU level, which should, in turn, trigger further centralizing litigation. The EU institutions may also resist this push and limit the scope and intensity of EU human rights oversight over national measures and thereby temper federalization trends.[44] In contrast, where there are strong legal opportunities at the national level for (certain) rights litigation, there is little incentive for litigants to

41 *See, e.g.*, FRA publication, 'How is the Charter of Fundamental Rights Used at National Level', 2016, available at: http://fra.europa.eu/en/publication/2016/how-eu-charter-fundamental-rights-used-national-level. *See also* the various sites of human rights legal training on the Charter, such as the European Inter-University Center for human rights and democratization (EUIC), available at: https://eiuc.org/education/training-seminars/eu-charter-of-fundamental-rights/training.html, Academy of European Law (ERA), The Charter of Fundamental Rights of the EU in practice, available at: https://www.era.int/cgi-bin/cms?_SID=NEW&_sprache=en&_bereich=artikel&_aktion=detail&idartikel=126152.

42 *See* the activities of the Public Interest Law Initiative (PILNET), available at: www.pilnet.org.

43 Hilson 2002, p. 243.

44 *See* Spaventa 2016, A. Jakab, 'Application of the EU Charter in 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, Oxford University Press, 2017, p. 252-262.

activate EU norms and processes; consequently, in practice, as well as in law, the federalizing impact of the Charter will be more limited.

The evolving EU legal opportunities, and the pull-and-push effect they exert on EU-law-based human rights litigation against Member States, are summarily presented, before calling for comparative empirical studies on national rights protection systems and Charter-based litigation patterns, aimed at testing these assumptions.[45]

E Ambivalent EU Legal Opportunities and Their Impact on Federalization through Rights

Legal opportunities at the EU level for human rights litigation have remained ambivalent, with some aspects creating incentives for Charter-based litigation and others sending more negative signals.

I EU Standards – Not Always the Panacea, but Sometimes Better than Home Rules

Gradually, through its case law on general principles of law and later on the Charter, the CJEU has fleshed out what EU human rights standards are. Informed by a comparative approach, taking into account the traditions of the ECHR and national constitutional laws,[46] and building on existing EU legislation, its case law goes neither for a maximalist nor for a minimalist protection, but for 'best fit', in light of the EU framework and objectives.[47] Broadly speaking, the Court seems to offer particularly generous interpretations of the right to family life (in particular

45 As this article focuses on providing and developing a conceptual framework to understand the dynamics of federalization through rights in the EU, and not on subjecting it to a thorough empirical test, it engages with empirical materials in a very limited and superficial manner. This framework was, however, developed in an interactive process when carrying out empirical research on the national application of EU citizenship and EU civil rights in the context of the bEUcitizen project on Hungary and France. *See*, in particular, M.-P. Granger & O. Salat, 'Report on France', 2015a and 'Report on Hungary', 2015b, Annex to van Eijken & de Vries, 2015, p. 190-325; O. Salat, 'Report on Hungary', Annex I, *in* M.-P. Granger & O. Salat (Eds.), *Report Exploring the Mechanisms for Enforcing Civil Rights with a View to Identifying the Barriers*, 2016, p. 85-93; M.-P. Granger, 'Report on France', Annex I, *in* M.-P. Granger & O. Salat (Eds.), *Report Exploring the Mechanisms for Enforcing Civil Rights with a View to Identifying the Barriers*, 2016, p. 118-172. The 'impressions' generated from the studies appear corroborated by comparative studies on the national courts' application of the Charter, such as the contributions in Burgorgue-Larsen 2017, as well as other analyses of the national courts' engagement with the Charter (*e.g.*, Commission's annual report on the application of the Charter, 18 May 2017, COM (2017, 739, Section 3, p. 9; Report of the Fundamental Rights Agency, Fundamental Rights Report, 2017, Section 1(1), p. 38, available at: http://fra.europa.eu/en/publication/2017/fundamental-rights-report-2017, and case law and FRA materials in Charterpedia on Article 51, available at: http://fra.europa.eu/en/charterpedia/article/51-field-application). *See also* the analysis of the Charter-related petitions to the European Parliament, Spaventa 2016, p. 26-31.

46 *See* Case 4/73, *Nold*, Case 11/70, Internationale Handelsgesellschaft.

47 For a relatively comprehensive study of general principles in the pre-Charter era, *see* T. Tridimas, *The General Principles of EC Law*, Oxford, Oxford University Press, 1999.

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in the immigration context),[48] the right to the protection of personal data,[49] and the right to effective (domestic) remedies,[50] in comparison with a number of national constitutional systems. It therefore comes as no surprise that, in the field of justice and home affairs, the Charter provisions most litigated before national courts are the right to the respect of private and family life (Art. 7), the right to the protection of personal data (Art. 8) and the right to an effective remedy or a fair trial (Art. 47).[51] Sometimes, however, national law provides for higher standards.[52]

II The Charter's Scope of Application – A Moving (Away) Target

As already noted, Article 51(1) of the Charter and the CJEU case law provide that the scope of application of the Charter corresponds to the scope of application of EU law.[53] Inevitably, the scope of application of EU fundamental rights has expanded together with the expansion of EU competences,[54] but the Charter cannot be used to expand EU competences (Art. 6(1) TEU and Art. 52(2) of the Charter). The determination of what is considered to be 'implementing' EU law for the purpose of the Charter's application is far from straightforward, and the CJEU case law on the matter has done little to dissipate confusion and frustration. In order to invoke the Charter against Member States, litigants need to expose some sufficient 'connection' with EU law, so that the national measure can qualify as an 'implementing' measure. In *Åkerberg Fransson*, the Court considered that national measures regulating sanctions for tax fraud fell within the scope of application of

48 Notably through the combined effect of free movement, EU citizenship and fundamental rights rules; *see, e.g.*, Case C-370/90, *The Queen v. Immigration Appeal Tribunal and Surinder Singh, ex parte Secretary of State for Home Department, ECLI*:EU:C:1992:296; Case C-60/00, *Mary Carpenter v. Secretary of State for the Home Department, ECLI*:EU:C:2002:434; Case C-127/08, *Blaise Baheten Metock and Others v. Minister for Justice, Equality and Law Reform, ECLI*:EU:C:2008:449; Case C-34/09, *Ruiz Zambrano, ECLI:*EU:C:2011:124.

49 *See* Cases C-131/12, *Google Spain and Google, ECLI*:EU:C:2014:317; Case C-293/12, *Digital Rights Ireland Ltd v. Minister for Communications, Marine and Natural Resources and Others*, ECLI:EU:C:2014:238; Case C-362/14, *Maximillian Schrems v. Data Protection Commissioner*, ECLI:EU:C:2015:650.

50 *See, e.g.*, Art. 19(1) TEU; Case C-222/86, *Unectef v. Heylens and Others, ECLI*:EU:C:1987:442; Case C-432/05, Unibet *(London) Ltd and* Unibet *(International) Ltd v. Justitiekanslern, ECLI*:EU:C:2007:163; Case C-279/09, *DEB Deutsche Energiehandels- und Beratungsgesellschaft mbH v. Bundesrepublik Deutschlan, ECLI:*EU:C:2010:811. For an overview, *see* K. Lenaerts, 'Effective Judicial Protection in the EU', 2013, available at: http://ec.europa.eu/justice/events/assises-justice-2013/files/interventions/koenlenaerts.pdf.

51 *See* EU Fundamental Rights Agency, Fundamental Rights Report, 2017, p. 40; European Commission, 2015 Annual report on the Application of the EU Charter of Fundamental Rights 19 May 2016, p. 28.

52 A typical example concerns the Spanish constitutional protection against the right to be tried in absentia, as illustrated in the *Melloni* case (C-399/11, ECLI:EU:C:2013:107).

53 Case C-617/10, *Hans Åkerberg Fransson*.

54 Originally confined to the internal market and a few common policies (*e.g.*, competition, agriculture), they now include the economic and monetary union, and cooperation in matters related to justice and home affairs, foreign and security policy. Still, EU competences are limited to the powers that have been conferred, *see* Arts. 4(1) and 5 TEU, which may be exclusive, shared or supportive EU competences.

EU law (and thus that of the Charter), as they sanctioned violations of EU VAT Directive obligations.[55] But in *Hernandez*, it clarified that it was not enough that the national measures fell within an EU competence: applicants had to show that the Member State was implementing a specific EU law obligation.[56] Beyond obvious candidates such as EU non-discrimination or data protection legislation, the EU citizenship treaty provisions and legislation seemed to offer a promising avenue for litigants wishing to invoke the Charter to secure higher EU protection standards. Indeed, following the *ERT* logic, national measures that restrict EU citizenship rights, such as the right to move and reside in another Member State, would fall within the scope of EU law and should comply with the Charter.[57] EU citizenship, furthermore, can also be invoked, in some circumstances, in the absence of cross-border movement. Indeed, as the 'the fundamental status' of all EU citizens,[58] it has been interpreted by the CJEU as prohibiting Member States from adopting measures that deprive EU citizens from the 'genuine enjoyment of the substance of the rights attached to their status as EU citizens.'[59] The Court nonetheless curtailed the federalizing potential of the – EU citizenship – Charter combined application, by later clarifying that the substance of EU citizenship does not include the Charter rights, but only a right not to be forced to leave the EU territory.[60] So far the Court has been careful of the Charter's overreach through an easy activation based on EU citizenship. It refrained from referring to, or relying on, the Charter in cases involving EU citizenship,[61] or found it inapplicable.[62] The Court has, moreover, considered that the Charter was not applicable to actions by Member States outside of the Treaty framework, such as Euro-crisis measures.[63] The Court's restrictive interpretation of the scope of the Charter, including cases where the rights of (mobile) EU citizens are at stake, and the general sense of confusion that the inconsistent case law produces, may well discourage litigants from starting Charter-based litigation.

55 Case C-617/10, *Hans Åkerberg Fransson*.

56 Case C-198/13, *Hernández*.

57 For a confirmation of this logic in relation to the Charter, *see* C-390/12, *Pfleger and Others*, ECLI:EU:C:2014:281, para. 35.

58 Case C-184/99, *Rudy Grzelczyk v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve*, ECLI:EU:C:2001:458, para. 31.

59 Case C-34/09, *Zambrano*, para. 42.

60 Case C-256/11, *Murat Dereci and Others v. Bundesministerium für Inneres*, ECLI:EU:C:2011:734, para. 66.

61 *See, e.g.*, Case C-34/09, *Zambrano*; Case C-256/11, *Dereci*. *See* E. Spaventa, 'The Interpretation of Article 51 of the EU Charter of Fundamental Rights: The Dilemma of Stricter or Broader Application of the Charter to National Measures', Project Report. European Parliament, 2016, Brussels, available at: www.europarl.europa.eu/RegData/etudes/STUD/2016/556930/IPOL_STU(2016)556930_EN.pdf.

62 *See, e.g.*, Case C-*333/13, Elisabeta* Dano *and Florin* Dano *v. Jobcenter Leipzig*, ECLI:EU:C:2014:2358.

63 The Court considered that the creation of the European Stability Mechanism fell outside the scope of EU law and the Charter (Case C-370/12, *Thomas Pringle v. Government of Ireland and Others*, ECLI:EU:C:2012:756, para. 180). It also ruled that national austerity measures fall outside the scope of the Charter, in the absence of evidence that these implemented EU obligations (Case C-128/12, *Sindicato dos Bancários do Norte and Others, ECLI*:EU:C:2013:149).

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III Procedural Hurdles in Accessing EU Courts

A significant limitation to activating EU procedural opportunities is that individuals do not have direct access to EU courts to challenge national measures that infringe upon their Charter rights. They can only complain to the European Commission, which may decide to follow up with infringement proceedings,[64] or bring litigation before domestic courts and seek a reference for a preliminary ruling to the CJEU.

Violations of EU fundamental rights by states can be addressed through the EU infringement procedure, which can lead to the imposition of financial penalties on the recalcitrant Member State (Arts. 258-260 TFEU). This procedure can be initiated by other Member States (Art. 259 TFEU), but these have, historically, refrained from bringing each other before the Court (save in a handful of salient bilateral disputes)[65] and have left it to the Commission to monitor compliance with EU obligations. It is thus unlikely that they would bring another Member State before the CJEU for a violation of the Charter.[66]

Victims of human rights violation, and NGOs, can complain to the European Commission. The Commission has discretion in launching infringement proceedings. For strategic reasons and owing to resource constraints, the Commission is selective and does not pursue every single violation.[67] It has, on occasion, deployed some creativity to bring what were broader threats on the rule of law and civil rights within the scope of application of EU law, so as to be able to start infringement proceedings. For example, the Commission brought Hungary before the Court for the adoption of measures imposing early retirement of judges, widely perceived as an attempt to pack courts with judges loyal to the Fidesz government, and a threat to the independence of the judiciary, with arguments based on a violation of EU non-discrimination legislation.[68] But where it cannot argue a direct violation of EU treaties or legislation, the Commission is cautious.[69] It has, so far, refrained from starting infringement proceedings against a Member State based solely on a violation of the Charter (possibly in combination with Art. 20 TFEU on EU citizenship or Arts. 2 TEU and 7 TEU).[70] It invokes the Charter against national measures only where these have a sufficient connection with EU law, for example because they (also) breach other primary or secondary EU

64 They may also petition the European Parliament, which can pressure the Commission to act.

65 Case C-364/10, *Hungary v. Slovakia*, ECLI:EU:C:2012:630.

66 As suggested by D. Kochenov, 'Biting Intergovernmentalism: The Case for a Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool?', *The Hague Journal of the Rule of Law*, Vol. 7, 2015, p. 153.

67 *See* European Commission, 2016, *Annual Report on the Application of EU Law*, Section II Enforcement in priority areas, COM(2017) 370 final, p. 4.

68 Case C-286/12, *Commission v. Hungary*, EU:C:2012:687.

69 *See* A. Lazowski, 'Decoding the Legal Enigma: The Charter of Fundamental Rights of the European Union and Infringement Proceedings', *ERA Forum*, Vol. 14, 2013, p. 573.

70 As suggested by A. Jakab, 'The Application of the Charter of Fundamental Rights by National Courts', *in* A. Jakab & D. Kochenov (Eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford, Oxford University Press, 2017, p. 252-262, Nagy 2017, p. 1-13.

rules.[71] For instance, following political and social mobilization in support of the Central European University, a private American university located in Budapest, threatened with closure as a result of an amendment to the Higher Education Act, the Commission built its case around both the violation of internal market rules and that of rights protected by the Charter, such as academic freedom, the right to education and the freedom to conduct a business, although without clearly and openly elucidating the 'relation' between the two sets of norms.[72] These cases suggest that the Commission is, in certain cases, willing to embark the Court in a process of pushing the boundaries of EU law to ensure federal control over Member States' respect of fundamental rights, by finding loose 'connections' with EU law.

Where the Commission decides not to act upon complaints, individuals and NGOs can use the 'indirect route', which consists in bringing litigation against Member States before domestic courts, and seeking a preliminary reference to the CJEU (Art. 267 TFEU). Although designed to ensure the uniform interpretation of EU law, the procedure is widely used to challenge domestic measures that are not in line with EU law, under the guise of interpretation.[73] However, parties before domestic courts cannot 'request' a preliminary ruling. They can only 'ask' the national courts to submit such a request to the CJEU. National courts have discretion as to whether to refer or not, except for courts against which there is no remedy, which have a duty to refer. However, these are released from this duty when the interpretation of EU law is sufficiently clear (*acte clair* doctrine), a possibility that they sometimes abuse to avoid referring issues to Luxembourg.[74] In any case, except in emergency procedures, it takes an average of 15 months to get a preliminary ruling,[75] during which the principal (national) procedure is pending. This delay may put litigants off activating this 'indirect remedy'.

Moreover, the possibility to direct Charter-based claims against Member States to the CJEU via preliminary ruling proceedings is also constrained by the

71 *For example*, on the challenges facing the Commission in handling threats on media freedom in Hungary, *see* Nagy 2017, p. 6.

72 European Commission, 'Commission Refers Hungary to the Court of Justice of the European Union over Higher Education Law', Press Release, 7 December 2017, available at: http://europa.eu/rapid/press-release_IP-17-5004_en.htm.

73 For an analysis of how to use the preliminary reference procedure to ensure compliance with EU law, *see* M. Broberg, 'Preliminary References as a Means for Enforcing EU Law', *in* C. Closa & D. Kochenov (Eds.), *Reinforcing Rule of Law Oversight in the European Union*, Cambridge, Cambridge University Press, 2016, p. 9-111.

74 Case 283/81, *CILFIT v. Ministero della Sanita*, ECLI :EU:C:1982:335. *For example*, the United Kingdom's Supreme Court did not refer questions to the CJEU concerning the interpretation of EU citizenship rights, brought by British citizens who, because they had been imprisoned, could not vote in European elections (*Chester v. Secretary of State for Justice; McGeoch v. The Lord President of the Council & Anor* [2013] UKSC 63) or because they had been living abroad, were not allowed to vote in the UK referendum on Brexit *Shindler & Anor v. Chancellor of the Duchy of Lancaster & Anor* [2016] EWHC 957). The German constitutional court also refused to refer a question to the CJEU in the Anti-terror database case in which it challenged the CJEU's wide interpretation of the scope of application of the Charter in *Akerberg Fransson* (FCC BvR 1215/07).

75 CJEU, *Annual Report 2016 Judicial Activity*, 2017, p. 100, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-03/ra_jur_2016_en_web.pdf.

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restrictive terms of Article 51(1) of the Charter.[76] Comparative studies reveal that national courts do not all have the same understanding of the scope of application of the Charter, and therefore of when they should refer questions concerning its interpretation and application.[77] This results in variation in the preliminary references rates related to the Charter across Member States and policy areas.

These characteristics play into the federalizing effect of the Charter. Where (lower) national judges are willing to refer a wide range of Charter-based claims, the preliminary reference procedure offers certain advantages, which can be appealing to litigants, in particular in the case of fundamental rights violations that result from legislative measures. Indeed, if the CJEU finds that the Charter (or EU law more generally) prohibits legislative provisions of the sort, the national court must set them aside, even if it does not have judicial review power under domestic law. While such power derives from EU law without the need for a preliminary reference,[78] national courts that are subject to 'political pressure' may feel more confident striking down domestic legislation if they have been 'asked' to do so by the CJEU.

Appealing to the CJEU via the preliminary reference procedure, or a Commission-led infringement action, can thus offer 'remedies' that are potentially more effective than those available under domestic law (in particular in countries in which judicial independence is under threat), as a result of the authority of EU law and the potential economic and political leverage of EU institutions. Moreover, unlike applications to the ECtHR, there is no need to exhaust domestic remedies before asking for a preliminary reference to the CJEU.

IV The Costs of EU Legal Opportunities

Involving EU legal opportunities does not come at a prohibitive cost. Complaining to the Commission takes little resources. Some knowledge of EU (human rights) law is, nonetheless, useful to make a strong 'case' that would compel the Commission to 'investigate'. When the Commission is willing to intervene, it can mobilize its own resources to build a strong case. The costs of litigating before domestic courts are aligned with those applicable in the country in which litigation is started. These costs are augmented by the need for one additional procedural step (preliminary reference), costs resulting from time delays, and access to legal professionals with expertise in EU law, and EU human rights law, which in some countries can be challenging for less resourceful or connected individuals or organizations.

V Judicial Receptiveness in Question

The CJEU does not appear to have fully endorsed its 'new' (post-Charter) human rights mandate.[79] Some of its members are keen to recall that it is 'not a human

76 Spaventa 2016, p. 13.

77 Van Eijken & de Vries, 2015; Granger & Salat 2016; Burgorgue-Larsen, 2017.

78 Case 106/77, *Simmenthal II*.

79 G. de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?', *Maastricht Journal of European and Comparative Law*, Vol. 20, No. 2, 2013, p. 168-184.

rights court'.[80] The receptiveness of the Court to Charter-based claims against Member States, in particular those that are on the 'edge' of EU competence, is a strong determinant of federalization through rights. So far, no clear trend emerges that suggests either a move towards federalization or to the contrary, a pushback.

While the previously broad interpretation of the scope of application of EU general principles for the protection of fundamental rights created an incentive to appeal to EU law, in particular where EU human rights norms were (potentially) more protective than national law, or where EU remedies appeared more effective, and shifted control over human rights violation by Member States from national courts to the CJEU, the recent narrowing by the CJEU of the scope of application of the Charter, as well as its minimalist interpretations of certain rights, limits incentives to involve the Charter and the Court in human rights litigation against Member States. In Spaventa's words, 'the Court has placed the fundamental rights ball back in the national courtyard, potentially at the expense of the protection of citizens' fundamental rights.'[81]

F Conclusions – Exploring National Legal Opportunities

Save for a few rights, for which the EU provides better standards and remedies, and to which the CJEU appears more receptive (*i.e.* non-discrimination, data protection, the right to family life, due process and right to effective remedies), EU legal opportunities for human rights litigation remain limited and therefore do not create a strong federalizing pull.

The attractiveness of the EU legal framework is, nonetheless, relative and must be compared to, and contrasted with, national legal opportunities. The EU legal opportunities may, for the time being, not be a panacea, but as the general human rights situation deteriorates in some Member States, and there are deficiencies in almost every Member State, EU law may still hold some appeal, at least for desperate litigants and NGOs defending human rights causes. Moreover, EU institutions may feel pressured to do something to counter democratic and Rule of Law backsliding in some Member States such as Hungary and Poland and may choose to 'open up' EU legal opportunities, by expanding the Charter's scope of application.

The conceptual framework suggests that the weaker the protection of human rights at the domestic level is, the greater the pressure for further federalization around rights and centralization of human rights protection grows, under the conditions that litigants have access to resources, legal practitioners have EU law

80 V. Skouris, 'Opening Remarks', *FIDE 2014 Conference Copenhagen*, May 2014.
81 Spaventa 2016, p. 22.

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expertise, and EU institutions and national courts are receptive to Charter-based claims in disputes against Member States.[82]

Preliminary comparative data suggest that in countries, such as Hungary, where national legal opportunities for human rights litigation are closing, litigants are trying to engage EU instruments and institutions to get around domestic limitations on judicial remedies.[83] The number of preliminary references coming from Hungary invoking the Charter have increased significantly in 2013-2014,[84] which corresponds to the introduction of limitations on constitutional review and increased political influence on courts.[85] Most were rejected by the CJEU, which considered that they fell outside the scope of EU law,[86] but one managed to capitalize on the *Akerberg Fransson* ruling, to challenge national tax penalty procedures in the light of the right to privacy and a fair trial as embedded in the Charter.[87]

In contrast, in states in which national legal opportunities for judicial protection of fundamental rights improved, for example in France with the introduction of the *Question Prioritaire de Constitutionalité*, litigation invoking EU law and preliminary references invoking fundamental rights has decreased, despite the coming into force of the Charter.[88] A more detailed analysis of the roots of EU and national litigation concerning the Charter, as well as complaints to the Commission, is necessary to test these assumptions and to tease out the complex dynamics at play.

If the logic is true, though, those governments that are most critical of the EU liberal influence on rights matters (*e.g.*, the Hungarian Fidesz government) and most concerned about the expansive reach of the EU human rights supervision may well 'inadvertently' contribute to further federalization through rights when they curtail legal opportunities for human rights protection.

82 On the willingness of national judges to take on Charter-based claims, *see* A. Jakab, 'Application of the EU Charter in National Courts in Purely Domestic Cases', *in* A. Jakab & D. Kochenov, *The Enforcement of EU Law and Values: Ensuring Member States' Compliance*, Oxford, Oxford University Press, 2017, p. 252-262.

83 *See* A. Berkes 'Hungary', *in* Burgorgue-Larsen (Ed.), *La Charte des Droits Fondamentaux saisie par les juges en Europe/The Charter of Fundamental Rights as apprehended by judges in Europe*, Paris, Pedone, 2017, p. 425-464; Nagy 2017, p. 1-13.

84 *See* Berkes 2017, p. 425-464, 457.

85 For an overview of the closure of remedies for human rights violations, *see* Granger & Salat 2015b.

86 *See* Berkes 2017, p. 425-464; C.I. Nagy, 'Do European Union Member States Have to Respect Human Rights? The Application of the European Union's Federal Bill of Rights to Member States', *Indiana International and Comparative Law Review*, Vol. 27, No.1, 2017, p. 1-13.

87 Case C-419/14, *WebMindLicences*, ECLI:EU:C:2015:832.

88 *See* Granger & Salat, 2015a; Granger, 2015, *see also* E. Dubout, P. Simon & L. Xenou, 'France', *in* Burgorgue-Larsen (Ed.), *La Charte des Droits Fondamentaux saisie par les juges en Europe/The Charter of Fundamental Rights as apprehended by judges in Europe*, Paris, Pedone, 2017, p. 327-336.